

The Construction of a System of Digital Trade Rules from the Perspective of International Law: Study on Soft Law Practices Based on the WTO Joint Statement Initiative on e-Commerce

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Abstract: Soft law, characterized by its flexibility, non-binding nature, and form adaptability, has emerged as a pivotal instrument for reconciling divergent national interests in digital trade governance. The World Trade Organization's (WTO) Joint Statement Initiative on Electronic Commerce exemplifies institutionalized soft law practice, yet critical provisions remain con-tested due to persistent disagreements among member states. This study examines the viability and limitations of soft law in structuring multilateral digital trade rules, proposing a theoretical pathway to overcome governance impasses. The analysis proceeds in three stages, first, a conceptual delineation of soft law within digital trade contexts, clarifying its definitional boundaries and functional attributes; second, an evaluation of soft law's regulatory efficacy through risk-benefit analysis, emphasizing its dual capacity to foster trade liberalization while preserving regulatory sovereignty; third, a normative argument for optimizing soft law's institutional potential through innovative governance mechanisms, drawing practical insights from WTO negotiations.

1 INTRODUCTION

With the deepening of the digital technology revolution and the reconfiguration of global value chains, digital trade has emerged as a key driver of global economic growth. WTO statistics show that the scale of global digital services trade exceeded \$6.8 trillion in 2023, accounting for over 60% of total services trade-evidently, the construction of its regulatory framework is directly pivotal to reshaping the global economic governance order.

However, the current landscape of global digital trade rules exhibits pronounced fragmentation. On one hand, driven by considerations of implementation efficiency and national economic interests, countries increasingly favor constructing regional digital trade agreements over establishing a unified global regulatory system. Agreements such as CPTPP and RCEP have developed distinct regulatory features in this context. On the other hand, the WTO, as the most authoritative platform for global economic cooperation, faces a structural mismatch: its foundational frameworks, the General Agreement on Trade in Services (GATS) and General Agreement on

Tariffs and Trade (GATT), were formulated in the era of traditional trade, prioritizing goods and conventional services rather than emerging digital issues. This institutional lag in WTO digital trade rules has further exacerbated regulatory fragmentation.

Against this backdrop, soft law has increasingly become a critical tool for governments, enterprises, and organizations to navigate negotiation deadlocks, owing to its unique regulatory flexibility. Unlike hard law, soft law features institutional designs such as non-binding commitments, progressive obligations, and open-ended clauses-arrangements that temporarily circumvent sovereignty-sensitive conflicts while moderately guiding trade behaviors through normative constraints. The WTO's Joint Statement Initiative on Electronic Commerce (JIS) exemplifies this mechanism: 86 participating economies reached preliminary consensus on issues including cross-border data flows and duty-free electronic transmissions. However, provisions such as the Digital Tax Exemption and Source Code Disclosure ban in the JIS remain ambiguously worded, highlighting a core challenge of soft law

governance, its reliance on voluntary compliance risks reducing it to a symbolic framework observed only by a subset of parties.

Notwithstanding these challenges, soft law's institutional advantages outweigh its inherent limitations as the optimal solution to balance national regulatory autonomy and digital trade liberalization. This study employs literature analysis, textual interpretation, and comparative methods to synthesize scholarly perspectives, identify research gaps through critical literature review, and situate its contributions within the field. By examining the JIS as a case study, it delineates soft law's characteristics, advantages, and drawbacks relative to other legal forms, and analyzes its practical applications. The study concludes that amid the rapid evolution of the digital economy and the unsettled nature of global digital governance, the central challenge lies not in debating the primacy of soft law versus hard law, but in maximizing soft law's value to accumulate international consensus for future multilateral rulemaking.

2 LITERATURE REVIEW

Academics hold divergent views on the definition of soft law, its role in global governance, and its significance for constructing global digital trade rules. A minority of scholars caution that while soft law offers flexibility in digital trade governance, its limitations are notable—for example, its applicability is primarily confined to low-politics domains, with restricted influence in high-politics arenas where sovereignty sensitivities are acute (He,2017). A substantial body of research focuses on soft law's regulatory function in emerging digital economy sectors such as artificial intelligence (AI). Scholars argue that soft law has been and will remain a primary normative tool in AI governance, as it establishes substantive expectations for parties that rely on collaborative compliance rather than governmental enforcement mechanisms (Marchant & Gutiérrez,2023). Proposed optimization pathways for soft law span areas including AI ethics, personal data protection, and cross-border data flows, emphasizing its capacity to reconcile national regulatory autonomy with global liberalization objectives (Zhang,2024). However, these studies often lack holistic analysis, particularly in underlining soft law's structural limitations in digital trade-omissions that may lead to

practical challenges in implementation and one-sided prescriptions for improvement.

Research on digital trade rules exhibits a fragmented nature, with most scholarships concentrating on isolated regulations within specific national or regional contexts, examining their origins, impacts, and evolutionary trajectories. Far less attention is paid to the role of global institutions like the WTO. Notable exceptions include calls for the WTO to centralize digital trade governance—either through a standalone multilateral agreement dedicated to digital economy regulation or by leveraging tripartite competition among the U.S., EU, and China as a catalyst for inclusive development, where smaller economies can utilize the WTO platform to advance their digital agendas (Sona,2022; Aaronson & Leblond,2018). Analyses of WTO e-commerce negotiations reveal significant divergences among major economies, such as the U.S., EU, China, Japan, on core issues, underscoring the necessity for the WTO to maintain neutrality in mediating these disputes (Abendin & Duan,2021). Academics generally adopt an objective yet constructive stance on international organizations' roles: while acknowledging that institutions like the WTO lag behind the digital economy's rapid evolution, they actively explore pathways to enhance WTO-led rulemaking—aiming to bridge the digital divide and balance competing interests through incremental, consensus-based reforms.

3 OVERVIEW OF THE SOFT LAW ON DIGITAL TRADE

3.1 Theoretical Explanation of Soft Law for Digital Trade Page

In academic discourse, neither soft law nor digital trade soft law has achieved a universally accepted definition. Synthesizing diverse perspectives, this section provides a theoretical explication of key concepts through four dimensions: connotation, typology, characteristics, and functions.

The concept of soft law traces its origins to international law, referring to regulatory instruments that lack the compulsory binding force of traditional law but shape actors' conduct through shared normative consensus and behavioral guidance. Unlike conventional international law—which prescribes legal liabilities and enforcement

mechanisms-soft law derives its regulatory efficacy from negotiated consent and rational persuasion. Normatively, soft law can be categorized into three forms. Firstly, resolutions, declarations, joint statements, and frameworks adopted by international/regional organizations or multilateral forums (e.g., JIS); secondly, voluntary accords concluded through diplomatic consultations between states, such as the United States-Mexico-Canada Agreement (USMCA), which balance flexibility with collaborative objectives; thirdly, technical norms, industry codes, and conduct guidelines developed by non-governmental actors (e.g., ISO international standards), offering granular, sector-specific operational guidance. In the digital trade context, these categories serve distinct roles. The first category provides foundational frameworks for harmonizing domestic regulations and facilitating international rulemaking; the second addresses sector-specific gaps; and the third delivery targeted, technologically aligned guidance-collectively fostering adaptive governance.

Soft law's core characteristics-non-mandatoriness, consultativeness, and flexibility-define its regulatory logic, while in the digital trade context, these are intertwined with technical dependency and sovereignty sensitivity.

Non-mandatoriness manifest how legal obligations are articulated and enforced: soft law instruments typically employ permissive language such as "strive to," or "endeavor to," as seen in JIS Article 5, which states that "Members shall endeavor to promote the mutual recognition of electronic signatures" rather than imposing binding mandates. This lack of legal compulsion does not equate to ineffectiveness; instead, soft law derives mandatoriness from reputational incentives and collaborative norms, fostering compliance through shared expectations rather than punitive measures. Flexibility emerges in the interpretive latitude of rules and the adaptability of implementation mechanisms, allowing members to tailor obligations to their developmental contexts—for example, selectively adopting clauses or adjusting compliance timelines. This adaptive approach ensures regulatory frameworks can evolve alongside technological advancements, providing practical leeway while maintaining normative coherence. The consultative nature of soft law formation—characterized by inclusive stakeholder participation and consensus-building—is particularly vital in an era of fragmented multilateralism, where divergent national interests and uneven developmental stages

risk paralyzing hard law negotiations.

In digital trade, technical dependency arises from the need to align regulatory frameworks with the rapid pace of digital innovation, because that rule governing data flows, encryption standards, and interoperability must reflect evolving technical architectures to avoid obsolescence. Sovereignty sensitivity stems from contentious issues like data localization and digital sovereignty, where soft law's flexible wording offers a compromise mechanism. For instance, JIS uses phrases like "encourages members to minimize restrictions" in its data localization provisions, a formulation that accommodates China's regulatory requirements under the Data Security Law to govern critical data exports while respecting the U.S. emphasis on digital liberalization.

3.2 Challenges and Opportunities of Soft Law for Digital Trade

Based on the above analysis, it's not difficult to find that soft law has a positive role to play in the regulation of the global digital trade order. However, it still faces challenges.

Chief among these is the risk of diminished effectiveness in balancing interest. Developing countries often adopt cautious or opposing stances toward the free flow of cross-border data due to concerns over digital sovereignty and security, while developed economies exhibit incompatible regulatory models—such as the U.S. emphasis on industry self-regulation and the EU's stringent privacy standards—creating tensions that are hard to reconcile within multilateral frameworks like the WTO (Abendin & Duan, 2021). This misalignment between national regimes and international soft law, coupled with inter-state regulatory contradictions, risks reducing soft law to a "lowest common standard" that lacks substantive harmonizing power, as parties prioritize minimal concessions over meaningful collaboration.

Compounding this is the challenge of conflict between regional digital trade rules and multilateral soft law instruments. Businesses face escalating costs from dual compliance, while economies with competing interests are pressured to choose between divergent frameworks. This may incentivize the creation of new, narrower agreements, leading to greater fragmentation of global rules.

A third challenge lies in the absence of robust implementation mechanisms. While instruments like JIS include provisions such as Article 14's

"prohibition of misleading commercial practices," they often lack clear definitions-for instance, failing to specify metrics for "reasonable network management" as mentioned in Article 13-and omit formal dispute-resolution frameworks for cross-border conflicts. This ambiguity creates interpretive flexibility that can be exploited. It may lead to market disorder and erode soft law's normative authority.

Given these challenges, soft law guiding the construction of a system of rules for digital trade is still the current global trend and has major advantages over other forms of regulation. There are two main reasons.

Soft law demonstrates superior applicability in digital trade governance compared to hard law constrained by low efficiency. First, rigid regulatory frameworks impose prohibitive entry barriers for SMEs and market participants in the digital economy's emerging subfields (Marchant & Gutierrez,2023). In contrast, soft law's low negotiation costs and adaptive implementation mechanisms enable inclusive participation from resource-constrained innovators and jurisdictions seeking cross-border cooperation. Second, soft law's deliberate ambiguity creates operational flexibility for states to balance regulatory sovereignty with trade liberalization objectives, achieving provisional equilibrium between efficiency and security imperatives (Zheng & Snyder,2023; Zhang,2024). Its normative influence materializes through de facto adoption: For instance, non-binding OECD guidelines on data flows-particularly principles like purpose limitation and data minimization-have gained global traction via ISO/IEC 27001 compliance frameworks, demonstrating soft law's capacity to shape corporate practices without formal mandates.

The WTO e-commerce negotiations further validate soft law's institutional credibility. While persistent disagreements persist on sensitive issues like cross-border data flows, consensus-building on most agenda items reflects soft law's viability as a transitional governance tool (Burri,2022). The WTO's inclusive platform, governed by transparent and impartial procedures, fosters multilateral trust-a prerequisite for meaningful engagement among states, businesses, and consumers (Hagemann,2018). Through iterative soft law commitments, stakeholders gradually align divergent interests within dynamic digital trade ecosystems, laying groundwork for potential hard law codification. This evolutionary trajectory not only addresses immediate governance gaps but also establishes sustainable

pathways for institutionalizing global trade norms.

4 SOFT LAW-ORIENTED RULE-BUILDING PATH

4.1 Multilateral Consultation and Interest Balancing Mechanism

The focus of this part is to balance the demands of countries at different levels of development. In this regard, the modularized design of DEPA can be used to allow member countries to choose the types of implementation clauses according to their capacity. For example, technology-neutral clauses could be categorized as immediate obligations (Category A), while clauses requiring infrastructure development could be categorized as transitional obligations (Category C) (Burri, et al.,2024). In order to promote the balance of interests, on the one hand, it is necessary to incentivize high-developed countries to provide technical and human resources assistance to low-development countries, and on the other hand, it is also necessary for developing countries to enhance political mutual trust and unite to seek a path of development. The former can be realized by improving market access through soft law, giving certain incentives to developed countries that actively trade with developing countries, lowering trade barriers, and supporting developing countries to integrate into digital trade more quickly. The latter can be achieved through measures such as information sharing among developing countries to enhance integration, and the WTO is the largest platform to support the integration of less developed countries into the global digital market, which reveals the importance of updating the rules within the WTO framework (Sona,2022).

4.2 Synergistic Rules of Hard and Soft Law

Hardening of soft law may cause harms such as chaotic regulatory order, inappropriate regulatory subjects, and weakening of the authority of the law. To prevent this, the synergy between soft law and hard law needs to be realized through the convergence of the rules and the transformation of domestic law. In this process, soft law is used to respond quickly to the needs of all parties, and hard law is used to ensure fair competition (Panahi,2024).

This part emphasizes the role of WTO. Firstly, GATS has been proven to be inefficient in dealing with digital trade issues, while WTO is recognized by countries as an international platform capable of setting uniform rules and resolving disputes (Abendin & Duan, 2021; Aaronson & Leblond, 2018). Therefore, the rules within the WTO framework should be updated on the basis of coordinating the interests of all parties and protecting less-developed countries by fully drawing on the existing high-standard international economic and trade rules, such as learning from the provisions of the CPTPP that encourage digital liberalization and learning from the strict provisions on privacy protection in the GDPR. In addition, domestic law transformation is the key to enhancing the effectiveness of soft law. China has responded quickly to problems in the digital market through soft law such as the Anti-Monopoly Guidelines for the Platform Economy (Zheng & Snyder, 2023). The Cooperation and Review Mechanism (CVM) established by the EU, which realizes a mix of hard and soft law and produces positive results, can also be drawn upon by the WTO (Stefan, 2024).

4.3 Innovative Regulatory Systems

To give full play to the advantages of the technology-dependent nature of the soft law on digital trade, digital technology should be utilized to establish a platform or institution for real-time supervision of the implementation of the soft law by members, while the dispute settlement mechanism should be improved in order to provide guarantees for the effective implementation of the soft law. For example, the WTO review mechanism can be used to publicize the assessment results on a regular basis, creating pressure for compliance. Considering the uneven levels of development of all parties, it is also necessary to help developing countries enhance the application capacity of blockchain regulatory tools and narrow the divide digital governance through technical training and infrastructure assistance provided by WTO and some developed countries. On this basis, we should further strengthen the intelligence of compliance supervision by all parties, for example, when the data localization measures of a member country exceed the scope of "reasonable network management" allowed by JIS, the system can automatically generate a risk report. In order to make up for the ambiguity of the dispute resolution mechanism in the soft law provisions, WTO can also

draw on the GDPR "one-stop regulatory" mechanism and set up a Digital Trade Dispute Resolution Center in WTO to resolve trade conflicts through arbitration, mediation, negotiation and other multi-dimensional methods. The WTO can also draw on the GDPR "one-stop regulation" mechanism to set up a "digital trade dispute mediation center" in the WTO to resolve trade conflicts through arbitration, mediation, consultation and other diversified methods.

5 CONCLUSION

This paper explores the unique value and potential of soft law in global digital trade governance through a theoretical analysis and investigation into the effectiveness of digital trade soft law. While the institutional effectiveness of digital trade soft law is constrained by practical limitations, its flexibility and non-binding nature enable it to serve as a crucial instrument for balancing national sovereign interests and advancing digital trade liberalization. By way of multilateral consultation, refinement of the soft law-hard law synergy mechanism, and regulatory system innovation, soft law can progressively evolve from an "interim solution" to a more established form, thereby furnishing a robust rule foundation for the Sound development of global digital trade. Further research should delve into the empirical assessment of soft law implementation, examine its application in emerging technologies, and bolster its enforceability and credibility via international platforms such as the WTO. These efforts will contribute to the progress of the global digital trade governance framework.

REFERENCES

- Aaronson, S.A. & Leblond, P. 2018. Another digital divide: The rise of data realms and its implications for the WTO. *Journal of International Economic Law* 21(2): 245-272.
- Abendin, S. & Duan, P. 2021. Global e-commerce talks at the WTO: Positions on selected issues of the United States, European Union, China, and Japan. *World Trade Review* 20(5): 707-724.
- Burri, M. 2022. WTO agreement on electronic commerce: An inquiry into its legal substance and viability. *Georgetown Journal of International Law* 53(4): 565-625.
- Burri, M. et al. 2024. The Evolution of Digital Trade Law: Insights from TAPED. *World Trade Review* 23(2): 190-207.

- De Búrca, G. & Scott, J. (Eds.). 2006. *Law and New Governance in the EU and the US*. Bloomsbury Publishing.
- Hagemann, R. 2018. New rules for new frontiers: Regulating emerging technologies in an era of soft law. *Washburn Law Journal* 57(2): 235-264.
- He, Z. 2017. Against the Trend of Globalization and the Trend of International Soft Law. *Journal of Wuhan University (Philosophy and Social Sciences Edition)* 70(4): 54-69.
- Marchant, G.E. & Gutierrez, C.I. 2023. Soft Law 2.0: An Agile and Effective Governance Approach for Artificial Intelligence. *Minnesota Journal of Law, Science and Technology* 24(2): 375-424.
- Panahi, T. & de Bittencourt Siqueira, A. 2024. Soft Law, Hardcore?: Die rechtliche Durchsetzung von Verhaltenskodizes nach dem Digital Services Act. *VerfBlog*. <https://verfassungsblog.de/soft-law-dsa-ko-regulierung/>.
- Prasad, R. 2023. Cyber Borderlines: Exploring the Interplay Between E-commerce and International Trade Law. *Studies in Law and Justice* 2(4): 1-9.
- Sona, V.V. 2022-2023. Incorporation of Digital Trade in the International Trade Law Regime: Challenges and Reforms in Modernization. *Indian Journal of Law and Legal Research* 4: 1-11.
- Ştefan, O. 2024. Preserving the Rule of Law Through Transnational Soft Law: The Cooperation and Verification Mechanism. *Hague Journal on the Rule of Law* 16(3): 671-692.
- Zhang, M. 2024. The International Standard Path for China to Promote Global Governance of Digital Trade from the Perspective of Soft Law. *Journal of Shanghai University of International Business and Economics* 31(1): 97-109.
- Zheng, K. & Snyder, F. 2023. China and EU's Wisdom in Choosing Competition Soft Law or Hard Law in the Digital Era: Perfect Match? *China-EU Law Journal* 9: 25-50.