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### Governing cross-border data flows

*Reconciling EU data protection and international trade law*

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### Publication date

2021

[Link to publication](#)

### Citation for published version (APA):

Yakovleva, S. (2021). *Governing cross-border data flows: Reconciling EU data protection and international trade law*.

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### 3. Privacy protection(ism): the latest wave of trade challenges on regulatory autonomy

#### 3.1 Introduction

Labels and frames certainly matter in public policy discussions. So much so, in fact, that they often dictate the outcome. For example, China has spent billions of dollars a year over the past several years to strengthen its *discursive power* to shape specific international policy debates,<sup>343</sup> especially in AI, which is an area where countries race for global technological and policy dominance.<sup>344</sup> Similarly, the ‘digital protectionism’ label has been used in the last decade as a tool to gain control in the domain of ‘digital trade’<sup>345</sup> policy debate in relation to personal data protection, and specifically to influence policy outcomes in the European Union, where privacy and personal data are well protected.<sup>346</sup> Perhaps even too well protected for those whose business models turn on personal data.<sup>347</sup> As already mentioned in the introduction, restrictions on transfers of personal data, such as those adopted by the EU, are increasingly criticised as being protectionist in trade policy conversations.

“Protectionism” has become a dirty word.<sup>348</sup> Yet, discursively, that is far from

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<sup>343</sup> Shambaugh (2015), pp. 99, 99–100.

China’s diplomatic and development schemes form just one part of a much broader agenda aimed at enhancing its soft power in media, publishing, education, the arts, sports, and other domains. Nobody knows for sure how much China spends on these activities, but analysts estimate that the annual budget for ‘external propaganda’ runs in the neighborhood of \$10 billion annually. By contrast, the U.S. Department of State spent \$666 million on public diplomacy in fiscal year 2014.

*Ibid.* See Wang (2015), pp. 172, 173 fn.4. (‘Point 5 in Section 7 of ‘Decision of the Central Committee of the Communist Party of China on Major Issues Pertaining to Deeping Reform of the Cultural System and Promoting the Great Development and Flouring of Social Culture’ states that China needs to “strengthen international discourse power, and properly respond to external world concerns”’.); see also Turner (2019), pp. 234–235 (citing recommendation III from Chapter 6 of China’s ‘Artificial Intelligence Standardization White Paper’ of January 18, 2018, which advocates ‘promotion of international standardization work on artificial intelligence, gathering domestic resources for research and development, participating in the development of international standards, and improving *international discourse power*’.) (emphasis added); Lee, (2016), p. 113 (‘Since Xi took over the reins of power in 2013, there have been signs of a shift in China’s foreign policy from one that accommodates the existing international rules to a policy that makes new rules and institutions on China’s terms’.)

<sup>344</sup> See, e.g., Dutton (2018) (illustrating the global race for artificial intelligence (‘AI’) dominance by the fact that between 2016 and 2018 Canada, China, Denmark, the E.U. Commission, Finland, France, India, Italy, Japan, Mexico, the Nordic-Baltic region, Singapore, South Korea, Sweden, Taiwan, the United Arab Emirates, and the United Kingdom published their strategies on AI).

<sup>345</sup> There is no universally-accepted definition of ‘digital trade’. See Aaronson, Leblond (2018), p., 248 (citing López González, Jouanjan (2017), p.6 (defining ‘digital trade’ as encompassing ‘digitally-enabled transactions in trade in goods and services that can be either digitally or physically delivered involving consumers, firms, and governments’.) For the purposes of this thesis, the author will use this term as defined by Aaronson, Leblond, *ibid.*

<sup>346</sup> See Section 3.3.

<sup>347</sup> See Cadwalladr, Campbell (2019) (revealing Facebook’s lobbying around the world, particularly in the United Kingdom, against data privacy legislation).

<sup>348</sup> Rodrik (2011), p. 252.

obvious: in a broader societal context, the term ‘protection’ is often seen in a positive light, especially when it refers to shelter, safety, or harm prevention. But when it comes to protecting privacy and personal data, trade policy and fundamental rights discourses often seem to work on separate, parallel tracks. Paraphrasing Esty, while the word ‘protection’ ‘warms the hearts’ of those seeing data protection and privacy as fundamental rights, it ‘sends chills down the spines of free traders’.<sup>349</sup>

This Chapter asks where one should draw the line between protection and (digital) protectionism. Set against a discursive backdrop where the label ‘protectionism,’ or ‘digital protectionism,’ is increasingly used in academic, societal, and political debates to refer to regulation that aims to protect privacy and personal data,<sup>350</sup> this Chapter considers the implications of this distinction for the autonomy afforded to domestic regulators to protect privacy and personal data by international trade rules and the rules’ interpretation. Further, it asks how the framing of the debate on privacy and data protection in terms of (digital) protectionism affects the normative foundations of domestic regulation on privacy and personal data, and the optimal level of privacy and personal data protection.

This Chapter tackles these questions by applying elements of ‘discourse analysis’<sup>351</sup> methodology, in particular, insights from the work of Michel Foucault on the relationship between discourse and power.<sup>352</sup> According to Foucault, discourse is a ‘system that makes possible and governs’ the formation of knowledge; it predetermines the objects of knowledge, statements, concepts, and theoretical options as well as the rules of their production.<sup>353</sup> Discourse is not determined once and for all – it controls the very *production*

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<sup>349</sup> Esty (1994), p. 36 (Emphasising the ‘clash of cultures’ between environmentalists and free traders and noting that ‘the word ‘protection’ warms the hearts of environmentalists but sends chills down the spines of free traders’.)

<sup>350</sup> See Section 3.3.

<sup>351</sup> See Gee (2010), p. 8.

Discourse analysis is the study of language-in-use. There are many different approaches to discourse analysis. Some of them look only at the ‘content’ of the language being used, the themes or issues being discussed in a conversation or a newspaper article, for example. Other approaches pay more attention to the structure of language (‘grammar’) and how this structure functions to make meaning in specific contexts. These approaches are rooted in the discipline of linguistics. *Ibid.*

<sup>352</sup> See, e.g., Miller (1990), pp. 115, 120–25.

<sup>353</sup> Foucault (1971a), p. 72.

We set out with an observation: with the unity of a discourse like that of clinical medicine, or political economy, or Natural History, we are dealing with a dispersion of elements. This dispersion itself with its gaps, its discontinuities, its entanglements, its incompatibilities, its replacements, and its substitutions can be described in its uniqueness if one is able to determine the specific rules in accordance with which its objects, statements, concepts, and theoretical options have been formed: if there really is a unity, it does not lie in the visible, horizontal coherence of the elements formed; it resides, well anterior to their formation, in the system that makes possible and governs that formation. *Ibid.*

of knowledge at a particular moment in history and can evolve over time.<sup>354</sup> Discourse has the power to ‘mediate the dominant view of what constitutes normality or deviance’ and to ‘produce ... behaviour that is in conformity with the dominant standard of normality or acceptability.’<sup>355</sup> Language, as Julia Black puts it, ‘frames thought, and produces and reproduces knowledge’ and is ‘intimately related to power’.<sup>356</sup> The use of language places the production of knowledge in a particular discourse, which defines the meaning of terms according to shared practices in line with the ideologies of the social groups controlling the discourse.<sup>357</sup> In other words, control over a discourse ultimately translates into control over the production of ‘truth’ at a particular point in time, and allows the suppression of views outside the prevailing discourse. The power of discourse, or discursive power, is often mentioned in academic, political, and journalistic sources in the context of international relations,<sup>358</sup> domestic trade policy formation,<sup>359</sup> and the functioning of international organisations.<sup>360</sup> As noted above, states (or governments) use discursive power to advance certain narratives and to shape international discourses and rules on particular topics. In a narrower sense, discourse can also be controlled by ‘disciplines,’ that

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According to Foucault, ‘[I]n every society the production of discourse is at once controlled, selected, organised and redistributed according to a certain number of procedures, whose role is to ward off its powers and its dangers, to gain mastery over its chance events, to evade its ponderous, formidable materiality’. Foucault (1971b), p. 52. See also Black (2002), p. 168.

Foucault, for example, whose influence is strong, conceptualized discourse as a group of statements that provided the rules for representing the knowledge about a particular topic at a particular historical moment. Discourse is about the production of knowledge, and itself produces the objects of our knowledge. It governs the way that a topic can and cannot be meaningfully talked and reasoned about, and influences how ideas are put into practice and used to regulate the conduct of others. Neither contends that nothing exists outside of discourse, that things do not have a real, material existence in the world, but rather that nothing has any meaning outside of discourse. *Ibid.*

See also Lesser (2006), p. 285 (defining discourses as ‘systems of thoughts composed of ideas, attitudes, courses of actions, beliefs and practices that systematically construct the subjects and the worlds of which they speak’.)

<sup>354</sup> See Foucault (1971a), p. 73.

As a group of rules for a discursive practice, the system of formation is not a stranger to time. It does not concentrate everything that may appear through an age-old series of statements into an initial point that is, at the same time, beginning, origin, foundation, system of axioms, and on the basis of which the events of real history have merely to unfold in a quite necessary way. A discursive formation, then, does not play the role of a figure that arrests time and freezes it for decades or centuries; it determines a regularity proper to temporal processes; it presents the principle of articulation between a series of discursive events and other series of events, transformations, mutations, and processes. It is not an atemporal form, but a schema of correspondence between several temporal series. *Ibid.*

<sup>355</sup> Manokha (2009), p. 430.

<sup>356</sup> Black (2002), p. 165.

<sup>357</sup> *Ibid.* pp. 165–169. See also Van Dijk (2006), p. 138 (‘Defined as socially shared representations of groups, ideologies are the foundations of group attitudes and other beliefs, and thus also control the ‘biased’ personal mental models that underlie the production of ideological discourse’.)

<sup>358</sup> See, e.g., Epstein (2008), pp. 2–4, 11–14, 16, 19–20, 22–23; Paolini (1993), pp. 98–99; Milliken (1999), pp. 225–226.

<sup>359</sup> See, e.g., Siles-Brügge (2013), pp. 605–613.

<sup>360</sup> See, e.g., Zang (2009), pp. 425–428.

is, by the social groups practicing such disciplines.<sup>361</sup>

Julia Black's work shows that discourse forms the basis of regulation in several respects: it influences regulation by, *inter alia*, defining the problem and its operational categories; it determines the goals that regulation aims to achieve; and it 'produces shared meanings as to regulatory norms and social practices which then form the basis for action (for example, the formation of regulatory interpretive communities).'<sup>362</sup> The use of elements of discourse analysis in this Chapter, aims to show how and why the definition of 'protectionism' came about, and how the interpretation of the legal norms embedding this term in the body of international trade law have evolved over time. This is especially pertinent as international trade rules are often phrased in broad and ambiguous terms,<sup>363</sup> which are operationalised through the interpretation of adjudicating bodies (in case of WTO law, by the WTO Panels and Appellate Body).

The Chapter makes two arguments. First, it argues that 'protectionism' is not endowed with an inherent meaning but is socially constructed by the power of the discourse controlling the negotiation, application, and interpretation of anti-protectionist international trade policy and rules. It explicates how shifts in the discourse dominating the negotiation and interpretation of trade law have, in the past, resulted in redefining protectionism as 'new protectionism'. Such redefinition, in turn, triggered the expansion of the scope of domestic policies viewed as protectionist by international trade institutions and elites and the shrinking of domestic autonomy to regulate in the public interest. By extrapolating these historical insights to current policy conversations surrounding digital trade negotiations by the European Union and the United States (referred to in this Chapter as 'digital trade' discourse(s)), this Chapter shows that, despite the fact that the rhetoric of both the EU and the US on this issue are centred around the same term, 'digital protectionism,' the trading partners advance different discourses based on diverging values, which translate to a different baseline between privacy and data protection, and protectionism. Second, this Chapter contends that coining the term 'digital protectionism' to refer to domestic information governance policies that are not yet fully covered by trade law disciplines is *not a logical step* to respond to objectively changing circumstances, but *a product of a certain dominant economic 'digital trade' discourse*, advanced, in particular, by the United States.<sup>364</sup> This Chapter demonstrates how the shift from 'protectionism' to

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<sup>361</sup> Foucault (1971b), pp. 59–60. By 'discipline,' Foucault meant 'a domain of objects, a set of methods, a corpus of propositions considered to be true, a play of rules and definitions, of techniques and instruments'. *Ibid.* According to Foucault, a discipline controls the production of discourse by recognising true and false propositions within itself, thus pushing back 'a whole teratology of knowledge beyond its margins'. *Ibid.*

<sup>362</sup> Black (2002), pp. 165, 178, 188.

<sup>363</sup> See Section 3.2.

<sup>364</sup> This discourse is discussed in more detail in Sections 3.3.1 and 3.3.2.

‘digital protectionism’ in this particular discourse has already resulted in the adoption of international trade rules further restricting domestic autonomy to protect the rights to privacy and the protection of personal data.<sup>365</sup>

This Chapter also suggests that the discourse controlling regulatory conversations on privacy and personal data protection predetermines the baseline between data privacy protection and protectionism and, as a result, affects the level of such protection considered to be necessary and legitimate from a trade perspective. The dominant economic discourse, in particular advanced by the US, internalises an economic approach to personal data and the protection of data privacy.<sup>366</sup> From that perspective, as further discussed in Section 3.4 of this Chapter, personal data is viewed as an economic asset and the extent to which data privacy protection is economically justified is determined against the benchmarks of welfare maximisation and Pareto efficiency. Within that discourse, any protection beyond what is Pareto efficient is viewed as protectionist.<sup>367</sup> Therefore, conducting policy conversations on domestic regulation protecting privacy and personal data within the boundaries of a purely economic ‘digital trade’ discourse puts such regulation in an *a priori* defensive position.<sup>368</sup> In contrast, within a pluralist discourse, the optimal level of protection will be higher.<sup>369</sup> For the purposes of this thesis, a pluralist discourse is understood as a discourse which accommodates a broad range of potentially conflicting perspectives, and which, in particular, internalises economic and non-economic grounds for protecting privacy and personal data as fundamental rights.<sup>370</sup> As a result, some of the policies viewed as protectionist in the economic digital trade discourse will be viewed as protection. Figure 2 illustrates this point:

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<sup>365</sup> For a discussion, see Section 3.3.4.

<sup>366</sup> By an economic approach to personal data and the protection of data privacy this thesis understands the law and economics approach, which focuses on economic costs and benefits of personal data protection, and does not take full account of protection of personal data as moral value or value in itself. For a more elaborate discussion, see Section 3.4.

<sup>367</sup> See Strange (1985), p. 235.

<sup>368</sup> See, e.g., Bauer, Erixon, Krol, Lee-Makiyama (2013), pp. 4–9, 20–21.

<sup>369</sup> See, e.g., Schwartz, Peifer (2017), p. 121 (comparing the European Union’s pluralist, fundamental rights-based approach to data protection with the United States’ consumer-based approach).

<sup>370</sup> See Twining (2010), p. 494.

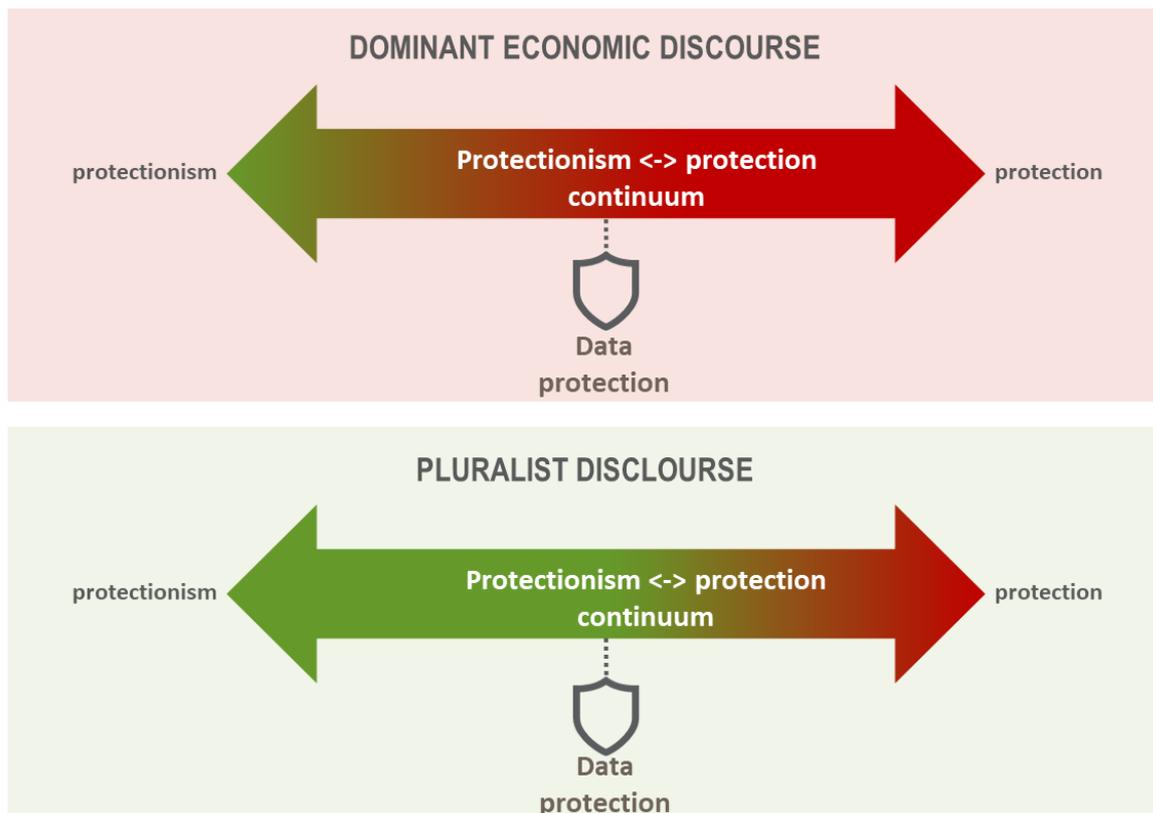


Figure 2: Protectionism in economic and pluralist discourses (design: Helma van der Wal)

Against this backdrop, this Chapter asserts that countries should be conscious of the value frameworks that come with a certain discourse and should ensure that their mutual values determine such discourse, as opposed to the other way around.

As already mentioned in the introduction to this thesis, on 25 January 2019, seventy-six members of the WTO launched talks on electronic commerce, which, among other things, will cover rules on cross-border flows of data.<sup>371</sup> This multilateral dialogue, having emerged within the discourse(s) of digital trade, aims at ‘long-standing, high-standard trade principles to digital trade’.<sup>372</sup> The parties to these negotiations include countries and regions that have different domestic policy priorities and that are situated at different levels of the ladder of economic development — Australia, China, the European Union, Japan, New Zealand, the United States, and Russia are examples.<sup>373</sup> This Chapter suggests that the parties to this multilateral effort should not proceed from the dominant discourse of digital trade as a starting point. Instead, first and foremost, the parties to the effort should agree on the goals of the international trading system in the digital age and the place

<sup>371</sup> See European Commission, *76 WTO Partners Launch Talks on E-Commerce*, 25 January 2019; Botwright (2019); Foroohar (2019); See also Behsudi (2019) (indicating that e-commerce talks are likely to take a very long time).

<sup>372</sup> Botwright (2019).

<sup>373</sup> See WTO, *Joint Statement on Electronic Commerce*, WT/L/1056, 25 January 2019.

afforded to essential domestic policy goals in this system. Negotiations conducted within a discourse based on such a mutual understanding would have a much higher chance of producing meaningful results.

This Chapter proceeds as follows. Section 2 focuses on the most important milestones in the evolution of the notion of ‘protectionism’, from the mid-eighteenth century until the early twenty-first century, using the lens of discourse analysis. Section 3 introduces the way in which the discourse of digital trade labels restrictions on transfers of personal data (such as those adopted by the EU), as ‘(digital) protectionism’. Then it extrapolates the logic of the reconstruction of the term ‘protectionism’ in the past on the claims to redefine ‘protectionism’ as ‘digital protectionism’. Section 4 explicates how such discourse affects the baseline between data privacy protection and protectionism and influences the right normative rationale behind the regulation of privacy and personal data protection.

### **3.2 The expansion of the notion of ‘protectionism’**

Although the notions of ‘free trade’ and ‘protectionism’ are among the oldest in economics,<sup>374</sup> there is still no uniform understanding of what constitutes ‘protectionism’.<sup>375</sup> This Section analyses of the notion of protectionism and shows that protectionism is not a natural phenomenon – it is a concept socially constructed within a particular discourse.

The core issue in defining protectionism is where to draw the line between regulation that is a precondition for trade (such as state intervention aimed at correcting market failures, which is economically efficient and socially productive), and protectionist regulation which creates market failures and stifles trade.<sup>376</sup> As Bhagwati, one of the leading twentieth-century trade theorists, noted,

[S]ince all policies will inevitably affect (directly or indirectly) comparative advantage and (in this sense) there is therefore no purely ‘natural’ or ‘market-determined’ comparative advantage, where *should* one draw the line and say that autonomy in this set of policies is fine but not in others?<sup>377</sup>

Eleven years later, Howse argued along similar lines that ‘[t]here is no natural or self-evident baseline or rule that can solve this basic dilemma.’<sup>378</sup> Defining what constitutes a precondition for free trade and what is a barrier to trade is, indeed, ‘an

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<sup>374</sup> Overbeek (1999), p. viii.

<sup>375</sup> Aaronson (2017), pp. 1–4, 16, 19.

<sup>376</sup> See, e.g., Bhagwati (1988), p. 126.

<sup>377</sup> See Bhagwati (1991), pp. 237, 240–241.

<sup>378</sup> See Howse (2002), pp. 95–96.

interpretive act,’ to use the terminology of Lang.<sup>379</sup> As Tarullo explained, determining what constitutes a trade barrier and what does not, depends on the assumption of “‘normal’ conditions of competitive markets’ that is used as a benchmark to identify the deviations.<sup>380</sup> It is the discourse that predetermines what Lang calls ‘collective habits of interpretation’<sup>381</sup> or ‘the characteristic mindsets and ways of thinking’<sup>382</sup> and ultimately influences the definition of ‘normal’ market and protectionism. In other words, *defining protectionism is an act of interpretation that occurs within a certain discourse*. Using a particular theoretical construction of protectionism has two important practical implications. First, such a construction informs the design of international trade rules - an example of this would be the non-discrimination provisions found in current international trade agreements.<sup>383</sup> Second, since these provisions are often phrased in broad and ambiguous terms, which are neither explained nor defined in the agreements,<sup>384</sup> *interpretation* by adjudicating bodies plays a crucial role in recognising particular domestic policies and rules as ‘legitimate’ or ‘protectionist’.<sup>385</sup> Hence, non-discrimination provisions will be interpreted in a broad or narrow sense, largely under the influence of the discourse governing such interpretation.

Against this backdrop, this Section shows how shifts in the dominant economic discourse have affected the redefinition of the notion of protectionism. It also demonstrates

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<sup>379</sup> See Lang (2011), pp. 169–170.

Since virtually every conceivable form of governmental action has some direct or indirect impact on trade, the selection of a particular set of measures as ‘barriers to trade’ involves the application of principles of selection and categorization. Similarly, we draw distinctions between government actions which constitute trade ‘distortions’ on the one hand, and other kinds of government actions which correct pre-existing market distortions on the other. *Ibid.*, p. 170.

<sup>380</sup> Tarullo (1987), p. 549 (discussing trade laws of general application).

These statutes are based on a regulatory model that assumes that deviations from market principles are ‘exceptional events’; they correct deviations from market principles by imposing extra duties to raise the low prices of imports to what they would (hypothetically) have been had the foreign producer been operating under ‘normal’ conditions of competitive markets and non-distortion by government. *Ibid.*

See also Lang (2011), p. 227 (referring to a notion of an ‘imagined ideal of a market’ that is used as a reference point to characterise a particular governmental policy as a precondition for free trade or ‘protectionism’).

<sup>381</sup> Lang (2011), p. 170.

<sup>382</sup> *Ibid.*, p. 173.

<sup>383</sup> See, e.g., Art. 1(1), GATT 1947 (non-discriminatory most-favored nation provision); Art. 301(2) NAFTA (non-discriminatory national treatment provision).

<sup>384</sup> See Tarullo (1985), pp. 535–536 (arguing that ‘legal principles are generally indeterminate’ and that ‘[p]olitical or ideological choices are embodied in doctrines that promise a faithful implementation of the principles themselves’). Using Article I of the GATT, which codifies the principle of non-discrimination in international trade, Tarullo illustrates that the non-discrimination principle ‘cannot be administered without political choices about legitimate national policies [and t]he rule cannot be explained or justified simply by reference to the aim of increased trade or the principle of equality’. See *ibid.*, pp. 536–541.

<sup>385</sup> See, e.g., Howse (2016), p. 47 (‘The text of the national treatment provisions of the GATT requires that the adjudicator decide whether less favourable treatment is provided for ‘like’ imported products and/or, in the case of taxation measures only, whether dissimilar treatment is provided for directly competitive and substitutable products’.)

how such a redefinition has influenced the substance and interpretation of international trade rules, which ultimately *transformed the very goal of the international trade system – from economic stability to liberalisation of trade*. This transformation has led to a *shrinking regulatory space left to domestic legal regimes by international trade rules*. It is, however, not the purpose of this Section to provide a comprehensive account of all aspects of protectionism in a historical perspective. Instead, this Section focuses on the key milestones of the evolution of protectionism in order to illustrate how the boundaries of discourse and its underlying goals and values affect the predominant conceptualisation of protectionism and the functioning of the international trading system. It starts in the mid-eighteenth century with the birth of the classical free trade movement, moves forward to the 1940s and the formation of the first multilateral trading system, and ends with a discussion of the neoliberal discourse which originated in the late 1960s. Before moving on to a historical account of the evolution of protectionism, however, the following Section introduces the key disagreements on the notion of protectionism that weave their way throughout the discussion.

### 3.2.1 Defining protectionism: key disagreement

Historically, the main disagreement in understanding what protectionism is, lies in the determination of whether protectionism is a subjective or an objective notion. This general disagreement is apparent in the question of *whether the regulatory intent underlying a domestic regulatory measure that discriminates against foreign competitors matters for the purpose of qualifying such a measure as protectionist*.<sup>386</sup> Related questions are *how much* or *how little* protection of domestic industries is sufficient to render regulation protectionist and who bears the burden of proof that a particular regulation is protectionist: the foreign state affected by the measure or the state that has adopted the regulation? As this Chapter shows, the answer to these questions has a profound effect on the breadth of the regulatory autonomy left to domestic regulatory regimes by international trade law in order to pursue important societal or public policy objectives, such as protection of human health, the environment, and public morals.<sup>387</sup>

An objective approach to defining protectionism captures a much broader range of

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<sup>386</sup> Compare Sykes (1999), p. 3 (taking an objective approach to protectionism; defin[ing] ‘regulatory protectionism’ as any cost disadvantage imposed on foreign firms by a regulatory policy that discriminates against them or that otherwise disadvantages them *in a manner that is unnecessary* to the attainment of some genuine, *nonprotectionist* regulatory objective’; specifically underscoring that in order to qualify as protectionist such regulatory policy ‘need not be deliberate and may result simply from regulators’ failure to appreciate the trade impact of their policies’) (emphasis added), with Irwin (1996), p. 5 (defining a policy of protection as governmental policies discriminating against imported goods ‘in favor of those produced within the country, *usually with the aim* of sheltering domestic producers from foreign competition through tariffs, quantitative restrictions, or other import barriers’.) (emphasis added). While the definition of Sykes puts an emphasis on the *effects* of a regulatory policy, that of Irwin focuses on the *aim* of such policy.

<sup>387</sup> See Sections 3.3.5, 3.4.

regulatory measures, namely any measure that may *de facto* result in discrimination between domestic and foreign firms irrespective of its aim, even if such discrimination is incidental.<sup>388</sup> An objective approach also tends to impose the burden of proving that regulation is not protectionist on the party that has adopted the regulation.<sup>389</sup> The subjective approach, in contrast, only covers regulation intending to shelter domestic markets from foreign competition, and places the burden of proof of such intent on the party alleging the protectionist nature of another party's measure.<sup>390</sup>

### 3.2.2 Protectionism and the classical free trade idea

As a driver of policy, free trade dates back to the classical doctrines based on the theories of absolute and comparative advantage developed by Adam Smith and David Ricardo, who argued that, just like individuals, countries could gain from international trade by exchanging goods that each country can produce at a lower cost.<sup>391</sup> As summarised by Irwin, 'free trade describes a policy of the nation-state toward international commerce in which trade barriers are absent, implying no restrictions on the import of goods from other countries or restraints on the export of domestic goods to other markets.'<sup>392</sup> While free trade is associated with efficiency gains, barriers to trade are seen as sources of lost gains from trade.<sup>393</sup> The main benchmarks around which classical economic discourse on free

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<sup>388</sup> See Sykes (1999), pp. 3–4 (providing examples of 'facially neutral regulation[s]' that instituted not *de jure* but *de facto* discrimination, for example, a pharmaceutical regulation 'requir[ing] foreign pharmaceutical manufacturers to engage in more testing and clinical trials than domestic manufacturers with no apparent health justification for this difference in treatment'.)

<sup>389</sup> See, e.g., Lang (2011), pp. 268–269 (illustrating WTO panel cases that exemplify how the country that has adopted the challenged regulation has had to show that the regulation is not protectionist, for example, one case regarding Thailand's 'import restrictions and internal taxes on imported cigarettes' and another case regarding France's 'ban on products containing asbestos for public health reasons').

<sup>390</sup> See, e.g., *ibid.*, pp. 211–214 (illustrating WTO panel cases in which the challenging country had to argue why the other country's measures were intentionally discriminatory and thus illegitimate, for example, one regarding a Pakistani challenge to an Indian measure that Pakistan believed intentionally discriminated against Pakistan, and another regarding a Danish and Norwegian challenge to a Belgian measure that Denmark and Norway believed intentionally discriminated against Denmark and Norway).

<sup>391</sup> Smith (1763b), pp. 207, 209 (advocating that eighteenth-century Britain should be 'a free port,' government should not interfere in free trade by measures 'of any kind,' and 'free commerce and liberty of exchange should be allowed with all nations, and for all things'.) See also Smith (1763a), pp. 204, 204 (Edwin Cannan ed., Clarendon Press 1869) ('All commerce that is carried on betwixt any two countries must necessarily be advantageous to both'.); Howse (2002), p. 94 ('The Ricardian theory of comparative advantage dictated the removal of import restrictions in almost all circumstances, regardless of any commitment of one's trading partners to liberalize *their* imports'.)

<sup>392</sup> Irwin (1996), p. 5 (emphasis added).

<sup>393</sup> See Howse (2002), p. 94.

Smith and Ricardo were concerned in the first instance to disprove the conventional or established mercantilist view that national *wealth* was reduced by (unilateral) free trade, and while they had many important reflections on the relationship of wealth to morals and justice, the basic logic of the theory of comparative advantage does not depend on any of those insights. *Ibid.*

See also Tumlir (1985), p. 4 ('Protection imposes costs on the trading economies; when trade restrictions begin to multiply among the main markets, the costs are compounded. When restriction nears the extent

international trade revolves, are economic efficiency and welfare.<sup>394</sup> However, focusing primarily on the enhancement of aggregate national wealth, the logic of comparative advantage does not take into account the concerns of distributive justice or morals.<sup>395</sup>

In classical economics, the doctrines of free trade and protectionism are thus fundamentally opposed, as they offer radically different perspectives on the best way to promote a nation's (and the world's) welfare: free trade, by maintaining the utmost freedom of trade between the countries, and protectionism (or mercantilism), by restricting imports, promoting domestic industries, and maintaining self-sufficiency from other countries.<sup>396</sup> Developed in the age of the formation of nation-states in Europe, mercantilist theory aimed to strengthen the power of the state and the accumulation of wealth by stimulating exports and limiting imports.<sup>397</sup> The free trade paradigm developed by Smith and Ricardo was used to oppose and then supplant mercantilism,<sup>398</sup> which dominated trade policy in the early eighteenth century.<sup>399</sup> This shift in the dominant economic ideology was not purely a result of progress in economic thought, but a reflection of a “shared vision” among political economists of Britain's economic future’ that represented the views of

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indicated, these costs could be large enough to be considered a major cause of the decline in economic growth’.)

<sup>394</sup> See Irwin (1996), p. 4.

Debates surrounding the economics of free trade and protection all revolve around the question of efficiency: how does a particular trade policy affect a country's ability to use its limited resources (in terms of primary factors of production, such as land, labor, and capital) to produce the greatest possible real income, which in turn enables it to procure a larger set of all goods.

*Ibid.*

<sup>395</sup> See generally *ibid.* pp. 40–41 (providing examples of ‘noneconomic arguments for protection that are a perennial feature of trade policy debates’). ‘Critics of the economic approach frequently contend that the criterion of wealth is too narrowly materialistic and excludes other more important societal considerations’.

*Ibid.*

<sup>396</sup> Overbeek (1999), p. viii (‘[T]he two doctrines of free trade and protectionism are fundamentally opposed’.)

<sup>397</sup> *Ibid.* pp. 1–2 (‘The two major aims of mercantilist theory and policy were (1) the strengthening of the power of the state (political) and (2) the accumulation of wealth (economic) [M]any of the policy proposals of mercantilist writers consisted of recommendations as to how to stimulate exports and hamper imports’.)

<sup>398</sup> See Howse (2002), p. 94 (‘Smith and Ricardo were concerned in the first instance to disprove the conventional or established mercantilist view that national wealth was reduced by (unilateral) free trade’); Schmidt (2013), p. 378 (‘Smith is remembered as a defender of free trade, but his practical goal was to repudiate mercantilism's way of protecting domestic industry’.); see also Nedzel (2014), p. 306 (‘Adam Smith, in the *Wealth of Nations* (1776), challenged mercantilism’.)

<sup>399</sup> See Nedzel (2014), p. 305 (suggesting the prevalence of mercantilism in the eighteenth century) (‘From the sixteenth to the eighteenth century, it was assumed that the amount of gold and silver amassed indicated a nation's wealth and power, and that the world's capital was static’.) Since the GATT was designed to be merely a multilateral treaty, it would be similar to the bilateral treaties that preceded it, but designed to operate under the umbrella of the ITO, when the ITO came into being. The general clauses of GATT were the same as those in the chapter of the draft ITO charter which was devoted to trading rules, which in turn had been heavily influenced by clauses in bilateral trade treaties. *Ibid.*

See also Lang (2011), p. 28 (referring to the Havana Charter, which was the draft of the ITO).

certain interest groups in Britain at that time.<sup>400</sup> As Venzke notes,

[i]t is not a coincidence that David Ricardo and others advocated trade liberalization and an international division of labour at a time in which Britain could become the ‘Workshop of the World,’ the centre of valuable production. Members of the British Parliament clearly saw the appeal of free trade so that ‘foreign nations would become Colonies to us, without imposing on us the responsibility of governing them.’<sup>401</sup>

### 3.2.3 Protectionism and ‘embedded liberalism’ of GATT 1947

During the interwar period, protectionism was mostly conceptualised in its narrow form, namely as tariffs, import quotas, and exchange controls.<sup>402</sup> In addition, protectionism was associated with political nationalism, heavy interference by government in economic life, and the quest for increased self-sufficiency that characterised the developed countries’ domestic policies at the time.<sup>403</sup>

In 1947, the General Agreement on Tariffs and Trade (‘GATT 1947’)<sup>404</sup> was signed.<sup>405</sup> It incorporated the trade policy chapter of the charter of the International Trade Organization (‘ITO’), the treaty establishing an organisation that never saw the light of day.<sup>406</sup> As a legal instrument, GATT 1947 codified efforts to curb protectionist policy. However, GATT 1947 had broader purposes as well. It was executed to avoid future trade wars (similar to those that occurred in the 1930s, and were, in part, seen as a cause of

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<sup>400</sup> Gomes (2003), pp. 45–46 (‘The attitude to foreign trade encapsulated in the principle of comparative costs sprang not only from developments in economic theory but reflected a ‘*shared vision*’ among political economists of Britain’s economic future. It so happened that this coincided with the *interests of the new and rising industrial bourgeoisie*’.) (emphasis added); see also Robinson (1977), p. 1336 (‘When Ricardo set out the case against protection, he was supporting British economic interests’.)

<sup>401</sup> Venzke (2019), p. 8, quoting Semmel (1970), p. 8.

<sup>402</sup> See, e.g., Eichengreen, Irwin (2010), p. 871 (‘The Great Depression of the 1930s was marked by a severe outbreak of protectionist trade policies. Governments around the world imposed tariffs, import quotas, and exchange controls to restrict spending on foreign goods’.)

<sup>403</sup> See Overbeek (1991), p. 633–634 (stating that up to 1939, ‘the belief in political and economic classical liberalism was broken. The prevailing climate of opinion moved increasingly towards a greater role for government, which meant more neo-mercantilism, statism and interventionism’). In the late 1920s and early 1930s, the United States adopted the interventionist New Deal; England ended its free trade policies introduced in the late nineteenth century; Russia, Germany, Italy and Japan ‘adopted totalitarian institutions, subordinating the individual to the state’. *Ibid.*

<sup>404</sup> Throughout this Chapter, GATT 1947 refers to the legal text. GATT (without the year) refers to the organization that administered GATT 1947, as well as the agreements and codes that came later, until 1995 when the WTO took over.

<sup>405</sup> WTO, Press Release, Fiftieth Anniversary of the Multilateral Trading System, 27 October 1997.

<sup>406</sup> See Jackson (1998), p. 17.

WWII);<sup>407</sup> to preserve international peace; and to prevent the spread of Communism.<sup>408</sup> The newly created trade rules were not about ‘comparative advantage as such,’ but rather about ‘the avoidance of protectionist *summum malum*’ (or ‘beggar-thy-neighbour’ policies), that is, when trade barriers introduced by one country led to a chain reaction of trade barriers introduced by other states.<sup>409</sup> In this sense, the post-war trading system only partially remained faithful to the neoclassical free trade idea.<sup>410</sup>

The discursive foundations of the GATT 1947 were not monochromatic, they were laid as a compromise between two discourses (or ‘philosophies,’ according to Lang)<sup>411</sup> that influenced its development.<sup>412</sup> On the one hand, according to the discourse advanced by the United States, protectionism was to blame for the Great Depression of the 1930s and the trade wars that ‘led in a straight line to the outbreak of the Second World War,’ and that discriminatory trade undermined peace.<sup>413</sup> On the other hand, another discourse advanced by the United Kingdom and influenced by Keynesian thinking emphasised the boundaries that the international trade regime should not cross in relation to domestic policies affecting trade: in particular, the discourse advocated that an important aspect of an international trade regime is the ability of the state to impose trade restrictions to ensure full employment

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<sup>407</sup> See Irwin, Mavroidis, Sykes (2008), pp. 5–6.

To understand the origins of the GATT, one must appreciate the traumatic events of the 1920s and 1930. Although monetary and financial factors were primarily responsible for allowing the recession to turn into the Great Depression of the early 1930s, the spread of trade restrictions aggravated the problem. The commercial policies of the 1930s became characterized as ‘‘beggar-thy-neighbor’’ policies because many countries sought to insulate their own economy from the economic downturn by raising trade barriers. *Ibid.*

See also Lang (2011), pp. 196–197 (‘GATT was in part understood as a way of maintaining Western unity during the Cold War, by placing it on a firm and stable economic footing. The fundamental and primary purpose of the post-war regime was international stability, in the specific sense of preventing a repeat of the disastrous trade wars of early 1930s’.); Howse (2022) pp. 94–95 (‘A paramount goal is the avoidance of a protectionist *summum malum*—the situation where domestic social or economic pressures lead some states to *increase* or *reinstate* barriers to trade, thus triggering a competitive reaction in kind by other states, and eventually a “race to the bottom” that is disastrous for the global economy’.)

<sup>408</sup> See Lang (2011), p. 196 fn.4.

<sup>409</sup> Howse (2002), p. 103 (‘After all . . . trade law in its original postwar form was not about comparative advantage as such, but about constraining destructive interdependence—of which a race to the bottom is one form’.) See *ibid.* pp. 94–95; see also Lang (2011), pp. 190–192.

<sup>410</sup> See Howse (2002), pp. 94–95 (discussing how international trade law was not only concerned with ‘the classic insights about the gains to wealth and welfare from free trade,’ but also the ‘*interdependency* of different states’ trade and other economic policies . . .’) ‘The postwar trade and financial order was therefore mainly designed to enable states to manage their domestic economies, in a manner consistent with political and social stability and justice, without the risk of setting off a protectionist race to the bottom’.

*Ibid.*

<sup>411</sup> Lang (2011), p. 192.

There were, broadly speaking, two ‘philosophies’ which emerged at this time, with somewhat different interpretations of the causes and consequences of commercial policy during the 1930s, and different prescriptions for the post-war trading order [B]oth of these philosophies had an important influence on the post-war GATT regime. *Ibid.*

For further discussion, see *ibid.* pp. 24–29 and 192–194.

<sup>412</sup> See *ibid.*, p. 192.

<sup>413</sup> See *ibid.*, p. 192–193.

and domestic economic stability.<sup>414</sup> The delicate compromise between these two views shaped the discourse of ‘embedded liberalism’<sup>415</sup> – a term coined by Ruggie,<sup>416</sup> which he described as follows:

The essence of embedded liberalism ... is to devise a form of multilateralism that is compatible with the requirements of domestic stability. Presumably, then, governments so committed would seek to encourage an international division of labor which, while multilateral in form and reflecting *some* notion of comparative advantage (and therefore gains from trade), *also* promised to minimize socially disruptive domestic adjustment costs as well as any national economic and political vulnerabilities that might accrue from international functional differentiation. However, as neoclassical trade theory defines the term, the overall social profitability of this division of labor will be lower than of the one produced by *laissez-faire*.<sup>417</sup> (emphasis in the original)

Hence, contrary to the (neo)classical case for free trade discussed above, the discourse of ‘embedded liberalism’ leaned towards the subjective – and, therefore, narrower – understanding of ‘protectionism’.<sup>418</sup> This matters because ‘embedded liberalism’ was not only reflected in the characteristics and design of the GATT 1947,<sup>419</sup> but it also governed the GATT 1947’s operation for at least two decades after its inception.<sup>420</sup> Put another way, during that period, trade *liberalisation* was less important as a goal in itself, it was a component of a broader societal goal of maintaining economic

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<sup>414</sup> See *ibid.*, p. 194.

<sup>415</sup> See *ibid.*

<sup>416</sup> Ruggie (1982), p. 392 (‘The liberalism that was restored after World War II differed in kind from that which had been known previously. My term for it is “embedded liberalism”’) (emphasis added).

<sup>417</sup> *Ibid.*, p. 399 (emphasis altered).

<sup>418</sup> See Irwin (1996), p. 5 (defining the subjective understanding of protectionism) (defining a policy of protection as governmental policies discriminating against imported goods ‘in favor of those produced within the country, *usually with the aim* of sheltering domestic producers from foreign competition through tariffs, quantitative restrictions, or other import barriers’) (emphasis added).

<sup>419</sup> See Lang (2011), p. 195 (‘Key players in the negotiations shared a common view of the legitimacy of state intervention to secure domestic stability, even if they disagreed on the precise form and depth that that intervention should take in particular circumstances’); see also Howse (2002), pp. 94–95.

The postwar trade and financial order was therefore mainly designed to enable states to manage their domestic economies, in a manner consistent with political and social stability and justice, without the risk of setting off a protectionist race to the bottom. The legal structure of the General Agreement on Tariffs and Trade (GATT) was designed to facilitate such concessions and make them binding, but it did not require them. *Ibid.* at 95.

<sup>420</sup> See Lang (2011), p. 205 (‘These shared ideas were reflected in a set of characteristic institutional forms, social practices, and legal structures which more or less endured over the first two decades of the GATT’s existence’.) These ‘shared ideas’, however, represented the compromise of the Global North and did not factor in the views of countries from the Global South, such as India. Instead of being normalized, Global South countries’ preferences were framed as ‘special and differential treatment’. See also Lamp (2015), pp. 745–752, 770.

stability.<sup>421</sup> Although the non-discrimination provisions of the GATT 1947 were formulated broadly,<sup>422</sup> in the first two decades of the GATT 1947's existence and the dominance of the discourse of 'embedded liberalism,' they were interpreted narrowly.<sup>423</sup> Only those discriminatory measures that were 'explicitly or implicitly motivated by a protectionist *intent*' were considered to violate the non-discrimination provisions and thus qualified as protectionism.<sup>424</sup> In other words, the subjective view based on regulatory intent had legal significance in the assessment of the protectionist character of a domestic measure challenged under the GATT 1947.<sup>425</sup>

The discourse of 'embedded liberalism' – reflecting the broad consensus on the goals of the multilateral trading system – also governed the practice of challenging other countries' domestic regulations.<sup>426</sup> In the first decades after the GATT 1947's formation, domestic policies that only indirectly intervened with international trade typically were not challenged as inconsistent with international trade rules.<sup>427</sup> In line with this consensus, contracting parties to the GATT 1947 did not resort to trade disciplines in order to 'reshape

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<sup>421</sup> See Lang (2011), p. 197.

[A]lthough the removal of trade barriers was of course an important intermediate purpose of the regime, liberalization was in fact a less important norm during the first two decades of the trade regime's history than is often assumed. Liberalization was pursued not through the application of a rigid principle, but only as far as states were practically able, and only as far as was consistent with the broader norm of economic stability. *Ibid.*

<sup>422</sup> See *ibid.*, p. 208 ('It takes only a moment's reflection to see how broad and intrusive these disciplines had the potential to be'); see also, e.g., Hudec (1990), p. 121 (stating that paragraph 4 of Article III GATT 1947, which contains a national treatment provision, 'covered every internal law and regulation affecting commercial movement of goods, an area that is virtually unlimited in scope').

<sup>423</sup> See Lang (2011), p. 211 (arguing that orientation towards embedded liberalism 'produced a field of trade law and policy which was narrowly defined (relative to the present day), focused on tariffs and other kinds of trade measures understood at the time as quantitative restrictions, and unwilling to scrutinize "internal" measures except in the clearest circumstances of circumvention of liberalization commitments'.)

<sup>424</sup> See *ibid.*, p. 254 ('From this perspective, the non-discrimination norm contained in Article III of the GATT is essentially an "anti-protectionism" norm and ought to be applied solely to those internal measures which are expressly or implicitly motivated by a protectionist intent'.) (emphasis added); see also Kurtz (2016), p. 137 ('GATT members were free to regulate domestically (behind-the-border) as they saw fit to do so. Trade law would only strike down such interventions if poisoned by protectionist animus'); Howse (2002), p. 97 ('The notion of "discrimination" against trading partners seems closely linked to the very idea of protectionism, though in some cases one may discriminate for non-protectionist reasons, which is why at least as a preliminary sorting or sifting mechanism, the nondiscrimination norm has a certain durability and putative legitimacy'.)

<sup>425</sup> See Lang (2011), p. 211; Howse (2002), p. 97.

<sup>426</sup> See Ruggie (1982), p. 399 (describing the 'essence of embedded liberalism'); Lang (2011), pp. 195, 205, 211 (arguing that orientation towards embedded liberalism 'produced a field of trade law and policy which was narrowly defined (relative to the present day), focused on tariffs and other kinds of trade measures understood at the time as quantitative restrictions, and unwilling to scrutinize "internal" measures except in the clearest circumstances of circumvention of liberalization commitments'.) ('Key players in the negotiations shared a common view of the legitimacy of state intervention to secure domestic stability, even if they disagreed on the precise form and depth that that intervention should take in particular circumstances'.) ('These shared ideas were reflected in a set of characteristic institutional forms, social practices, and legal structures which more or less endured over the first two decades of the GATT's existence'.)

<sup>427</sup> For a discussion, see *ibid.*, pp. 214–216.

domestic state-market relations'.<sup>428</sup>

### 3.2.4 *The new protectionism and the neoliberal discourse: towards an ever-broader conceptualisation of 'protectionism'*

#### 3.2.4.1 The 'new protectionism'

Starting in the early 1970s, the notion of protectionism has gradually become much more capacious. In trade economics literature, the term 'new protectionism' was coined to refer to a broader range of domestic measures restricting international trade.<sup>429</sup> Unlike traditional protectionism, the new version included not only the more traditional or mercantilist restrictions on trade, but also non-tariff barriers ('NTBs,' or 'behind the border' barriers) to trade, such as negotiated or 'voluntary' export restraining arrangements, and measures allegedly abusing the GATT 1947 non-discrimination provisions, such as anti-dumping measures.<sup>430</sup>

Trade economists also viewed the 'new protectionism' as different in another important respect.<sup>431</sup> While the old protectionism of the 1930s was characterised as 'unsystematic, improvised, and at the end, a result of panic,' the 'new protectionism' was seen to be *driven by strong politically organised forces* representing the interests of domestic industries.<sup>432</sup> This approach, as this Chapter shows in greater detail below, had a major impact on the acceptability (under trade law) of key domestic policy measures.

Authoritative trade economists often attributed the rise of non-tariff barriers as a form of circumvention of GATT 1947 disciplines,<sup>433</sup> linked to the tendency of the United States to palliate the decline of its economic dominance (a 'diminished giant syndrome,' in the

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<sup>428</sup> *Ibid.*, pp. 215–216 ('[T]oo intrusive an application of GATT disciplines on internal regulation would undermine that purpose, as it would run the risk of itself upsetting the delicate balance of concessions embodied in the original agreement, and undermining support for the trading system as a whole'.)

<sup>429</sup> See Salvatore (1993), p.1 (Dominick Salvatore ed., 1993) ('This phrase, coined in the mid 1970s, refers to the revival of 'mercantilism' whereby nations, particularly the industrial nations, attempt to solve or alleviate their problems of unemployment, lagging growth, and declining industries by imposing restrictions on imports and subsidizing exports'.)

<sup>430</sup> See Bhagwati (1988), pp. 43–53 (conceptualising NTBs in the form of domestic regulation on countervailing duties and anti-dumping provisions that was seen as being restrictively used against foreign suppliers); see also Bhagwati (1991), p. 239 (distinguishing between two classes of non-tariff barriers: 1) barriers bypassing the GATT's rules, which include visibly and politically negotiated voluntary export restraints and other export restraining arrangements (e.g. import quotas, nonautomatic licensing, and variable levies); and 2) protectionist 'captured' provisions that have a legitimate role in a free trade regime (e.g. countervailing duties and anti-dumping provisions) but are used to 'harass unfairly their successful foreign rivals and thus to deter fair competition and free trade'.); Overbeek (1999), p. 555.

<sup>431</sup> See Tumlir (1985), pp. 38–39.

<sup>432</sup> See *ibid.* ('Protectionism in the 1930's was unsystematic, improvised, and at the end, a result of panic. The new protectionism is a very different animal. It has been growing gradually. Industries have used intelligent, long-term planning in creating an expanded system of protection. [T]he new protectionism is politically stronger because it accommodates a broader range of interests'.)

<sup>433</sup> Baldwin (1986), p. 1 ('The international trading economy is in the anomalous condition of diminishing tariff protection but the increasing use of nontariff trade-distorting measures'.)

words of Bhagwati),<sup>434</sup> and to suppress increasing competition from less developed, newly industrialising countries.<sup>435</sup> A number of those countries imposed barriers to US exports in areas where the United States had a comparative advantage, especially knowledge-intensive industries and services.<sup>436</sup> In addition, new protectionism was viewed as a means of alleviating domestic stability issues, such as growing unemployment and inability, due to economic decline, to deliver on the social obligations of the expanded welfare states.<sup>437</sup> Recall from Section 3.2.3 of this Chapter that it was precisely these measures that were seen as legitimate and not, therefore, protectionist in the ‘embedded liberalism’ discourse.<sup>438</sup>

In the new protectionism, free trade theorists saw a threat to the legitimacy and to the very existence of the multilateral trading system associated with post-war prosperity and economic growth.<sup>439</sup> Recalling the disastrous consequences of protectionism in the 1930s, Bhagwati, one of the most influential trade theorists of the time, warned that the new protectionism would, just like its predecessor, trigger beggar-thy-neighbour policies and result in new trade wars.<sup>440</sup>

#### 3.2.4.2 ‘Fair trade

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<sup>434</sup> See, e.g., Bhagwati (1993a), p. 22 (‘America has been struck by a “diminished giant syndrome”—reinforced by the slippage in the growth of its living standards in the 1980s. This affliction has caused a loss of confidence in America’s inherited postwar trade policies’.); see also Bhagwati (1993b), p. 39 (‘Many of my examples [of demands for fair trade] come from the United States where the diminished giant syndrome has prompted an acute search for unfair trade by others’.)

<sup>435</sup> Baldwin (1986), p. 1, 20 (‘[N]ew nontariff protectionism [is related] to significant structural changes in world industrial production that have brought about a decline in the dominant economic position of the United States, a concomitant rise to international economic prominence of the European Economic Community and Japan, and the emergence of a group of newly industrializing developing countries (NICs)’.)

<sup>436</sup> See Howse (2016), p. 17

[M]any barriers worldwide hampered America in exploiting its apparent contemporary comparative advantage in knowledge-intensive industries and services. In some, intellectual property was largely unprotected; in most, competition in network services, such as in telecommunications and finance, was severely restricted or limited, while many others still imposed byzantine and archaic regulatory requirements on products, both imported and domestic. In many cases, a business presence in the other country was necessary for the full exploitation of comparative advantage, and here American firms faced severe foreign investment restrictions.

<sup>437</sup> See Salvatore (1993), p. 9; see also Overbeek (1999), pp. 553–555.

<sup>438</sup> See, e.g., Lang (2011), pp. 29, 192–205; Ruggie (1982), p. 399.

<sup>439</sup> Baldwin (1986), p. 1 (‘[New protectionism] is taking place largely outside the framework of GATT and threatens to undermine the liberal international trading regime established after World War II’.) For further discussion, see Bhagwati (1991), pp. 238–244.

<sup>440</sup> See Bhagwati (1991), pp. 238–244. But see Strange (1985), pp. 254–255

[T]he next few years will show whether world trade can continue to survive despite the deadlock in the GATT and despite a certain amount of increased protectionism. My contention is that a combination of political and economic interests, reinforced by structural change in the international division of labor brought about by the mobility of capital and technology, is preventing a world depression from seriously arresting or reversing the steady growth in world trade.

### *The 'New Protectionism' in 'Fair Trade' Clothing*

Alongside the new protectionism discourse within US business and governmental circles during the 1970s, measures characterised as new protectionism were increasingly re-framed as means to curtail 'unfair trade practices' from (primarily) developing countries.<sup>441</sup> From this perspective, trade-restricting practices, such as import controls and voluntary export restraints, labelled as new protectionism by trade economists, were presented as *responses* to unfair trade.<sup>442</sup> Implicitly using its domestic market as a primary reference point, the United States used the 'fair trade' discourse to argue that any commercially significant institutional or regulatory difference between its domestic regime and that of other countries distorted the conditions of competition and constituted barriers to US exports.<sup>443</sup> Bhagwati, in contrast, viewed these claims as nothing more than a different rhetoric of protectionist demands in order to make lobbying efforts more successful.<sup>444</sup>

Guided by the new fair trade narrative, the US government saw the changing mission of international trade law as the elimination of unfair trade practices through, in particular, the harmonisation (or 'globalisation') of a broad range of domestic regulatory frameworks

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<sup>441</sup> Subsidies, dumping practices, and other discriminatory rules disfavoring U.S. (and other) imports are examples of such 'unfair trade practices'. See Baldwin (1986), pp. 16–19; see also *ibid.*, p. 18 ('The *emphasis on the great need for fair trade* is evident in the 1974 legislation authorizing U.S. participation in the Tokyo Round of multilateral negotiations'.) (emphasis added).

<sup>442</sup> See *ibid.*, pp. 18–19

The most important protectionist action taken by the United States since the late 1960's, namely, the gradual tightening of controls over steel imports, has also been justified mainly on the grounds of unfair trade practices by foreign producers. When a series of voluntary export restraint agreements with leading steel-exporting nations were concluded in late 1984, a spokesperson for the U.S. Trade Representative stated, 'We are responding to unfair trade in the U.S.; defending yourself against unfair trade is not, in our opinion, protectionism'. The unfair trade argument has been used in support of most other trade-restricting or trade-promoting actions taken by the United States in recent years.

<sup>443</sup> Lang (2011), p. 227

In practice, when one country alleges that another country's measure is an unfair trade practice (or trade distortion), it will implicitly use the institutional form of its own domestic market as the primary reference point against which fairness and distortions are measured. . . . The result is that the notion of a 'trade distortion' comes to be equated in practice with the existence of a commercially significant institutional or regulatory difference between countries.

<sup>444</sup> See e.g. Bhagwati (1991), p. 239

[I]f protectionists demand protection, they will today confront politicians who are generally hesitant to supply it because it is not comfortable to be called "protectionist." However, if you cry "foul" and allege that the foreign rival is resorting to "unfair" trade practices and therefore you need protection, your chances of successful lobbying are much greater. Protectionists have increasingly come to appreciate this and to shift their style of complaints accordingly to "unfair trade", opening this notion to ever more areas of concern (e.g. workers' rights enforcement by foreign countries).

See also Bhagwati (1988), pp. 123–124 ('The insidious growth of the "fairness" issue poses a yet more disturbing threat to freer trade'.)

that affect international trade.<sup>445</sup> Demands for ‘level playing fields,’ ‘harmonisation,’ and ‘fair trade’ more generally worried trade economists, who saw in such demands a threat to the legitimacy and feasibility of free trade: not only did they consider it to be impossible to harmonise every aspect of domestic regulation, but they also argued that it was in these differences between domestic regimes that lay the source of the comparative advantages that make trade beneficial in the first place.<sup>446</sup>

In sum, the ‘new protectionism’ in ‘fair trade’ clothing ‘provided the enabling conditions and leverage for a radical renegotiation of the international rules that had undergirded the profound global economic transformations of the previous era.’<sup>447</sup>

### *‘Fair Trade’ and the Human Rights Movement*

Another, non-economic, strand of the ‘fair trade’ debate dealt with background conditions affecting the cost of production in developing countries, such as environmental and labour standards.<sup>448</sup> As the liberalisation of capital flows allowed multinational

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<sup>445</sup> Baldwin (1986), p. 18

In reshaping the proposal of the president [for the Tokyo Round of multilateral negotiations], the Congress stressed that the president should seek ‘to harmonize, reduce, or eliminate’ nontariff trade barriers and tighten GATT rules with respect to fair trading practices. Officials in the executive branch supported these directives not only on their merits but because they deflected attention from more patently protectionist policies.

<sup>446</sup> See Bhagwati (1993b), p. 18

[T]he true and greater crisis that we face with regard to the theory and policy of free trade today comes . . . from the growth of demand for ‘level playing fields,’ ‘harmonization,’ ‘fair trade,’ etc., all of which are variously undermining insidiously the legitimacy and feasibility of free trade since it is virtually impossible to harmonize everything so that playing fields are truly level in every way. There will always be something that an opponent of free trade will be able to find that is different in the country of one’s successful rival and hence can be argued to make free trade unfair and therefore illegitimate and unacceptable.

See also Bhagwati (1991), p. 240

If differences in national institutions and policies can affect comparative advantage, as they surely can, and if these are now increasingly cited as sources of unfair trade (as they are), then we may be seriously eroding the possibility of free trade and leading towards ‘managed trade’ or towards free trade only when a great deal of policy harmonization has occurred (as in the European Community (EC)).

<sup>447</sup> Lang (2019), p. 3 (‘What “new protectionism” signaled above all . . . [was] an attempt by many States to rewrite the rules of global trade to establish a new international division of comparative advantage and secure their preferred places in that order . . . . In retrospect, the “new protectionism” is therefore best understood . . . as a successful attempt to transform the system from one type of open global trading order to another’.)

<sup>448</sup> See Bhagwati (1996), pp. 10–11 (stating that non-economic fair trade arguments are based on three concerns: a sense of a ‘transborder’ obligation towards others living in nation-states with lower standards; concerns of distributive justice that amount to the fear that freer trade with poor countries with abundant unskilled labor will immiserate working people in those countries; and concerns of fair competition that require that costs attributed to environmental and labor standards should not differ across countries in free trade.); see also Bhagwati (2007), pp. 133–134; Howse, Trebilcock (1996), p. 74 (1996)

Unlike the arguments for trade restrictions on environmental and labor rights grounds . . . which have a normative reference point external to the trading system itself, competitiveness-based ‘fair trade’ claims focus largely on the effects on domestic producers and workers of

companies from developed countries to move production to developing countries with lower environmental and labour standards, the non-economic fair trade argument raised concerns of a ‘race to the bottom’ of such standards in developed countries.<sup>449</sup> To prevent this, proponents of the argument called for the creation of an international ‘level playing field’ and especially with regard to environmental and labour-rights trade measures.<sup>450</sup> Just like their economic counterpart, these arguments were attacked by opponents as protectionism in disguise.<sup>451</sup> Moreover, even if one views these arguments as not protectionist in nature, addressing non-economic issues through trade measures was perceived as a second-best solution, because the first-best domestic measures are those not interfering with international trade.<sup>452</sup>

Although trade theorists advancing the idea of free trade were critical of the fair trade narrative, it would be inaccurate to say that this critique applied to *any* domestic interference with free trade.<sup>453</sup> For example, Bhagwati acknowledged that objecting to any

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other countries’ environmental and labor policies, and not per se on the effects of those policies on the environment and on workers elsewhere.

See also Wai (2003), p. 48–49 (‘Free trade based on comparative advantage is agnostic about the production conditions in any particular jurisdiction, including its domestic regulatory standards. Fair trade theory, in contrast, is very much concerned with defining the background of those conditions under which international trade should occur. Production that violate these background conditions would constitute “unfair competition”’.) For an overview of non-trade rationales for environmental and labor protection, see Howse, Trebilcock (1996), p. 63–65.

<sup>449</sup> See Howse (2002), p. 104

In the wake of the debt crisis, a range of developing countries ended up removing or modifying restrictions on foreign investment and various other domestic policies that were disincentives to the attraction of foreign capital. This led to fears of ‘social dumping’ in the developed world that would eventually cause a race to the bottom: developed countries would not be able to sustain high environmental and labor standards, or rates of taxation needed to finance the redistributive policies of the welfare state, if they had to compete with these poorer countries for the location of capital investment.

<sup>450</sup> *Ibid.*, p. 103; see, e.g., Howse, Trebilcock (1996), p. 78–79. For a literature overview on globalization and labor standards, see Lee (1997), p. 176–83. On the ‘race to the bottom’ argument in relation to environmental standards, see Esty (1994), pp. 22–23. The issue the level-playing field when it comes to social and human rights has resurfaced in the current EU’s trade policy discourse. See Borrell (2020).

<sup>451</sup> See, e.g., Bhagwati (2007), pp. 123–131, 147–150 (arguing that the ‘race to the bottom’ argument is not supported by empirical evidence; differences in environmental and labor standards are insignificant to affect the location of production; higher labor and environmental standards themselves can be a protectionist move; and finally, attributing such arguments to ‘rent seeking’.); see also Overbeek (1999), p. 557 (‘At present [(1990s)], protectionists in wealthier countries, who are always on the look-out for new reasons for trade barriers, are using labor and environment related arguments to back up demands for additional trade impediments. ... [T]his type of argument is extreme protectionism in its crudest possible disguise’.); Lee (1997), p. 177. But see Ehrlich (2010), p. 1014, 1026, 1029–30 (providing empirical evidence of genuine nature of concerns with environmental and labor standards); Davies, Chaitanya Vadlamannati (2013), p. 11–12 (providing empirical evidence of the race to the bottom in labor standards).

<sup>452</sup> See Howse (2002), p. 100 (‘Thus, the notion that a more effective policy instrument than trade protection is always available to achieve *any* legitimate public end vastly oversimplifies the problem of politics’.) Bhagwati argued that using trade distorting measures to tackle unemployment is only a second-best measure, while purely domestic measures would be the first best solution. See Bhagwati (1991), p. 238. On the theory of second best, see Bhagwati (1971).

<sup>453</sup> See, e.g., Bhagwati (1988), pp. 126–127.

state intervention as a departure from fair trade was ‘a wrongheaded’ approach.<sup>454</sup> He also supported some of the ‘fair trade’ arguments insofar as they were focused on the importance of creating intra-sectoral level playing fields – especially in the ‘context of the few technology-intensive industries in which there are significant scale economies relative to the size of the world market.’<sup>455</sup> Along the same lines, he called for greater tolerance of ‘other countries’ social objectives’; regulation pursuing such objectives, he argued, should not be labelled as ‘unfair’.<sup>456</sup>

### 3.2.4.3 Neoliberal discourse

As this Chapter has explicated above, redefining ‘protectionism’ as ‘new protectionism’ was framed as a necessary and logical step in response to new forms of trade barriers. Ruggie convincingly argues instead that the emergence of the new protectionism was not the cause of, but rather the effect of neoliberal discourse, which redefined the *social purposes* of the international trading system.<sup>457</sup> It was, thus, a new vision of the international trading system dictated by neoliberal discourse, and not objective circumstances, which effectuated the transformation of the notion of protectionism.<sup>458</sup>

This evolution of neoliberal discourse happened against the background of a shift in the economic theory of regulation.<sup>459</sup> A neoliberal view that *any* regulation may constitute a potential barrier to trade relies to a large extent on the theory of regulatory capture that became ‘common language’ in the circles of trade economists and international lawyers associated with the GATT.<sup>460</sup> These economic theories were later embraced in two official GATT reports.<sup>461</sup> In contrast to public interest theory (which advanced analytical arguments that regulation is adopted in the public interest, primarily to correct market failures and pursue non-economic and societal goals),<sup>462</sup> the ‘regulatory capture’ theory

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<sup>454</sup> *Ibid.*, p. 126.

<sup>455</sup> *Ibid.*, p. 127.

<sup>456</sup> *Ibid.*

<sup>457</sup> Ruggie (1982), p. 410–413. See also Lang (2011), p. 169–170.

<sup>458</sup> See Ruggie (1982), p. 410, 412–413.

<sup>459</sup> See generally Zang (2009), p. 432–457.

<sup>460</sup> *Ibid.*, p. 438 (‘During the 1980s, Ordo-liberal and public-choice economics gained influence among trade economists and international lawyers associated with GATT, and ‘capture’ theory became the common language’.)

<sup>461</sup> *Ibid.*

<sup>462</sup> See Baldwin, Cave, Lodge (2012), pp. 39–43; Ogus (1994), pp. 58–71. The private interest theory questioned one of the core assumptions of the public interest theory, the assumption of the ‘benevolent regulator,’ in other words, that the political process creating regulation is efficient. See, e.g., Stigler (1971), p. 3 (‘The second [alternative] view [of regulation] is essentially that the political process defies rational explanation: “politics” is an imponderable, a constantly and unpredictably shifting mixture of forces of the most diverse nature, comprehending acts of great moral virtue (the emancipation of slaves) and of the most vulgar venality (the congressman feathering his own nest)’.)

(based on the empirical foundations of the public choice theory) argued that regulation is adopted and implemented primarily in the interest of organised interest groups,<sup>463</sup> and that regulatory capture is essentially unavoidable.<sup>464</sup> Captured regulation leads to a reduction of social welfare because it merely leads to the transfer of wealth from one industry to another and no longer serves public interest.<sup>465</sup> This explains why, from the perspective of this theory, regulation should be reduced to a minimum.<sup>466</sup>

This theory was also used as a justification of the aggressive pursuit of export interests on the international level for constraining domestic protectionist trade policy making.<sup>467</sup> Binding reciprocal trade rules were thus seen as a tool to contain domestic protectionism through what Baldwin calls a ‘juggernaut effect,’ which is using domestic export-oriented groups who profit from a reduction of trade barriers to fight the domestic protectionist lobby.<sup>468</sup> The new approach to domestic regulation was reinforced by a somewhat simplified version of trade economics that ‘professors dole out to journalists’<sup>469</sup> (a ‘market fundamentalist ideology’ rather than the true economic science).<sup>470</sup> Proponents of this ideology argued that trade leads to efficiency gains and enhances domestic welfare, while

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<sup>463</sup> Ogus (1994), pp. 57–58. For an overview of ‘regulatory capture’ theory, see Baldwin, Cave, Lodge (2012), pp. 43–49; Ogus (1994), pp. 55–75; Sunstein (1993), pp. 69–71.

<sup>464</sup> Political economists developed sophisticated models based on empirical data that strongly suggested that not only elected political actors but also non-elected bureaucrats (especially in the case of the European Economic Community) were more prone to adopt protectionist regulation than to adhere to free market principles. See Messerlin (1981), pp. 469–71. But see Baldwin (1989), p. 131 (‘[T]he individual’s various social concerns can play an important role in shaping his or her decisions. To expand their already substantial contributions toward understanding the policymaking process, economists should integrate such social motivations into their microeconomic optimizing framework’.)

<sup>465</sup> See e.g., Tumlir (1985), p. 4 (arguing that ‘[a]ll protection is a redistribution of income and wealth within the protecting country’); see also Overbeek (1999), p. 558 (discussing the policy of managed trade).

<sup>466</sup> See e.g., Sunstein (1993), p. 70 (criticising the capture theory). Sunstein states that, ‘[T]he notion of rent-seeking rejects, as unproductive, nearly all of the basic workings of politics. It treats citizenship itself as an evil. Efforts to enact public aspirations, to counteract discrimination, to protect the environment—all these are seen as the diversion of productive energies into a wasteful place’. *Ibid.*, p. 71.

<sup>467</sup> Lang (2011), p. 234 (‘As regards the trade regime itself, public choice theory supported the view that aggressive championing of export interests through trade negotiations was generally beneficial, as it provided a counterweight to the inherent tendency of protectionist special interests to capture domestic trade policy-making processes’.)

<sup>468</sup> Baldwin (2016), p. 70; see also Howse (2002), pp. 100–101.

<sup>469</sup> See Rodrik (2011), p. 77

Free market economics was in the ascendancy, producing what has been variously called the Washington Consensus, market fundamentalism, or neoliberalism. This new vision elevated the simplistic case for trade—the one that economics professors dole out to journalists—over the appropriately qualified version. It regarded any obstacle to free trade as an abomination to be removed; caveats to be damned.

see also Driskill (2012), p. 2 (‘[I]n light of the apparent settled nature of economists’ judgement on the issue of trade liberalization, the profession has stopped thinking critically about the question and, as a consequence, makes poor-quality arguments justifying their consensus’.)

<sup>470</sup> Stiglitz (2018), p. xl (‘Doubling down on the Washington Consensus was a policy inspired by the special interests that it served, but the belief in the efficacy of these policies was supported by “market fundamentalist” ideologies—the notion that free, unregulated markets were the best way to organize a society’.) (emphasis added).

silencing the downsides, such as the lack of consideration of social or distributional effects of free trade policy.<sup>471</sup> Relying on the assumption that any public policy objective can be more efficiently achieved by domestic regulation not interfering with international trade, this approach judged domestic trade restrictive measures against the benchmark of an imaginary ‘toolbox of effective nontrade policy instruments’.<sup>472</sup> This perspective was also reinforced by the predisposition that protectionism explains domestic rules that deviate from this benchmark of efficient domestic rules.<sup>473</sup>

Taking an opposite view, Stiglitz argued, that ‘[t]he globalization which emerged at the end of the twentieth century and the beginning of the twenty-first was not based on “free trade,” but managed trade—managed for special corporate interests in the United States and other advanced countries.’<sup>474</sup> The ‘market fundamentalist’ ideologies that created a presumption that ‘free, unregulated markets were the best way to organize a society’ reinforced the myopic focus of political economy theory on the failures of domestic regulation.<sup>475</sup> Paradoxically, a policy of deregulation (or not adopting regulation in the first place) and of complete free trade *is* a type of domestic policy, which itself is prone to ‘capture’ by domestic interest groups that benefit from such policies.<sup>476</sup> This led to questions about why international trade law regulation would be immune to such capture.<sup>477</sup> To illustrate this line of reasoning, an argument can be made that some countries, such as the United States, set their data protection standards *strategically low* in order to increase their competitiveness on a global digital market.<sup>478</sup>

#### 3.2.4.4 The impact of neoliberal discourse on the formation and functioning of the international trading system

Neoliberal discourse had a profound impact on the further rounds of negotiations of the GATT, in particular, the Uruguay Round (1986-1994) that led to the creation, design

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<sup>471</sup> See Howse (2002), p. 99 (‘Put in this crude way, the case for trade liberalization appeared to be totally indifferent to any notion of a just distribution of benefits and burdens from the removal of trade restrictions’.)

<sup>472</sup> *Ibid.*, p. 100 (‘One simply *assumed* a certain toolbox of effective nontrade policy instruments, and the stability and viability of the social bargains within states as well, or at least the stability of institutions that construct and reconstruct such social bargains’.)

<sup>473</sup> See *ibid.* (‘In its confidence in the prescription of free trade as a timeless truth, the network identified special interest groups as the evil force that explained all, or almost all, deviations from the clearly rational policy prescription to use nontrade instruments for achieving public policy goals’.)

<sup>474</sup> Stiglitz (2018), p. 20.

<sup>475</sup> See *ibid.*, p. xl.

<sup>476</sup> See Howse (2002), p. 100–101.

<sup>477</sup> See *ibid.*

<sup>478</sup> See, e.g., Greenleaf (2012), p. 72 (characterising the U.S. privacy standards as inherently or deliberately weak). ‘[A]ttempts by US companies and the US government to use their combined economic and political influence to limit the development of data privacy laws in other countries will continue to be important, but may now be on the wrong side of history’. *Ibid.*; see also Azmeh, Foster (2016), p. 12 (‘Over the last few years, the political role of ICT companies has increased substantially with some of these firms becoming key political lobbying forces’.)

and functioning of the WTO. The conclusion of the WTO Agreement led to a considerable expansion of the scope of the multilateral trade system.<sup>479</sup> The WTO Agreement not only incorporated the GATT 1947,<sup>480</sup> but also introduced new international trade law disciplines on the international trade in services in the GATS, technical standards,<sup>481</sup> sanitary and phytosanitary measures,<sup>482</sup> and intellectual property.<sup>483</sup> Another important outcome of the Uruguay Round was the creation of a binding dispute settlement mechanism.<sup>484</sup>

During the Uruguay Round, ‘a specialised policy elite’ – employees of the GATT/WTO secretariat and a broad range of ‘experts’ – took over the gradual development and administration of the multilateral trading system.<sup>485</sup> These elites were ‘insulated from, and not particularly interested in, the larger political and social conflicts of the age’<sup>486</sup> and shared a common set of neoliberal normative values (ethos or ideology) on the nature and goals of international trade, the relationship between trade law, and politics and the boundaries of domestic regulatory autonomy.<sup>487</sup> The main goal of the international trading

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<sup>479</sup> Howse (2002), pp. 17, 53–54 (showing that the U.S. fair trade agenda became the core of the Uruguay Round, which led to the adoption of trade disciplines implementing the rules dictated by ‘the predominant ideology represented by the Washington consensus’: extension of disciplines on domestic regulation beyond GATT non-discrimination obligations, greater market access, expansive intellectual property protection, demonopolization and deregulation of telecommunications and finance, and ‘scaling down’ governmental health, safety and environmental protection).

<sup>480</sup> GATT 1994 (incorporating almost all of the provisions of GATT 1947).

<sup>481</sup> TBT Agreement.

<sup>482</sup> SPS Agreement. Kurtz notes in relation to the SPS that it ushered ‘in a harder positive integration edge to a member state’s commitments in the WTO. The underlying logic is that, by flattening insensible regulatory variances between states, the SPS Agreement can lower compliance costs, enhance efficiency gains and thus lead to an overall improvement in economic welfare’. Kurtz (2016), p. 138.

<sup>483</sup> TRIPS. See also Gervais (2010), p. 3.

<sup>484</sup> Although there was a dispute settlement mechanism under the GATT 1947, the decision of the dispute settlement body (‘Panel’) had to be adopted by a consensus, which, in practice, meant that a losing party could block the adoption of the decision against it. Jackson (1998), p. 68. Establishment of the Dispute Settlement System solved this problem. The Dispute Settlement System is embodied in the DSU; see Jackson (1998), pp. 72–73; see also Vermulst, Driessen (1995), p. 131 (providing an overview of the WTO dispute settlement system).

<sup>485</sup> Howse (2002), p. 98

This group included some officials employed in the GATT/ WTO Secretariat . . . the larger group of ‘experts’: former or current governmental trade officials; GATT-friendly academics who often sat on GATT/WTO dispute settlement panels and were invited to various conferences and meetings of the GATT/WTO; international civil servants in other organizations (particularly the World Bank, the Organisation for Economic Co-operation and Development, and the International Monetary Fund) preoccupied with trade matters; and a few private attorneys, consultants, and former politicians.

<sup>486</sup> *Ibid.* (‘A sense of pride developed that an international regime was being evolved that stood above the ‘madhouse’ of politics (if one can borrow Pascal’s image), a regime grounded in the insights of economic ‘science,’ and not vulnerable to the open-ended normative controversies and conflicts that plagued most international institutions and regimes, most notably, for instance, the United Nations’.)

<sup>487</sup> See Lang (2011), p. 181

[T]rade regime’s neoliberal turn was in significant part . . . a transformation of collective ideas about the nature and purpose of the trade regime, collective ideas about the function of law in trade politics, and collective principles and techniques for evaluating the legitimacy of

system, as advanced by these policy elites, was no longer ‘embedded liberalism,’ but the continued, gradual liberalisation of trade.<sup>488</sup> International trade and globalisation became an imperative for any trade policy measure, subordinated to the domestic economic, social, and political priorities, and an ‘end in itself’.<sup>489</sup> Under the influence of these policy elites, the WTO dispute settlement system, which had exclusive competence to enforce WTO rules, became largely ‘self-referential’ and gave little weight to other international rules, such as those governing human rights.<sup>490</sup>

This shift in the *dominant discourse* affected the behaviour of WTO members.<sup>491</sup> Compared to the previous system under GATT 1947, the WTO dispute settlement system was used to challenge a broader range of domestic policy issues.<sup>492</sup> As a result, in addition to traditional trade-related questions such as tariffs and quotas, WTO dispute settlement bodies increasingly had to evaluate compliance with the new trade rules of domestic health and environment standards, cultural policies, and regulation protecting public morals.<sup>493</sup> In addition to domestic regulation discriminating on the basis of origin (‘*de jure* discrimination’),<sup>494</sup> which was a primary matter of concern in the GATT 1947, from the

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governmental action . . . [and] this transformation of the GATT/WTO’s ‘legal imagination’ radically reshaped the form, structure, content, and interpretation of international trade law.

See also Weiler (2001), p. 193 (‘The diplomatic ethos which developed in the context of the old GATT dispute settlement tenaciously persists despite the much transformed juridified WTO’.)

<sup>488</sup> See Rodrik (2011), p. 76 (citing Friedman (1999), pp. 61–65)

[T]he WTO marks the pursuit of a new kind of globalization Domestic economic management was to become subservient to international trade and finance rather than the other way around. Economic globalization, the international integration of the markets for goods and capital (but not labor), became an end in itself, overshadowing domestic agendas Globalization became an imperative, apparently requiring all nations to pursue a common strategy of low corporate taxation, tight fiscal policy, deregulation, and reduction of the power of unions.

See also Howse (2002), p. 104 (‘[Some insiders] moved from free trade as an economic ideology to free trade as embedded in a broader liberal economic ideology. Trade liberalization became part of a general set of prescriptions for growth and prosperity, at odds to a large extent with the progressive welfare state vision of the embedded liberalism bargain’.); WTO, Appellate Body Report, *EC – Chicken Cuts*, para. 243 (stating that security and predictability of ‘the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994’).

<sup>489</sup> See Rodrik (2011), p. 76.

<sup>490</sup> Weiler (2001), p. 194 (‘A very dominant feature of the GATT was its self-referential and even communitarian ethos explicable in constructivist terms’.)

<sup>491</sup> See Lang (2011), p. 223.

<sup>492</sup> See *ibid.*, p. 223–224 (‘By the end of the 1990s, however, as informal norms limiting the scope of application of the GATT regulatory disciplines were gradually reconstituted, the range of measures subject to challenge under Articles I and III of the GATT had broadened considerably It was in part the result of a twofold imaginative change consisting of, first, a redefinition of the common sense concept of “trade barrier,” and second, a rethinking of the nature and purpose of the trade regime itself’.)

<sup>493</sup> See e.g. WTO, Appellate Body Report, *US-Gambling*; WTO, Appellate Body Report, *EC – Asbestos*; WTO, Appellate Body Report, *US – Shrimp*; WTO, Appellate Body Report, *EC – Hormones*; WTO, Appellate Body Report, *Canada – Periodicals*.

<sup>494</sup> Hudec (1998), p. 620 (defining ‘*de jure* discrimination’ as ‘regulatory measures that discriminate explicitly by providing different standards for domestic and foreign goods or services’); see also Diebold (2010), pp. 35–37.

late 1980s onwards, an increasing number of disputes focused on *de facto* discrimination. These were the domestic measures that did not specifically aim to discriminate against foreign goods in favour of domestic ones based on their origin, but rather, on a domestic regulatory purpose (e.g. health or environmental protection).<sup>495</sup>

The WTO caselaw that emerged from these disputes demonstrates a neoliberal shift in the trade adjudicators' interpretative techniques.<sup>496</sup> The WTO adjudicating bodies increasingly refrained from considering regulatory intent when assessing whether a particular domestic measure resulting in discrimination between domestic and foreign goods or services violated the relevant trade agreement and was, therefore, protectionist.<sup>497</sup> Instead, the focus shifted towards the economic *impact* on the competitive opportunities of foreign goods and the effects on competition between products or services.<sup>498</sup> These developments led to an equivalence between trade-distorting measures, discrimination, and protectionism.<sup>499</sup>

This equivalence between discrimination and protectionism had two practical implications. First, it altered the baseline between legitimate regulation and protectionism,

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<sup>495</sup> See Hudec (1998), p. 620 (defining 'de facto discrimination' as 'regulatory measures that make no explicit distinction between foreign and domestic goods (called "origin-neutral"), but which have a disproportionate impact on foreign goods or services that is for some reason viewed as wrong or illegitimate'). 'Historically, GATT has been principally occupied with border measures and explicitly discriminatory measures, with de facto discrimination only becoming a major concern relatively recently'. *Ibid.*, p. 622. Hudec clarifies that '[o]f the first 207 legal complaints filed in GATT between 1948 and 1990, only a small handful involved claims of de facto discrimination by internal regulatory measures'. *Ibid.*, p. 622 fn.8; see also Diebold (2010), pp. 37–45.

<sup>496</sup> See Lang (2011), p. 255.

<sup>497</sup> See *ibid.*, pp. 255, 257–265 ('Over the course of the 1990s, the clear trend was incrementally but decisively to eliminate virtually any explicit consideration of intent in the interpretation of GATT non-discrimination norms'.); see also Diebold (2010), pp. 75–80; Trebilcock, Howse, Eliason (2013), pp. 138–145 (examining the Appellate Body's interpretation of the National Obligation in the GATT and 'rejection of an 'aims and effects' test to determine the validity of an internal tax measure'.); Ehring (2002), p. 931–946; Hudec (1998), pp. 629–633.

<sup>498</sup> See, e.g., WTO, Panel Report, *Argentina – Hides and Leather*, para. 11.182; (clarifying that 'Article III:2, first sentence, is not concerned with taxes or changes as such or the policy purposes Members pursue with them, but with their economic *impact* on the competitive opportunities of imported and like domestic products') (emphasis added); Lang (2011), p. 262; Howse (2016), p. 46:

Consideration of regulatory intent or of evidence of purposeful discrimination plays no role in this analysis. The adjudicator makes a determination of whether the products are 'like' based upon objective criteria, such as physical characteristics and end uses, while consumer preferences can also be dispositive, and then undertakes a formalistic (not empirical) analysis of whether the regulatory intervention in question has detrimental impact on competitive opportunities for imported like products. In this disparate impact or de facto discrimination analysis, there is no apparent room for consideration of outside values or legitimate regulatory purposes.

<sup>499</sup> See Lang (2011), p. 255 ('[A]n implicit association . . . began to be made between the notion of discrimination under Articles I and III and the notion of a "market distortion" from economic analysis'.) '[T]he non-discrimination norm became a much more powerful tool to wield against domestic regulation, even that which was apparently "non-discriminatory" in the sense that that term had been traditionally understood. "Discrimination" began to look very much like "trade-distorting market intervention"'. *Ibid.*, p. 264.

thus making the term protectionism much more capacious. This, in turn, left a much narrower domestic regulatory space to protect non-economic values, such as the environment, labour rights, animal welfare, and human rights. Second, by refraining from any consideration of regulatory intent in the assessment of violations of international trade commitments, the WTO adjudicating bodies transferred the centre of gravity in the consideration of regulatory purposes towards the all-important general exceptions contained in GATT 1994 Article XX and GATS Article XIV.<sup>500</sup> This shift had an important consequence for the domestic regulatory space: while the burden of proof of an alleged violation of a trade obligation is normally on the complaining party, the burden of proof that all the conditions of a necessity test have been met are on the party whose regulatory measure is contested.<sup>501</sup> Moreover, this is not just ‘a question of technical burden of proof,’ as Weiler argues, but ‘a question of cultural identity, the way a society wishes to understand its internal hierarchy of values.’<sup>502</sup> The relegation of values competing with the liberalisation of trade to exceptions, ‘establishes the WTO as a system of symbolic normative hierarchy wherein the default norm is the integrity of the market and liberalized trade.’<sup>503</sup> In this way, regulations in the public interest that interfered with international trade commitments were effectively put in a defensive position, facing the requirement of the necessity test and the requirements of the *chapeau* of the general exceptions.<sup>504</sup>

Although the interpretation of the general exceptions and, in particular, the necessity test has been uneven throughout the years,<sup>505</sup> one thing has remained stable: it is a particularly difficult test to meet.<sup>506</sup> The interpretation of the general exceptions, which have become the core mechanism to distinguish between domestic measures that are legitimate and those that are protectionist,<sup>507</sup> has created a ‘protectionist bias’; that is, an inclination to protect the interests of trade-oriented stakeholders that ‘may be inconsistent

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<sup>500</sup> See WTO, Appellate Body Report, *Argentina – Financial Services*, para. 6.114; (‘[A] Member’s commitments under the GATS could in some cases serve to further its national policy objectives. Where measures are found to be inconsistent with a Member’s obligations or commitments under the GATS, the GATS provides for various mechanisms, such as Article XIV, which take account of policy objectives underlying such measures’.)

<sup>501</sup> See Regan (2007), p. 364.

<sup>502</sup> Weiler (2009), p. 768.

<sup>503</sup> Weiler (2009), p. 768.

<sup>504</sup> See Lang (2011), p. 265 (arguing that ‘[p]art of the purpose and the effect of the reinterpretation of Article III, in other words, was to shift the centre of gravity of the legal discipline of domestic regulation under the GATT from the non-discrimination test in Article III to the necessity test in Article XX’).

<sup>505</sup> For a comprehensive overview, see Marceau, Trachtman (2014), pp. 368–377; Regan (2007), pp. 347–366; Venzke (2011), pp. 1116–1135 (detailing how various GATT panels and Appellate Bodies have analysed Article XX arguments).

<sup>506</sup> Delimatsis (2011), p. 266; Venzke (2011), pp. 1118–1119. For a discussion, see Section 2.3.2.

<sup>507</sup> See Delimatsis (2014), p. 95 (‘Since the inception of GATT, necessity tests have formed part of the contract, providing flexibility and “breathing space” to regulators. Necessity has been traditionally considered as the prevailing proxy for the identification and the discipline of protectionist or unduly burdensome regulatory behaviour’.)

with the human rights interests of consumers in maximum equal liberty and open markets.’<sup>508</sup> For example, as discussed in Section 2.3.2 above, in the interpretation of the ‘reasonably available’ test – the benchmark for the assessment of whether a particular trade-inconsistent domestic measure meets the ‘necessity’ requirement of the general exception<sup>509</sup> – WTO adjudicating bodies assess whether an alternative measure that provides *the same level of protection* of the public interest or objective pursued by a trade-inconsistent measure without *prohibitive cost or substantial technical difficulties* is available.<sup>510</sup> Inconsistency in the interpretation of what ‘the same level of protection’ and ‘prohibitive’ costs entail, in some cases amounted to the consideration of an actual level of protection achieved by a contested measure (rather than a desired level of protection subjectively determined by the state and not (yet) necessarily achieved), and a disregard of high administrative and enforcement costs. Such inconsistencies left WTO members a much narrower regulatory space than the wording of the test might otherwise suggest.<sup>511</sup> The reality is that a less trade-restrictive measure is, in theory, almost always reasonably available in the imaginary ‘toolbox of effective nontrade policy instruments’ mentioned above.<sup>512</sup> As argued in Section 2.3.2 above, despite the fairly consistent language in WTO case law that the less restrictive alternative should be real rather than hypothetical, this logic has not always been followed in practice.

Recently, under sharp waves of critique and public discontent with the WTO’s practice of reframing regulatory approaches protecting non-economic values as barriers to trade, the WTO attempted to restore its legitimacy by trying to give more deference to the levels

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<sup>508</sup> Petersmann (2001), p. 27.

<sup>509</sup> See, e.g., WTO, Appellate Body Report, *Korea – Various Measures on Beef*, para. 164; WTO, Panel Report, *Argentina – Financial Services*, para. 7.729; WTO, Appellate Body Report, *US-Gambling*, paras. 304–307; WTO, Appellate Body Reports, *EC – Seal Products*, paras. 5.169, 5.214.

<sup>510</sup> WTO, Appellate Body Report, *US-Gambling*, paras. 308.

<sup>511</sup> See WTO, Appellate Body Report, *Korea—Various Measures on Beef*, para. 178. Based on the actual application of the contested measure, the Appellate Body held the following:

We think it *unlikely that Korea intended to establish a level of protection that totally eliminates fraud* with respect to the origin of beef (domestic or foreign) sold by retailers. The total elimination of fraud would probably require a total ban of imports. Consequently, *we assume that in effect Korea intended to reduce considerably* the number of cases of fraud occurring with respect to the origin of beef sold by retailers. The Panel did find that the dual retail system ‘does appear to reduce the opportunities and thus the temptations for butchers to misrepresent foreign beef for domestic beef.

*Ibid.* (emphasis added). The alternative measure, which the Appellate Body said was reasonably available to Korea, involved higher administrative and enforcement costs. Korea argued that it lacked the resources necessary for this alternative, but the Appellate Body still concluded that the contested measure did not pass the ‘necessity’ assessment. *Ibid.*, paras. 175, 180. But see WTO, Appellate Body Report, *US-Gambling*, paras. 308, 317 (The Appellate Body dismissed the alternative measure proposed by a claiming party as ‘not an appropriate alternative’, and stated, ‘[A] “reasonably available” alternative measure must be a measure that would preserve for the responding Member its right to achieve *its desired level of protection* with respect to the objective pursued under paragraph (a) of Article XIV’) (emphasis added).

<sup>512</sup> Howse (2002), p. 100.

of protection of domestic societal interests.<sup>513</sup> It does not seem to be working. As Andrew Lang neatly put it,

[i]n the lingua franca of trade professionals, ‘the toothpaste was out of the tube,’ and it was simply not possible to return to a trade regime which was narrowly focused on (say) border barriers, and only a small subset of domestic regulations which had direct and immediate impacts on trade flows.<sup>514</sup>

However, this does not mean that restoring such legitimacy is insurmountable in the future.

After the Uruguay Round, WTO multilateral negotiations have not made any significant progress in the further liberalisation of international trade beyond what could be achieved through a neoliberal interpretation of existing rules.<sup>515</sup> Instead, international trade law-making moved to bilateral and regional fora where multiple bilateral and plurilateral preferential trade and investment agreements have been concluded around the world (some 2300 bilateral investment treaties and 306 regional trade agreements are in force).<sup>516</sup> These agreements have structured and furthered the integration of national economies into a single world economic order.<sup>517</sup> As opposed to WTO negotiations, where consensus of all parties is required, bilateral and regional negotiations make it easier for certain states to advance a new form of the neoliberal discourse – that of global digital trade – to achieve an ever-deeper trade liberalisation.<sup>518</sup> Drawing a parallel with the redefinition of protectionism as ‘new protectionism’ in 1970s, the next Section discusses how the redefinition of protectionism as ‘digital protectionism’ may have contributed to such a transition.

### **3.3 Digital protectionism: the latest wave of trade constraints on regulatory autonomy**

As noted in the Introduction to this thesis, the last decade has witnessed a trend towards regulating electronic commerce and digital trade in bilateral and regional trade

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<sup>513</sup> For a detailed account see Howse (2016), pp. 13, 45–75.

<sup>514</sup> Lang (2011), p. 315.

<sup>515</sup> Burri (2013), p. 3 (‘As the Doha negotiations continue to make little progress, the multilateral venue of rule-making is being seriously undermined, and this triggers forum-shopping—bilaterally, regionally, and through new plurilateral initiatives within clubs of countries, unaffiliated to any international organization, such as the Anti-Counterfeiting Trade Agreement (ACTA)’.)

<sup>516</sup> See WORLD TRADE ORGANIZATION, *Regional Trade Agreements*, [https://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](https://www.wto.org/english/tratop_e/region_e/region_e.htm); UNCTAD. (2016), p. 101. According to Wolfe, of the 275 regional/bilateral trade agreements (‘RTAs’) that had been notified to the WTO by May 2017, seventy-five have e-commerce provisions, and such provisions are included in more than 60% of the RTAs that entered into force between 2014 and 2016. Wolfe (2019), p. s63.

<sup>517</sup> See Howse (2016), p. 48.

<sup>518</sup> See Pauwelyn (2012).

agreements.<sup>519</sup> These changes have occurred against a background comprised of the idea that globalisation is a net positive, on the one hand, and the development of new information technologies that allow for an almost instant exchange of information, services, and capital, on the other hand. As personal and other data became an essential component of cross-border trade, ensuring its unrestricted cross-border flow became an important yet contentious point in the negotiations of ‘new generation’ international trade agreements. These negotiations coincided with the discourse of digital trade advanced by the United States, stressing the economic benefits of digital trade and exposing the downsides of restrictions on cross-border flows of personal data – which are also sometimes referred to as data localisation requirements<sup>520</sup> – labelling them as ‘*digital protectionism*’. This label, as the Chapter explains below, is, in particular, often attached to the EU restrictions on cross-border transfers of personal data, explained in Section 2.2.1.3 above, by those criticising the EU approach.<sup>521</sup> It is that set of rules that is more often showcased as being detrimental to international trade, and described as protectionist.<sup>522</sup>

In spite, or perhaps because, of this, EU politicians also regularly express their disapproval of digital protectionism.<sup>523</sup> Although the EU and US discourses on digital trade are ostensibly woven with similar terminological threads of digital protectionism, such discourses are inchoate and fundamentally diverge in their views on the underlying values and policy objectives of digital trade.<sup>524</sup> Although in both cases powerful economic interests may have played a role in constructing the discourse, when it comes to the interplay between digital trade and the protection of privacy and personal data, unlike the United States, the European Union is bound by internal *constitutional* constraints, already discussed in Chapter 2, and elaborated upon in more detail in Chapter 5 of this thesis. It is this divergence that could explain why the attempt to redefine protectionism – and narrow

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<sup>519</sup> See Wolfe (2019), p. s63.

<sup>520</sup> It could be argued that ‘restrictions on cross-border data flows’ and ‘data localization’ mean different things, as data localization laws do not always restrict cross-border flows of data. See, e.g., Casalini, López González (2019), p. 5. Some authors view data localization as a form of restrictions on cross-border data flows. See, e.g., Hodson (2019). Given that there is no consensus on the meaning of these terms, and drawing a clear line between them is not the purpose of this thesis, the author uses them interchangeably.

<sup>521</sup> Bauer, Erixon, Krol, Lee-Makiyama (2013) p. 11.

<sup>522</sup> See Goldfarb, Trefler (2019), pp. 479–480 (viewing restrictions on personal data transfers as a form of data localization that could favor domestic firms and have negative effects on trade); see also Ferracane, van der Marel (2018b) (‘We find that restrictions on the cross-border movement of data, as opposed to restrictions on the domestic use of data, significantly reduce imports of services’.); Goldfarb, Tucker (2011), pp. 69–70 (demonstrating that European strict e-privacy rules lead to an average reduction in effectiveness of 65% of banner ads, thus proving to be damaging for the European advertising industry).

<sup>523</sup> Stupp (2015).

<sup>524</sup> Greenberg Center for Geoeconomic Studies (2017).

domestic regulatory space to protect personal data – has ultimately been reflected in the US-led, and not the EU-led, trade agreements.<sup>525</sup>

The European Union’s restrictions on cross-border transfers of personal data undoubtedly impose limitations on international trade. The key question is, however, whether such restrictions can appropriately be labelled as ‘protectionist,’ and if so, what the consequences of using this label might be in future policy decisions. This Chapter addresses this question in Section 4.

### 3.3.1 *The digital trade discourse(s)*

As shown above, in showcasing the economic benefits of free cross-border data flows, the narrative of digital trade often presents domestic privacy and data protection regimes (as well as their international divergence) as digital trade barriers. A number of economic arguments, advanced primarily by the US government, European, and US pro-trade think tanks (but also by several academics), are used to explain why restrictions on cross-border flows of personal data or data localisation requirements hamper digital trade. For instance, an influential McKinsey & Company report argued that in 2014 alone, cross-border data flows generated \$2.8 trillion in value.<sup>526</sup> An earlier study conducted for the US Chamber of Commerce by the pro-trade think tank, the European Centre for International Political Economy (‘ECIPE’) warned of the negative welfare effects on the EU economy if cross-border data flows were to be disrupted by the then-draft GDPR.<sup>527</sup> A number of other ECIPE studies predict that the removal of restrictions on cross-border flows of information would *increase* imports of services, on average by five percent.<sup>528</sup> These studies feed into the lobbying activities of export-oriented service industries around the world.<sup>529</sup> In a similar vein, in a taxonomy of trade restricting measures prepared by the United States International Trade Commission (‘USITC’), the EU data protection framework (which, unlike US law, requires a higher level of data protection complemented by restrictions on cross-border transfers of personal data), is mentioned as restricting

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<sup>525</sup> See Fefer, Morrison, Akhtar (2019), pp. 21–23 (2019).

<sup>526</sup> Manyika, Lund, Bughin, Woetze, Stamenov, Dhingra (2016), p. 10. See also U.S. Chamber of Commerce, Hunton & Williams LLP. (2014), pp. 1–2.

<sup>527</sup> Bauer, Erixon, Krol, Lee-Makiyama (2013), p. 3.

<sup>528</sup> See Ferracane, van der Marel (2018b) ( ‘Our analysis predicts that, if countries lifted their restrictions on the cross-border flow of data, the imports of services would rise on average by five percent across all countries, with obvious benefits for local companies and consumers who could access cheaper and better online services from abroad’.)

<sup>529</sup> See, e.g., Global Services Coalition Statement on Digital Trade. (2017) (quoting Manyika, Lund, Bughin, Woetze, Stamenov, Dhingra (2016), and several ECIPE studies and ‘calling[ing] for negotiators of ongoing or future negotiations related to data flow including FTAs/EPAs to make their utmost efforts to agree on strong and effective provisions which guarantee free flow of data, and prohibit forced data localization and requirements for provision of software source code, while applying appropriate and effective protection and security for personal data’.)

international digital trade in several sectors.<sup>530</sup> The USITC and ECIPE stress that, generally speaking, restrictions on cross-border transfers, in addition to substantive rules restricting the use of personal data and data localisation measures, increase the costs of conducting business for multinational companies.<sup>531</sup> More specifically, researchers associated with the ECIPE argue that restrictions on cross-border data flows reduce (or, in other words, restrict) imports of data-intensive services.<sup>532</sup>

As any user of Facebook can attest, personal data, viewed as an economic asset, also constitutes an important ingredient of AI-based systems and algorithms, an input in the production of many digital services, production processes, and logistics.<sup>533</sup> In other words, it is *a factor of production*.<sup>534</sup> Foreign providers of such services, including targeted marketing companies, are in a less favourable position than domestic providers that do not have to comply with cross-border transfer restrictions to provide the same services domestically.<sup>535</sup> In addition, restrictions on flows of data are viewed not only as detrimental to ICT services, but also for trade in goods and services generally, as they may result in companies choosing a less efficient mode of production (or supply) of services.<sup>536</sup> Global

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<sup>530</sup> United States International Trade Commission (2017), p. 273 ('According to input from industry representatives, regulatory and policy measures focused on data protection and privacy affect all kinds of industries. These measures can inhibit global digital trade by U.S. firms due to the increased administrative costs associated with complying with stricter privacy measures that differ from U.S. standards'.)

<sup>531</sup> *Ibid.*; Ferracane, van der Marel (2018b).

<sup>532</sup> See Ferracane, M.F., van der Marel, E. (2018a), p. 15 (showing that 'more restrictive data policies, in particular with respect to the cross-border movement of data, result in lower imports in data-intense services for countries imposing them'.)

<sup>533</sup> See Crémer, De Montioye, Schweitzer (2019), p. 73 ('Data is a core input factor for production processes, logistics, targeted marketing, smart products and services, as well as Artificial Intelligence (AI)').

<sup>534</sup> See Mueller, Grindal (2019), p. 80 (concluding that 'information in the form of digital data flows can be considered a mobile factor of production'); see also Costa-Cabral, Lynskey (2015), p. 11 ('Without personal data as an input some goods and services are now ostensibly impossible to produce, leading to the growth of commodity markets for personal data. Thus, personal data is a full-fledged factor of production in a modern economy'.); see also Gürses, van Hoboken (2018), p. 595 (showing that users' data has become an integral part of production and testing of digital services and software).

<sup>535</sup> As already explained in Section 2.2.2, under the GDPR, in order to access EEA personal data from outside the EEA foreign companies not only have to comply with legal grounds for collecting personal data under Articles 5 and 6 of the GDPR (requirements that generally apply to European companies), but also with the limitations on cross-border transfers of personal data (Chapter V GDPR). EDPB, Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, 25 May 2018, p. 3.

When applying Article 49 one must bear in mind that according to Article 44 the data exporter transferring personal data to third countries or international organizations must also meet the conditions of the other provisions of the GDPR. Each processing activity must comply with the relevant data protection provisions, in particular with Articles 5 and 6. Hence, a two-step test must be applied: first, a legal basis must apply to the data processing as such together with all relevant provisions of the GDPR; and as a second step, the provisions of Chapter V must be complied with.

*Ibid.*; see also Bergkamp (2002), p. 39.

<sup>536</sup> See Ferracane, van der Marel (2018b) (citing Andrenelli, Cadestin, De Backer, Miroudot, Rigo, Ye (2018). ('[A] range of data-intense services from computer services to retail and information services are increasingly being traded over the internet rather than by other means such as foreign establishments.

information flows allow multinational companies to operate globally without an international physical presence.<sup>537</sup> Some academics also argue that restrictions on data flows may limit the possibilities of the world-wide aggregation of personal data and are thus threatening technological advances in such areas as cloud computing and AI.<sup>538</sup> In a similar vein, the US Chamber of Commerce and Hunton & Williams warned that such restrictions may turn the ‘Internet’ into a ‘splinternet,’ paving the way to economic stagnation.<sup>539</sup>

### 3.3.2 Framing data protection as ‘digital protectionism’ in the digital trade discourse

Discourse matters, and the discourse is changing. Political, academic, and societal debates on cross-border data flows now revolve around terms such as ‘digital protectionism,’ ‘data protectionism,’ data nationalism,’ ‘innovation mercantilism,’ ‘data colonialism’ and ‘digital colonialism’.<sup>540</sup>

That said, the view that restrictions on cross-border flows of personal data could favour domestic industries is not new.<sup>541</sup> As early as 1978, John Eger raised a concern that the restrictions on cross-border flows of personal data adopted by some EU countries and envisaged to be introduced on an EU level might, in practice, not only be used to protect privacy and national sovereignty, but also ‘to protect domestic economic interests’ as indirect barriers to trade.<sup>542</sup> It is only recently, however, that the term ‘digital

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Restricting data would, therefore, also inhibit companies from choosing the most efficient channel of trading many services’.)

<sup>537</sup> See UNCTAD (2017), p. 167.

<sup>538</sup> See Chander, Lê (2015), p. 680 (2014) (Labelling E.U. restrictions on transfers of personal data as data localization measures and stating that ‘[b]y creating national barriers to data, data localization measures break up the World Wide Web, which was designed to share information across the globe. ... Data localization would dramatically alter this fundamental architecture of the Internet’.); *ibid.*, p. 681 (arguing that data localization measures promote ‘data nationalism,’ which ‘poses a mortal threat to the new kind of international trade made possible by the Internet—information services such as those supplied by Bangalore or Silicon Valley’.); see also Goldfarb, Trefler (2019), p. 29 (‘Data localization is an issue for AI because AI requires data. In other words, localization is a way to restrict the possible scale of any country in AI, but at the cost of lower quality overall’.) But see Kuner (2015a), p. 2090 (offering a powerful critique of these arguments).

<sup>539</sup> U.S. Chamber of Commerce, Hunton & Williams LLP. (2014), pp. 2–3 (‘Technological advances and an increasingly globalized economy have brought us to a policy crossroads: one path leads to a ‘splinternet’ of economic isolation, characterized by misguided attempts to safeguard data by building protectionist walls [T]his isolationist approach has repeatedly caused economic stagnation’.)

<sup>540</sup> See e.g. Chander, Lê (2015), pp. 679, 739; Mishra (2016), pp. 137, 144 (‘From a [international political economy] perspective, a dominant view is the emergence of ‘innovation mercantilism’ in digital trade today’.); Aaronson (2017), p. 3; Mitchell, Mishra (2018), pp. 1111–12 (2018); Couldry, Mejias (2019); Coleman (2019).

<sup>541</sup> See Eger (1978), p. 1066.

<sup>542</sup> See *ibid.*, p. 1066 (‘Many countries in Europe may have no concern other than protecting the privacy of personal data, a concern which neither the American public nor any member of a democratic society can fault. But there is the danger, of course, that these new laws will be used not only to protect just privacy but also to protect domestic economic interests’.)

protectionism’ was coined to refer to such restrictions.<sup>543</sup> For example, in a non-paper for the discussions on electronic commerce at the WTO, Japan stressed the necessity ‘to address emerging “digital protectionism”’ as a prerequisite for ‘open, secure, and reliable global-e-commerce environment that will promote and facilitate cross-border digital trade.’<sup>544</sup> Relying on the definition of barriers to digital trade by USITC, Aaronson defined digital protectionism as ‘barriers or impediments to digital trade, including censorship, filtering, localization measures, and regulations to protect privacy.’<sup>545</sup> Other academics, most notably Chander and Lê, argued that ‘[w]e must insist on data protection without *data protectionism*. A better, safer Internet for everyone should not require breaking it apart.’<sup>546</sup> Similarly, Burri called upon international legal scholars to ‘stress the dangers of data protectionism, often under the disguise of legitimate objectives, such as national security or privacy protection.’<sup>547</sup> At the same time, Burri points out that not only divergent approaches to data privacy and protection (which is arguably the crux of the cross-border data flow problem), but also standards of data protection that are *too low* could be viewed as barriers or obstacles to trade.<sup>548</sup> This is, in part, because consumer confidence and trust, she argues, are a precondition for well-functioning digital trade.<sup>549</sup> This leads to a search for an optimal level (from a trade perspective) of protection rather than a complete absence of protection.<sup>550</sup>

The US administration’s recent rhetoric centred on the notion of data protectionism seems to be based exactly on this logic. US trade experts and the administration have used harsh language to characterise the European Union’s privacy and data protection framework.<sup>551</sup> Work by Aaronson demonstrates how the US administration routinely uses the terms ‘protectionism’ or ‘digital protectionism’ to refer to EU-style privacy and personal data protection regimes.<sup>552</sup> Yet, in parallel to attaching the (negative) label ‘protectionism’ to – what it sees as too much – privacy protection, the US government has

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<sup>543</sup> See (2017), pp. 2, 8.

<sup>544</sup> WTO, Work Programme on Electronic Commerce, Non-Paper for the Discussions on Electronic Commerce / Digital Trade from Japan, JOB/GC/100, 21 July 2016, para. 2.2.

<sup>545</sup> Aaronson (2015a), p. 674 (citing United States International Trade Commission. (2013), pp. 5–1 to 5–2; see also Aaronson (2017), pp. 17– 22.

<sup>546</sup> Chander, Lê (2015), p. 739 (emphasis added).

<sup>547</sup> Burri (2017c), p. 448 (emphasis added).

<sup>548</sup> Burri (2017a), pp. 13–14.

<sup>549</sup> *Ibid.*; see also Mishra (2019), p. 503 (‘Implementing internet privacy is increasingly recognised as one of the fundamental requirements for digital trade’.)

<sup>550</sup> *Ibid.*

<sup>551</sup> See, e.g., United States International Trade Commission (2014), p. 14 (stating that E. U. data privacy and protection requirements are ‘obstacles to international digital trade,’ among localization requirements, intellectual property rights infringement and customs measures.)

<sup>552</sup> See, e.g., Aaronson (2017), pp. 8–10; see also Aaronson (2016a). See also Schwartz, Peifer (2017), p. 118 (‘In the United States, there has been scepticism about E.U. privacy rights and whether they are merely disguised protectionism’.)

also at times criticised situations with *too little* privacy protection on instrumental grounds, arguing that insufficient consumer privacy protection can stifle electronic commerce.<sup>553</sup> It seems to agree that the protection of privacy and personal data are crucial to maintaining consumer trust in digital technologies, which is in turn indispensable for the strong and orderly development of electronic and digital commerce.<sup>554</sup> As this Chapter argues in Section 3.4, this is not a mere ‘inconsistency in the US arguments on this issue,’<sup>555</sup> but indeed a fundamental question of a baseline – or optimal level of protection – that delineates ‘useful’ (and possibly indispensable) protection from excessive protection (that one would then label ‘protectionist’ to try to lower it). In Section 3.4, this Chapter returns to the key role of *discourse* in drawing this baseline.

Authors associated with ECIPE and Baker & McKenzie, have characterised the EU data protection framework as ‘disproportionate and potentially protectionist’.<sup>556</sup> This resonates with Beattie’s article in the *Financial Times* comparing the European Union’s approach to resistance to genetically modified organisms (‘GMOs’) on public health grounds – a topic around which the battle between the European Union and United States lasted for at least two decades.<sup>557</sup> Even the then US President Barack Obama, reacting to the antitrust and data protection enforcement actions against US tech giants Google and Facebook in the European Union, publicly insinuated the European Union was merely pursuing its own ‘commercial interests’.<sup>558</sup>

As alluded to above, despite being criticised for pursuing potentially protectionist

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<sup>553</sup> See Aaronson (2016b), p. 87; see also Aaronson (2017), pp. 21–22.

<sup>554</sup> *Ibid.*, p. 19.

<sup>555</sup> Aaronson (2016b), p. 87 (‘U.S. arguments against digital protectionism are often inconsistent’.); see also Aaronson (2017), p. 21 (‘[T]he United States has adopted an inconsistent approach to privacy as a barrier to trade’.)

<sup>556</sup> Bauer, Erixon, Krol, Lee-Makiyama (2013), p. 4. (‘The question of whether the European regulatory model on privacy is disproportionate and potentially protectionist has become one of the most controversial political debates within the EU at this time, and perhaps rightly so’.); see also Determann (2016), pp. 247–248 (‘The USA support free global trade and have so far not retaliated against the protectionist data transfer restrictions in “Fortress Europe”’.)

<sup>557</sup> Beattie (2017) (arguing that the E.U. privacy and data protection framework is a localization requirement that acts as a form of protectionism in favour of (unnamed) interest groups, just as the E.U. prohibition on GMOs helped European farmers to protect themselves unfairly from U.S. competition.) Beattie contends that this regulatory framework will benefit European firms and, in the long term, the European Union’s ‘attitude to cross-border data flows . . . will retard European companies’ ability to maximise digital technology to full advantage’. *Ibid.* From the author’s perspective, the EU-US controversy on beef treated beef would be a better parallel to the debate surrounding data protection. While mutual permeation of WTO and EU rules governing GMOs within a pluralist governance structure has eventually led – to a large extent – to reconciliation of differences between the EU and US approaches to the GMO issues, the disagreement on governance of beef hormones has never been fully reconciled. For a discussion, see Krisch (2012), pp. 205 – 216. See also European Commission, Press Release: The European Union and the United States sign an agreement on imports of hormone-free beef, 2 August 2019.

<sup>558</sup> Ahmed, Robinson, Waters (2015) (‘We have owned the internet. Our companies have created it, expanded it, perfected it in ways that they can’t compete. And oftentimes what is portrayed as high-minded positions on issues sometimes is just designed to carve out some of their commercial interests’.)

restrictions on transfers of personal data, the EU itself is also actively seeking to remove measures it labels as digital protectionism.<sup>559</sup> If one looks at the EU not as a homogenous institution but as a composition of different subsystems (primarily at the EU and member states levels) with different goals and decision-making processes that determine the European Union's external (trade) and internal policies, then the situation is less clear.<sup>560</sup> The issue becomes even more complicated if one also takes into account that, in the European Commission, different departments (directorates general) are responsible for international trade (DG Trade)<sup>561</sup> and fundamental rights (DG Just).<sup>562</sup>

After the 2008 worldwide financial crisis, the European Commission changed its discourse; in its new discourse, trade liberalisation was 'consistently presented ... as a desirable and even necessary solution to the *crisis* and protectionism as a mistake from the past that has to be avoided.'<sup>563</sup> (emphasis in the original). This rhetoric targeted not only the European Union's trading partners, but also the traditionally more protectionist EU member states that were opposed to the European Union's bilateral concessions that could harm their domestic industries.<sup>564</sup> Faithful to its longstanding course towards further liberalisation of trade and with an eye toward benefiting from globalisation, in its 2015 Communication 'Trade for All,' the European Commission contended that 'the free flow of data across borders has become more *important for European competitiveness* in general.'<sup>565</sup> In November 2016, the EU trade commissioner Cecilia Malmström noted that 'in the digital age, restrictions on cross-border data flows inhibit trade of all kinds, and may amount to "digital protectionism."<sup>566</sup> She committed to using international trade deals as a means for setting the rules for digital trade.

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<sup>559</sup> Fioretti (2018).

<sup>560</sup> See Young, Peterson (2014), p. 23 (2014) ('Trade policy might be viewed as one of the most atomistic of all areas of public policy. Each policy decision—whether it is to negotiate a free trade agreement or impose anti-dumping duties on an imported product—involves different calculations, interests, and timeframes'.) Eckes, (2012), p. 233, explaining that in the EU foreign policy is 'first and foremost a task of the executive; and the European executive is more fragmented than the average national executive. Indeed, it consists of "unseen and many layers"'.)

<sup>561</sup> EUROPEAN COMMISSION, *Directorate-General: Trade*, [https://ec.europa.eu/info/departments/trade\\_en](https://ec.europa.eu/info/departments/trade_en)

<sup>562</sup> EUROPEAN COMMISSION, *Directorate-General: Just*, [https://ec.europa.eu/info/departments/justice-and-consumers\\_en](https://ec.europa.eu/info/departments/justice-and-consumers_en)

<sup>563</sup> Bollen, De Ville, Orbie (2016), p. 288 (emphasis added).

<sup>564</sup> *Ibid.* ('This liberalisation-as-recovery-instrument discourse has been very powerful and difficult to contest by traditionally more protectionist Member States, uncompetitive industries or trade unions'.); see also Siles-Brügge (2011), p. 643 ('How did DG Trade manage to convince the Member States to agree to the provisions of the FTA when it was facing the opposition of the powerful car industry . . . ? The answer is that, in a sense, it had already won the battle, by recasting liberalisation as *necessary* process, both in terms of the external constraint posed by globalisation but also, more specifically, the competitive pressure emanating from commercial rivals'.)

<sup>565</sup> Communication from the Commission, *Trade for All Towards a More Responsible Trade and Investment Policy*, COM/2015/0497 final, 14 October 2015, p. 12 (emphasis added).

<sup>566</sup> European Commission, Press Release: Commissioner Malmström on the Opportunities of Digital Trade, 17 November 2016.

Where, then, one might ask, is the issue, if everyone agrees on the ills of digital protectionism? It follows from the fact that, when it comes to the rights to privacy and the protection of personal data, the European Union's opposition to digital protectionism is now on a wholly different trajectory. The EU approach in this respect shifted in 2015 following a push-back by the European Parliament,<sup>567</sup> EU-member states,<sup>568</sup> academics,<sup>569</sup> and civil society,<sup>570</sup> to the European Union's digital 'free trade' policy, which made it apparent that such a policy 'should not undermine European levels of protection and democratic policy-making'.<sup>571</sup> This shift is apparent, for example, in the 2017 Communication 'Exchanging and Protecting Personal Data in a Globalised World,' where the European Commission carefully carved out privacy protection from 'protectionism' by highlighting that 'European companies operating in some third countries are increasingly faced with *protectionist restrictions that cannot be justified with legitimate privacy considerations*'.<sup>572</sup>

In sum, while the European Union and the United States frame their digital trade discourses in similar terms, they clearly do not agree on the right balance to be struck between the economic benefits of digital trade, on the one hand, and societal values, such as the protection of the rights to privacy and personal data, on the other.<sup>573</sup> Both trading partners, however, do seem to agree that the term 'protectionism' has a negative valence. In practice, however, the European Union and the United States apply their own standards and values to measure what digital protectionism is *abroad* as a result of regulatory

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<sup>567</sup> See European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)) ('[T]o ensure that the EU's Acquis on data privacy is not compromised through the liberalisation of data flows . . . while recognizing the relevance of data flows as a backbone of transatlantic trade and the digital economy'); European Parliament resolution of 3 February 2016 containing the European Parliament's recommendations to the Commission on the negotiations for the Trade in Services Agreement (TiSA) (2015/2233(INI)). ('[T]o acknowledge that data protection and the right to privacy are not a trade barrier, but fundamental rights, which are enshrined in Article 39 TEU and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union'.)

<sup>568</sup> See Bollen, De Ville, Orbie (2016), p. 284 ('In the states where TTIP has become most politicised, notably Germany, Austria and the United Kingdom, the openness-protectionism dichotomy is of minor importance. Instead, the debate is dominated by arguments about sovereignty, regulatory paradigms and food safety'.)

<sup>569</sup> See, e.g., Irion, Yakovleva, Bartl (2016), p. 54 ('The risks for privacy and data protection stemming from the sphere of the EU are, broadly speaking, that EU international relations could place more emphasis on international trade in services relative to EU standards on privacy and data protection'.)

<sup>570</sup> See, e.g., Järvinen (2016) ('Discussions on forced data localisation should take place outside trade agreements. Otherwise, our fundamental rights to privacy and data protection can be undermined or challenged as trade barriers'.)

<sup>571</sup> Bollen, De Ville, Orbie (2016), p. 284.

<sup>572</sup> Communication from the Commission, *Exchanging and Protecting Personal Data in a Globalised World*, COM (2017) 7 final, 10 January 2017, p. 6 (emphasis added).

<sup>573</sup> Aaronson (2015a), p. 687 ('Unfortunately, despite their collaboration, the US and the EU do not completely agree on digital rights. In addition, the US and the EU disagree on the role of the state and business in protecting privacy'.)

divergence on a number of domestic policies that affect digital trade, including privacy and data protection.<sup>574</sup> While both the European Union and the United States recognise, in theory, that privacy and data protection are important values, they diverge quite jarringly on what the ‘correct’ level of such protections should be.<sup>575</sup> In other words, there is a deep disagreement on where to draw the line between protection and protectionism. This is the issue to which this Chapter returns below. The next Section, however, adds one more layer to the analytical edifice and turns to the business interests that underpin the shifts in the discourse.

### 3.3.3 Business interests behind the ‘digital trade’ discourse

In Section 2.2.4.3 above, this Chapter explained how a policy favouring liberalisation of trade, just as a policy favouring domestic regulation limiting free trade (which is often presented by those favouring free trade, as protectionist), can be captured. In following pages, this Chapter demonstrates that not only the economic benefits of cross-border digital trade but also certain business interests profiting from the absence of restrictions on cross-border transfers are shaping the ‘digital trade’ discourse.

The United States was one of the first WTO members to adopt a so-called ‘digital trade’ agenda back in 2002.<sup>576</sup> Historically, the United States has a ‘strong competitive advantage in the digital economy...’<sup>577</sup> As Aaronson has argued, by making the campaign against digital protectionism an essential element of its international trade policy as demanded by the global US-based internet platforms, the United States is trying to promote a global internet, free of barriers to entry, while preserving its declining internet dominance.<sup>578</sup> Some observers suspect that the United States applies the ‘digital protectionism’ label to any domestic regulation that reduces its market share abroad in this space.<sup>579</sup> This echoes the above-mentioned ‘diminished giant syndrome,’ a term coined

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<sup>574</sup> See Aaronson (2015a), p. 682 (‘Under US law, online privacy is a consumer right, whereas in the EU (as well as in Australia and Canada), privacy is a human and consumer right that must be protected by governments’.)

<sup>575</sup> See *ibid.*, pp. 682–683 (‘Under US law, online privacy is a consumer right, whereas in the EU privacy is a human and consumer right that must be protected by governments. The EU strategy seemed directly at odds with US voluntary, limited, and sectoral approach’.)

<sup>576</sup> See Burri (2017b), pp. 99, 129; Wunsch-Vincent (2003), p. 7.

<sup>577</sup> Azmeh, Foster (2016), pp. 4–5 (‘Such policies also represent a long term threat to the US economy which has a strong comparative advantage in the digital economy and related activities which gives it a strong advantage to lead the major technological shifts in the coming decades in different economic sectors’.); see also Aaronson (2017), p. 8 (noting the particular importance of digital trade to the U.S. economy).

<sup>578</sup> See Aaronson (2016a), *Digital Protectionism?* (‘The United States has conflicting objectives regarding the digital economy. On one hand, it wants to encourage a vibrant global Internet with few barriers to entry. On the other, the United States wants to preserve its Internet dominance, which is clearly declining as China, India, Indonesia and others develop their digital prowess and bring more people online’.)

<sup>579</sup> *Ibid.* (‘[T]o some observers, it seems like the United States defines [digital protectionism] as policies that with or without intent reduce U.S. market share in foreign markets’.)

by Bhagwati to refer to the US trade policy in the 1970s, which used new protectionism to reshape the international trading order to its advantage.<sup>580</sup> American tech companies view initiatives to control domestic data space in several countries, including through restrictions on data flows (e.g. those adopted in China, Australia, India, Russia, Thailand, Turkey, and the United Arab Emirates), as threats to their business model.<sup>581</sup> As a result, the executives of these companies, often relying on the research of specialised think tanks, activated their lobbying activities with trade policy officials to ‘do a better job of limiting digital protectionism’.<sup>582</sup>

A 2016 study showed that tensions around cross-border data flows have intensified due to an increase in the use of the label ‘digital protectionism’.<sup>583</sup> Based on the analysis of data on political spending (lobbying, campaign contributions, and other forms of political activism), the authors of the study were able to claim convincingly that powerful US tech companies (including large corporations like Google, Facebook, Amazon, Microsoft, and Apple, as well as smaller firms such as LinkedIn, Airbnb, and Expedia) and industry associations (such as the Business Software Alliance, Information Technology Industry Council, and the Software & Information Industry Association)<sup>584</sup> played a crucial role in the formation of the US’s ‘digital trade agenda,’ prioritisation of cross-border data flows in international trade policy, and increase in pressure on domestic regulations restricting such flows.<sup>585</sup> These political efforts, as well as fears concerning the diminishing technological advantage of the United States in the global digital economy, made the ‘digital trade agenda’

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<sup>580</sup> See Bhagwati (1993a), p. 22 (‘The American mood parallels Great Britain’s at the end of the nineteenth century . . . . As was Great Britain at that time, America has been struck by a “diminished giant syndrome”—reinforced by the slippage in the growth of its living standards in the 1980s’.)

<sup>581</sup> See, e.g., Aaronson (2015a), p. 684 (‘[P]olicymakers from [China, Australia, India, Russia, Thailand, Turkey, and the United Arab Emirates] were increasingly determined to control the Internet within their borders and facilitate the rise of domestic Internet firms. Many US based Internet companies saw in these actions a threat to their bottom lines’.)

<sup>582</sup> *Ibid.* Aaronson notes, for example, that Google used the research of a Canadian think-tank to document how more than 40 governments instituted broad scale restrictions of information flows. See also Morozov (2015).

<sup>583</sup> Azmeh, Foster (2016), p. 11 (‘[T]ensions around cross-border data flows. Such tensions have been brought to the fore by the growing use of so-called ‘digital protectionism’ in a number of countries’.)

<sup>584</sup> *Ibid.*, pp. 12–14 (‘In the US, political spending by these firms have increased substantially over the last few years making internet and new ‘tech’ companies one of the strongest lobbying sectors in Washington . . . . This included major spending from large companies such as Google, Facebook, Amazon, Yahoo, Apple, eBay, Microsoft, and Apple, but also younger firms such as Snapchat, Rapidshare, LinkedIn, Dropbox, Twitter, Airbnb, Expedia, in addition to industry associations’). See also UNCTAD. (2019), pp. 88–89, (‘[Global digital platforms]’ have an interest in lobbying for international rules and regulations that allow to enable them to leverage their business models. Indeed, in the past few years, technology companies have replaced the financial sector as the biggest lobbyists, and major platforms have spent considerable resources in key locations’.)

<sup>585</sup> See Azmeh, Foster (2016), p. 19 (‘Many of the policies demanded by the industry were reflected in the US trade policy and in the ‘digital dozen’ principles adopted by the USTR. . . . Similarly, the trade promotion authority (TPA) listed digital trade and cross-border data flows as principle negotiating objectives of the United States’.)

‘a key part of the US trade policy in future multilateral and bilateral agreements’.<sup>586</sup>

Due to absence of reliable granular information on lobbying at the EU institutions,<sup>587</sup> no similar research seems to exist on the lobbying activities on digital trade at the EU level. The EU Transparency Register, which discloses information on interest groups affecting decision-making in the European Union, does not contain statistics on interest group spending in each particular area.<sup>588</sup> The available information, however, demonstrates that not only big US tech companies, such as Google, Apple, Facebook, Amazon, and Microsoft,<sup>589</sup> but also large European industry associations, such as Business Europe and Digital Europe, annually spend several million Euros on lobbying activities at EU institutions involving digital trade, cross-border data flows, and personal data protection.<sup>590</sup>

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<sup>586</sup> *Ibid.*, p. 30; see also Selby (2017), p. 217 (‘It is not surprising to see the US government push strongly in the next generation of international trade agreements to restrict efforts to implement data localization in other countries’.)

<sup>587</sup> To the knowledge of the author, the EU Transparency Register is the only reliable source of information on lobbying activities and spending at the EU institutions. The problem is, however, that while registration in the Register is mandatory for lobbying at the European Commission, this is not the case for lobbying at the European Parliament and the Council. Furthermore, the lobbying spending indicated in the Register is not granular enough, as it is not possible to see the amount spent on lobbying efforts on each specific topic. In addition, there is also no control mechanism to verify that information is accurate and up-to-date. See Antypas (2018); Timmermans (2019); Nielsen (2019).

<sup>588</sup> See EU TRANSPARENCY REGISTER, Homepage,

<https://ec.europa.eu/transparencyregister/public/homePage.do>

<sup>589</sup> See Azmeh, Foster (2016), pp. 12–13, 12 fn.5; EU TRANSPARENCY REGISTER, *Registrant Profile: Google*, <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=03181945560-59> (showing that Google spent more than eight million Euro on lobbying activities in the European Union in 2018); EU TRANSPARENCY REGISTER, *Registrant Profile: Amazon Europe Core SARL*,

<http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=366117914426-10&isListLobbyistView=true> (showing that Amazon spent more than 1.75 million Euro on lobbying activities in the European Union in 2019); EU TRANSPARENCY REGISTER, *Registrant Profile: Microsoft Corporation*,

<http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=0801162959-21&isListLobbyistView=true> (showing that Microsoft spent more than five million Euro on lobbying activities in the European Union from July 2018 through June 2019); EU TRANSPARENCY REGISTER, *Registrant Profile: Apple Inc.*,

<http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=588327811384-96> (showing that Apple spent more than two million Euro on lobbying activities in the European Union from October 2018 through September 2019); EU TRANSPARENCY REGISTER, *Registrant Profile: Facebook Ireland Limited*,

<http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=28666427835-74&isListLobbyistView=true> (showing that Facebook spent more than 4.25 million Euro on lobbying activities in the European Union in 2019). Unfortunately, the E.U. Transparency Register does not break down these costs by topic.

<sup>590</sup> See EU TRANSPARENCY REGISTER, *Registrant Profile: BusinessEurope*,

<http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=3978240953-79> (showing that Business Europe spent more than four million Euro on lobbying activities in the European Union in 2019); EU TRANSPARENCY REGISTER, *Registrant Profile: DigitalEurope*,

<http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=64270747023-20> (showing that Business Europe spent more than four million Euro on lobbying activities in the European Union in 2018); see also EUROPA: TRANSPARENCY REGISTER, *List of meetings DIGITALEUROPE has held*

### 3.3.4 Measures banning ‘digital protectionism’ in recent trade agreements

Just as in the neoliberal discourse of the 1970s and 1980s, the modern digital trade discourse(s) are reflected in recent international trade agreements, which increasingly include dedicated chapters on electronic commerce and digital trade (‘digital trade chapters’).<sup>591</sup> Such chapters tackle a range of domestic policies affecting cross-border digital commerce<sup>592</sup> (‘digital trade provisions’), but this Chapter only focuses on those concerning cross-border data flows.

WTO members have not yet achieved a multilateral consensus on the design and scope of digital trade provisions, which have thus far only appeared in bilateral and regional trade agreements, and have somewhat overshadowed the WTO’s multilateral efforts in this area.<sup>593</sup> Although the proposals on electronic commerce in the WTO increasingly focus on barriers to digital trade and digital protectionism,<sup>594</sup> the WTO has not yet made any progress on this issue. It remains to be seen how the above-mentioned negotiations on electronic commerce, which started in 2019, will play out. Despite a seemingly firm consensus on the use of the terms ‘digital trade’ and ‘digital protectionism’ – the axes around which the discourses governing international negotiations revolve – the value structures underlying these discourses diverge, as the US and the EU example above illustrates. This Section explicates how the international trade provisions on cross-border data flows advanced by the United States and the European Union mirror this divergence.

In the spirit of its digital trade agenda, the United States has been a pioneer in including provisions on free cross-border data flows in international trade agreements.<sup>595</sup> Although the United States has advocated regulating information flows via international

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*with Commissioners, Members of their Cabinet or Director-Generals since 01/12/2014 under its current ID number in the Transparency Register: 64270747023-20,*  
<http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=64270747023-20&pdf=true> (showing that Digital Europe was active on the topics of trade, data flows, artificial intelligence, and GDPR).

<sup>591</sup> See, e.g., CPTPP.

<sup>592</sup> See, e.g., Art. 14.5 CPTPP (outlining the endeavors each party to the agreement must make in maintaining a legal framework governing electronic transactions domestically).

<sup>593</sup> See Burri (2017c), p. 417 (‘As the Doha negotiations continue to make little progress, the multilateral venue of rule-making has been seriously undermined and this has triggered forum-shopping—bilaterally, regionally, or through plurilateral initiatives’.)

<sup>594</sup> See Mitchell, Mishra (2018), p. 1111 (‘The majority of the recent proposals on electronic commerce circulated by WTO Members in recent years tend to focus on regulatory barriers to digital trade. In particular, they emphasize digital protectionism’.)

<sup>595</sup> Aaronson (2016b), p. 59 (‘The United States is the Paul Revere of digital protectionism, using naming and shaming to condemn such policies’.); see also Aaronson (2015b), p. 507; U.S. Chamber of Commerce (2014), p. 3; Geist (2018) (‘The CPTPP also includes a specific exception for financial services, ironically at the insistence of the US Treasury, which wanted to retain the right to establish restrictions on financial data flows’.)

trade rules roughly since the 1980s,<sup>596</sup> the first time a non-actionable (or non-binding), horizontal provision on free cross-border data flows appeared in its trade agreement was in the electronic commerce chapter of the 2012 US-Korea free trade agreement (KORUS).<sup>597</sup> The United States later proposed a *binding* horizontal provision – a demand of key US lobbies as explained above – in the drafts of the currently stalled TTIP and TiSA.<sup>598</sup> The e-commerce chapter of the CPTPP similarly includes a legally binding horizontal obligation on the free cross-border data flow of information, including personal data, which states that ‘[e]ach Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.’<sup>599</sup>

This provision was included in CPTPP before the US withdrawal from the agreement<sup>600</sup> and remained unchanged in the final version of the agreement concluded without the United States.<sup>601</sup> The USMCA – a revision of the North American Free Trade Agreement (‘NAFTA’) – includes a similar provision.<sup>602</sup> Including such provisions in recent trade agreements is a US priority.<sup>603</sup> The US proposal for the ongoing e-commerce talks at the WTO and the recent US-Japan Digital Trade Agreement replicates the ‘golden standard’ provisions on digital trade.<sup>604</sup> This move, against the background of trade

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<sup>596</sup> See Aaronson (2015a), p. 672 (noting that the issue of free flow of information in trade agreements ‘is not new; in the 1980s, with the advent of faster computers, software, and satellites, officials from some states, including the US and Japan, wanted to include language governing the free flow of information in trade agreements’.) For a concise overview of earlier initiatives, see *ibid.*, p. 679–685.

<sup>597</sup> *Ibid.*, p. 687 (‘[T]his provision does not forbid the use of such barriers, nor does it define necessary or unnecessary barriers. In short, the language is not actionable’.) Art. 15.8 KORUS.

<sup>598</sup> See Le Roux (2017), p. 731. TiSA, Annex on Electronic Commerce; Coalition For Privacy & Free Trade (2013), pp. 2–3. But see Fontanella-Khan (2013) (noting E.U. officials’ fear that ‘finding a middle ground with the U.S. would only lower overall E.U. privacy standards’.)

<sup>599</sup> Art 14.11(2) CPTPP.

<sup>600</sup> The version of the agreement with the United States as a party was known simply as the Transpacific Partnership (‘TPP’). Removing the United States from this agreement was one of President Trump’s first decisions. See Executive Office of the President, Office of the U.S. Trade Representative (2017). Letter to TPP Depository.

<sup>601</sup> See generally CPTPP.

<sup>602</sup> Art. 19.11(1) USMCA (‘No Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means if this activity is for the conduct of the business of a covered person’.); see also Aaronson, Leblond (2018), p. 257 (noting that despite the fact that Trump withdrew from the TPP right after becoming President, ‘the Trump administration has built its proposals on those of the Obama administration (namely, the TPP)’.)

<sup>603</sup> See, e.g., Fefer, R.F. (2019), p. 1 (‘To enable international data flows and trade, the United States has aimed to eliminate trade barriers and establish enforceable international rules and best practices that allow policymakers to achieve public policy objectives, including promoting online security and privacy’.); see also Press Release, Office of the U.S. Trade Representative, Summary of Objectives for the NAFTA Renegotiation, 17 November 2017 (outlining specific negotiation objectives for the initiation of NAFTA negotiations as it related to digital trade in goods and services and cross-border data flows).

<sup>604</sup> Manak (2019); White House (2019); Art.11(1) US-Japan Digital Trade Agreement. (‘Neither Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means, if this activity is for the conduct of the business of a covered person’.)

restricting measures in traditional trade sectors,<sup>605</sup> illustrates the strategic importance of digital trade for the US economy.

As compared to prior US-led free trade agreements, both the CPTPP and USMCA not only contain an exception from a free data flow provision for regulation pursuing important domestic public policy objectives, but also a dedicated article on the protection of personal information.<sup>606</sup> In both cases, the structure and text of the exception strongly resemble those of Article XIV(c)(ii) of GATS. For example, Article 19.11(2) of the USMCA, states the following:

This Article does not prevent a Party from adopting or maintaining a measure inconsistent with paragraph 1 that is necessary to achieve a legitimate public policy objective, provided that the measure:

- (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
- (b) does not impose restrictions on transfers of information greater than are *necessary* to achieve the objective.<sup>607</sup>

In both the USMCA and CPTPP, the exceptions do not specifically identify privacy and data protection by name, or any other particular policy objective.<sup>608</sup> It can be reasonably argued that privacy and data protection would fall under such exceptions, as these policy interests are among the public policy goals that are most likely to be affected by the free cross-border data flow provision. The above-mentioned necessity test – the benchmark to evaluate the consistency of domestic regulation with the conditions of the exception – requires an objective assessment.<sup>609</sup> The USMCA also clarifies that ‘[a] measure does not meet the conditions of this paragraph if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that *modifies the conditions of competition* to the detriment of service suppliers of another Party.’<sup>610</sup> This ties in with the interpretation of the necessity test in the WTO general exceptions discussed in Sections

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<sup>605</sup> See Chow, Sheldon, McGuire (2019), p. 2151 (‘[T]he Trump Administration is following a path of economic nationalism and pushing back with threats of not playing by the accepted rules of international governance’); see also Handley, Limão (2017), pp. 141–143.

<sup>606</sup> Art. 14.11(2) CPTPP and Art. 19.11(2) USMCA contain an exception for the free cross-border data flow provision; Art. 14.8 CPTPP and Art. 19.8 USMCA contain a provision on the protection of personal information.

<sup>607</sup> Art. 19.11(2) USMCA (emphasis added).

<sup>608</sup> See *ibid.*; Art. 14.11 CPTPP.

<sup>609</sup> Instead of the ‘necessity’ requirement, exception in Art. 14.11(2) CPTPP provides that restrictions should not be ‘greater than are *required* to achieve the objective’. This difference seems, however, purely semantic, and according to the WTO Secretariat, is yet another way to convey the concept of ‘necessity’. See WTO, Note by Secretariat, ‘Necessity tests’ in the WTO, S/WPDR/W/27, 2 December 2003, para. I.A.5.

<sup>610</sup> Footnote 5 to provision of Art. 19.11(2)(b) USMCA (emphasis added).

2.3.2 and 3.2.4.3, and does not recognise regulatory intent as a factor in the necessity test assessment.

The provision for the protection of personal information in the USMCA includes not only aspirational provisions for the protection of personal information but also a number of binding obligations:

1. '[To] adopt or maintain a legal framework that provides for protection of personal data of users of digital trade,' featuring the APEC Privacy Framework and the 2013 OECD Guidelines governing the Protection of Privacy and Transborder Flows of Personal data as examples of such frameworks;
2. To implement key data protection principles such as a limitation on the collection of data, data quality, purpose specification and a requirement that 'any restrictions on cross-border flows of personal information are necessary and proportionate to the risks presented';
3. A transparency requirement that parties publish information on how individuals can pursue a remedy in case of violation of personal information protections and on how companies can comply with the local personal information protection requirements; and
4. To cooperate with regulations towards developing mechanisms of compatibility between the parties' data protection regimes and an endorsement of APEC Cross-Border Privacy Rules (CBPR) system as a 'valid mechanism' to facilitate cross-border information flows while protecting personal data.<sup>611</sup>

This provision transplants the US approach to the protection of personal data as a consumer right. Explicit mention of the 2013 OECD Guidelines and the APEC CBPR reflects the economic approach to the protection of personal data as a precondition for digital trade.<sup>612</sup> This way, privacy and personal data protection become normalised – or redefined – as tools of international trade and are viewed as trade values.<sup>613</sup>

The European Union's digital trade discourse has also produced several 'new generation' international trade agreements that contain, in addition to the usual chapters on trade liberalisation, specific chapters on electronic commerce that included predominantly

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<sup>611</sup> Art. 19.8 USMCA.

<sup>612</sup> *Ibid.*; see Yakovleva, (2018), pp. 484–485.

<sup>613</sup> Art. 19.8 USMCA; see Yakovleva (2018), pp. 484–485.

aspirational provisions.<sup>614</sup> However, so far, unlike the United States, the European Union has taken a more cautious approach to cross-border data flows in trying to defend its regulatory autonomy to protect the fundamental rights to privacy and personal data.<sup>615</sup> So far, none of the EU completed trade agreements include binding provisions on cross-border data flows.<sup>616</sup> As already mentioned above, in the course of the TTIP and TiSA negotiations, such provisions, especially the exceptions from them for privacy and data protection, became a contentious (and a turning) point in the European Union's approach to regulating cross-border data flows in trade agreements, which has affected its trade negotiations with other trading partners.<sup>617</sup> In the digital trade chapters of JEFTA and the revision of the EU-Mexico Free Trade Agreements, the European Union explicitly refrained from including a free cross-border data flow provision; these agreements only contain a three-year review clause, which allows parties to reconsider this issue.<sup>618</sup> Cross-border flows of personal data between the European Union and Japan were eventually routed through a mutual adequacy decision granted by both parties to each other (the European Union – in accordance with the GDPR) shortly before JEFTA took effect.<sup>619</sup>

As already mentioned in the Introduction, in 2018, the European Union agreed on model provisions for free cross-border data flows and respective exceptions for privacy and data protection.<sup>620</sup> The European Union has already included these clauses in its proposals for currently negotiated trade agreements with New Zealand, Australia, Chile, Indonesia, Tunisia, and the UK and in its proposal for the recent WTO negotiations on electronic commerce.<sup>621</sup> Unlike an open provision on cross-border data flows in Articles 14.11(2) of

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<sup>614</sup> See Bollen, De Ville, Orbie (2016), p. 282 ('[S]ince the 2006 Global Europe communication the EU has put bilateral trade deals explicitly at the service of its commercial and wider economic interests'); *ibid.*, p. 287 (stating that after the 2008 crisis the European Union significantly intensified 'the (neo)liberal pattern in the bilateral dimension' by opening trade negotiations with the US, Canada, and Japan); see also Siles-Brügge (2011), p. 629; Orbie, De Ville (2014), pp. 95–110.

<sup>615</sup> See Aaronson (2015a), p. 685 ('The EU, in contrast, embraced a less combative and more internationalist strategy. The EU pushed for WTO wide data flow principles but did not name and shame other countries for digital protectionism (although it does list some countries' policies as barriers to trade)').

<sup>616</sup> See *ibid.*, pp. 685, 689–690.

<sup>617</sup> See Irion, Yakovleva, Bartl (2016), p. 41; see also Fontanella-Khan (2013).

<sup>618</sup> Art. 8.81 JEFTA; Art. XX EU Proposal for a Chapter on Digital Trade of the modernised EU-Mexico FTA; see also Fortnam (2017).

<sup>619</sup> European Commission, Press Release: *European Commission Adopts Adequacy Decision on Japan, Creating the World's Largest Area of Safe Data Flows*, IP/19/421, 23 January 2019.

<sup>620</sup> EU model clauses on cross-border data flows.

<sup>621</sup> See European Union, Joint Statement on Electronic Commerce. EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce. Communication from the European Union. INF/ECOM/22, 26 April 2019; EU proposal for a Chapter on Digital Trade of the EU-New Zealand FTA; EU proposal for a Chapter on Digital Trade of the EU-Australia FTA; La proposition de l'Union européenne (UE) relative à Accord de libre-échange UE-Tunisie UE-Tunisie, Titre [ ] Commerce Numérique, 9 November 2018; Draft text of the Agreement on the New Partnership with the United Kingdom, European Commission, 18 March 2020. Digital Trade Proposals for EU- Chile and EU-Indonesia were drafted before the European Union agreed on the model provisions. Therefore, these proposals only contain a placeholder for a provision on cross-

the CPTPP and 19.11(1) of the USMCA, these model clauses, discussed in greater detail in Chapter 4 of this thesis, contain an enumerated list of restrictions on cross-border data flows.<sup>622</sup> This article is formulated in a way that makes the European Union's own restrictions on cross-border transfers of personal data *a priori* not subject to the prohibition to restrict cross-border data flows. Furthermore, the clauses also embody the recognition that 'the protection of personal data and privacy is a *fundamental right* and that high standards in this regard contribute to trust in the digital economy and to the development of trade.'<sup>623</sup> In addition, it provides for a broad exception for domestic privacy and data protection rules,<sup>624</sup> which is fundamentally different from, and sufficiently broader than, those included in the CPTPP and the USMCA in at least three ways. First, it integrates into a trade agreement a different normative approach to protecting the rights to privacy and data protection – that of fundamental rights protection as compared to the instrumental approach embedded in the CPTPP and the USMCA.<sup>625</sup> Second, it recognises rules on cross-border data flows as a valid regulatory tool to protect the rights to privacy and personal data.<sup>626</sup> Third, it incorporates a subjective 'it deems appropriate' test similar to that employed in national security exceptions in WTO agreements, as opposed to the objective necessity test in the CPTPP and the USMCA.<sup>627</sup>

To sum up, in the light of the different digital trade discourses advanced by the United States and the European Union, the contrast in the design of cross-border data flow provisions and exceptions from such provisions for domestic regulation that protects privacy and personal data illustrates the practical implications of a different baseline between protection and protectionism within a particular discourse.

### 3.3.5 The 'Digital protectionism' label as a trigger to redefine 'barriers to trade'

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border data flows. EU proposal for a Digital trade title in the Trade Part of a possible modernised EU-Chile Association Agreement, 5 February 2018 (containing a placeholder for provisions on data flows); EU proposal for a Chapter on Digital Trade of the EU-Indonesia FTA, 27 July 2017. The European Union tabled its model clauses at a later stage in negotiations with these two countries. See, e.g., European Commission, Report of the 5th Round of Negotiations for a Free Trade Agreement Between the European Union and Indonesia, July 2018.

<sup>622</sup> EU model clauses on cross-border data flows.

<sup>623</sup> *Ibid.* (emphasis added)

<sup>624</sup> *Ibid.* (emphasis added).

<sup>625</sup> Compare Art. 14.11(3) in conjunction with Art. 14.8(1) CPTPP and Art. 19.8(1) USMCA with European Union, Joint Statement on Electronic Commerce. EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce. Communication from the European Union. INF/ECOM/22, 26 April 2019, p. 4.

<sup>626</sup> Compare Art. 14.11(3), in conjunction with Art. 14.8(1), CPTPP and Art. 19.11(3), in conjunction with Art. 19.8(1), USMCA with European Union, Statement on Electronic Commerce. EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce. Communication from the European Union. INF/ECOM/22, 26 April 2019, p. 4.

<sup>627</sup> Compare Art. 14.11(3) CPTPP and Art. 19.11(2) USMCA with European Union, Statement on Electronic Commerce. EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce. Communication from the European Union. INF/ECOM/22, 26 April 2019, p. 4; see, e.g., Art. XIV.bis GATS.

This Chapter argues that in the context of the expansion of ‘protectionism’ into ‘new protectionism’ in the 1970s and 1980s that led to a fundamental redefinition of ‘barriers to trade’ and the renegotiation of international trade rules, the coining of the term ‘digital protectionism’ is a new trigger for another fundamental redefinition of what constitutes a barrier to trade and, thus, deeper trade liberalisation. Simply put, by labelling certain domestic policies such as restrictions on cross-border data flows, and data localisation measures as digital protectionism, it is much easier to critique them, reject them, and put competing policy interests such as privacy, data protection, or industrial policy in a subordinate position. Moreover, in trade terms, affixing the digital protectionism label to another country’s policy decision and insisting on the efficiency gains of free trade automatically puts that measure on the defensive.

At the dawn of the multilateral trading system governed by the discourse of embedded liberalism, the term protectionism was meant to target measures *intended* to protect domestic industry (as applied by the GATT for two decades or more).<sup>628</sup> Within the discourse of neoliberalism, the term ‘new protectionism’ led to a removal of the intent component of the test as a relevant factor in defining a protectionism measure.<sup>629</sup> The increasingly frequent use of the term ‘digital protectionism’ seems to be heading in the direction of questioning any form of regulation altogether.<sup>630</sup> Despite the notable differences in the scope and types of domestic policies outlawed by digital trade provisions in the EU- and US-led trade agreements discussed in the previous Section, they have one trait in common: they are *not* formulated as non-discrimination provisions.<sup>631</sup> While a challenge to restrictions on cross-border data flows or data localisation measures would require the contesting party to prove discrimination if such measures were challenged under the MFN obligation of the GATS, or the services chapters of post-GATS trade agreements,<sup>632</sup> this Chapter argues that such a challenge under the digital trade provisions would not impose such a requirement because the measures prohibit restrictions on cross-border data flows or data localisation measures irrespective of their discriminatory character.<sup>633</sup> This means that a complainant need not establish discrimination. Put simply, new digital trade provisions make it easier to challenge domestic regulation that interferes with digital trade, and make the rate of successful challenges much more probable compared to challenges under non-discrimination provisions.

Aaronson puts forward several theoretical arguments about why digital

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<sup>628</sup> See Section 3.2.3.

<sup>629</sup> Aaronson (2017), pp. 6–7.

<sup>630</sup> *Ibid.*, pp. 6, 8, 17.

<sup>631</sup> Art. 14.11 CPTPP; Art. 19.11 USMCA.

<sup>632</sup> See Marceau, Trachtman (2014), pp. 358–360.

<sup>633</sup> See Art. 14.11CPTPP; see also Art. 19.11 USMCA.

protectionism is unlike other forms of protectionism and calls on the United States to lead in redefining ‘protectionism’ for the digital age.<sup>634</sup> Her arguments are based on the premise that information is different from the objects of trade that the ‘old protectionism’ is concerned with.<sup>635</sup> The discussion above, however, shows that this redefinition has already taken place. While it seems hard to disagree with the proposition that information is different in nature from goods and services, does that difference imply *ipso facto* that there is a sufficient reason to redefine protectionism? This implication is not obvious, as the characteristics that delineate protectionism from protection – the discriminatory intent or effect of domestic regulation – are not related to the objects of regulation. Therefore, the rhetoric presenting the redefinition of ‘protectionism’ as ‘digital protectionism’ as a logical, necessary step to respond to changing circumstances could be self-serving. Put differently, it could be that, just as in the case of ‘new protectionism,’ that the emergence of ‘digital protectionism’ is a product of a new digital trade discourse – and not the consequence of digital transformation of trade – which serves particular business interests and not the broader public interest.

All that said, provisions aiming at curtailing digital protectionism have already been incorporated into several trade agreements.<sup>636</sup> Given that a different conceptualisation of digital protectionism has already led to diverging and potentially mutually inconsistent digital trade provisions, a consensus on what digital protectionism means is necessary. ‘Digital protectionism’ is defined and interpreted within a particular discourse. It follows that, to be able to reach a consensus on the meaning of ‘digital protectionism,’ *countries must agree on the discourse in the first place*. As things stand now, though there is an agreement on the use of the terms ‘digital trade’ and ‘digital protectionism,’ the value structures underlying the discourse are vastly different. Using the example of privacy and data protection, the following Section illustrates how fundamental values on which a discourse is based affect the baseline between protection and protectionism.

### **3.4 The baseline between privacy protection and protectionism: the role of discourse**

One variant of the digital trade discourse, advanced in particular by the United States and demonstrated in Sections 3.3.1 and 3.3.2 above, tends to equate strict privacy and data protection measures, such as restrictions on cross-border data flows, with a non-tariff trade

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<sup>634</sup> Aaronson (2016b), pp. 58, 87 (‘Scholars and policymakers alike need to rethink how we define and measure [digital protectionism] as well as reconsider the appropriate strategies to address it. ... Given the stakes, the United States should take a leading role in defining protectionism at the World Trade Organization’.)

<sup>635</sup> Aaronson (2017), pp. 6–8.

<sup>636</sup> See, e.g., Art. 14.11 CPTPP; Art. 19.11 USMCA; see also EU model clauses on cross-border data flows, pp. 1–2.

barrier and, potentially, digital protectionism.<sup>637</sup> However, even when some degree of privacy and data protection *are* factored into this discourse of digital trade, the protection of these interests is often presented as an *economic* necessity, a precondition for free trade rather than a fundamental right and societal value beyond its economic utility.<sup>638</sup> It is likely to be presented as such because the use of the digital protectionism label features trade values as natural and obvious, and forces policy makers to defend the measure against a baseline of free trade, as non-protectionist. Regulatory conversations on privacy and data protection within the economic digital trade discourse about the term ‘digital protectionism’ thus implicitly bring in the normative goal of maximisation of wealth rather than a set of goals interacting with, and counterbalancing each other.<sup>639</sup>

This Section unpacks the differences between economic and legal (fundamental rights) approaches to data protection, exposes the limits of the economic approach to privacy and data protection embraced by the economic ‘digital trade’ discourse, and calls for a pluralist ‘digital trade’ discourse. It argues that, in shaping policy about the protection of privacy and personal data beyond what is economically justified, it is more likely to be labelled as protectionism in an economic discourse than in a pluralist discourse in which the protectionism label loses some of its discursive power.

### 3.4.1 Normative approaches to privacy and data protection

There are at least two policy approaches to the protection of privacy and personal data: (1) an economic approach in which personal data is viewed as an economic asset and its protection is a precondition of data-intensive trade; and (2) a moral value approach in which personal data is a materialised form of human behaviour and its protection is directed not to data, but to an *individual’s constitutional rights*.<sup>640</sup> While in the first case, the normative goal of protection is to generate more trade in data, as individuals tend to share more data when they believe it is protected,<sup>641</sup> in the second case the aim is the

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<sup>637</sup> It is, however, often recognised that other legitimate concerns could also play a role. See, e.g., Mishra (2016), pp. 150–152 (‘The contentious issues with respect to data localization extend well beyond free trade versus protectionism into some delicate, complex and legitimate political concerns, such as technology transfer and IP rights, privacy, human rights, and national security, which is currently missing (and expectedly so) on most trade agendas.’) Mitchell and Hepburn similarly concede that there might be privacy and security concerns behind restrictions on cross-border data flows, but add that ‘digital protectionism may also be at play’. Mitchell, Hepburn (2017), p. 186.

<sup>638</sup> Art 19.8 USMCA; Yakovleva (2018), pp. 484–485.

<sup>639</sup> See Driskill (2012), pp. 2–3 (‘[T]he standard argument made by economists in favour of free trade ... implicitly imposes philosophical value judgements about what is good for a nation or society, or it makes leaps of empirical faith about how the world works.’)

<sup>640</sup> See Spiekermann-Hoff, Böhme, Acquisti, Hui (2015), p. 164 (‘Interpreting personal data as a tradable good raises ethical concerns about whether people’s lives, materialized in their data traces, should be property at all, or whether in fact personal data should be considered inalienable from data subjects.’)

<sup>641</sup> See, e.g., Acquisti, Brandimarte, Loewenstein (2015), pp. 512–513 (showing that providing users with explicit control mechanisms over their personal data may lead to sharing more sensitive data by users).

protection of human dignity, autonomy, and privacy as values in themselves.<sup>642</sup>

From an economic perspective, protection of privacy and personal data has several justifications, of which the creation and maintenance of consumers' trust is most prominently featured in the economic discourse on digital trade.<sup>643</sup> This justification is explicitly included in the text of several EU- and US-led trade agreements.<sup>644</sup> This economic approach serves as a normative rationale for the protection of personal data as a commercial consumer right in the United States.<sup>645</sup> By contrast, the moral value approach views the protection of personal data rights from a broad societal perspective, as contributing to the preservation of a free and democratic society, social equality, individual autonomy, integrity, and self-determination.<sup>646</sup> In addition, preventing and correcting discriminatory harms caused by inappropriate use of personal data can (and should) be seen as a matter of social justice.<sup>647</sup>

Importantly, these two approaches are not mutually exclusive, as economically motivated protection contributes to the protection of a fundamental right, and fundamental rights protection may have positive effects on digital commerce. The European Union is a good illustration of how these two approaches can coexist, as it simultaneously advances

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<sup>642</sup> See De Terwangne (2009), pp. 180, 185–188; Cohen (2000), pp. 1423–1428; Schwartz (1999), pp. 1658–1666; Schwartz (2004), p. 2087; Zuboff (2015), pp. 85–86; LeSieur (2012), pp. 94–95, 98; Cinnamon (2017), pp. 610–611.

<sup>643</sup> See Section 3.3. Looking at the digital economy as a whole, trust meets all the criteria of a public good: it is neither rivalrous nor excludable. Without regulation, the market will not produce an optimal amount of trust necessary for the digital economy to flourish. On trust as a public good, see generally Schäfer, Ott (2004), pp. 359–360; Cohen (1992), p. 976 ('Economists too have recognized that trust is an extremely valuable and vulnerable resource, which the market alone cannot be counted on to supply'.) For a discussion on the how privacy protection contributes to building trust, see Richards, Hartzog (2016), p. 435; Richards, Hartzog (2017), pp. 1185–1186; Joinson, Reips, Buchanan, Paine Schofield (2010), p. 4. For an overview of other economic justifications of privacy protection, see, e.g., Brown (2016), pp. 248–256.

<sup>644</sup> See, e.g., Art. 19.8(1) USMCA ('Personal Information Protection— The Parties recognize the economic and social benefits of protecting the personal information of users of digital trade and the contribution that this makes to enhancing consumer confidence in digital trade'.); see also Art. 14.8(1) CPTPP (a similar provision stating 'The Parties recognise the economic and social benefits of protecting the personal information of users of electronic commerce and the contribution that this makes to enhancing consumer confidence in electronic commerce'.); Art. 8.57(4) EU-Singapore FTA; Art. 16.4 CETA (entitled 'Trust and confidence in electronic commerce,' which requires that parties 'should adopt or maintain laws, regulations or administrative measures for the protection of personal information of users engaged in electronic commerce' . )

<sup>645</sup> See U.S. White House. (2012), p. 6 ('Preserving trust in the Internet economy protects and enhances substantial economic activity. Online retail sales in the United States total \$145 billion annually. ... To preserve these economic benefits, consumers must continue to trust networked technologies. Strengthening consumer data privacy protections will help to achieve this goal'.) For a comparison of EU and US data protection regimes, see Schwartz (2013), pp. 1966–1967; Schwartz, Solove (2014), p. 877.

<sup>646</sup> See De Terwangne (2009), pp. 180, 185–188; Cohen (2000), pp. 1423–1428; Schwartz (1999), pp. 1658–1666; Schwartz (2004), p. 2087; Zuboff (2015), pp. 85–86; LeSieur (2012), pp. 94–95, 98; Cinnamon (2017), pp. 610–611.

<sup>647</sup> See Bridges (2017), p. 153 (arguing that 'denying privacy is a mechanism for social control'.); Taylor (2017), pp. 4–8 (Showing, based on examples of big data-driven discrimination, that 'a specific articulation of social justice is now required with regard to contemporary data technologies'.); Cinnamon (2017).

both models in the domestic and international arenas.<sup>648</sup> In the European Union, a strong economic discourse – in which personal data and its protection are presented as enablers of the digital single market – is counterbalanced by a fundamental rights discourse.<sup>649</sup> It is for that reason Polčák and Svantesson label the intertwined nature of economic and fundamental rights considerations in data privacy a ‘Gordian knot’.<sup>650</sup> On the one hand, the EU privacy and data protection framework is deeply rooted in a European cultural preference for strong privacy protection and is viewed as an integral part and key instance of the protection of human dignity.<sup>651</sup> However, as explained in Section 2.2.1.1, the history of the EU data protection regime shows that the both EU legislative instruments on data protection – the 1995 Data Protection Directive and the GDPR – are underpinned by the goal of establishing a functioning internal market, of which the protection of the fundamental rights of individuals to privacy and data protection is a necessary ingredient.<sup>652</sup> In its communication ‘Completing a Trusted Digital Single Market for All’ the European Commission noted that it is crucial to ‘enable the free flow of personal data within the Union, from which the critical mass of data essential for a strong data economy can be generated.’<sup>653</sup> This rhetoric is clearly linked to the neoliberal internal and external policy discourse of the European Commission discussed above. At the same time, the Commission acknowledged the following:

[r]espect for private life and the protection of personal data are *fundamental rights* in the EU. ...

Strong data protection, confidentiality of communications and data security are crucial to dispel individuals’ doubts about misuse of their data and to create trust. Without this *trust*, the potential of a thriving data economy will not be met.<sup>654</sup>

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<sup>648</sup> EU model clauses on cross-border data flows, Art. 1(1). For a discussion on economic and non-economic goals of the EU data protection framework, see Section 2.2.1.1.

<sup>649</sup> EDPS, Opinion 4/2015, Towards a new digital ethics data, dignity and technology, 11 September 2015 pp. 4, 9–10.

<sup>650</sup> Polčák, Svantesson (2017), p. 208 (‘[D]ata privacy involves multiple fundamental human rights – the right of privacy and the freedom of expression at a minimum – and significant commercial values. Indeed, maybe we are here dealing with a Gordian knot’.)

<sup>651</sup> See Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303), Explanation on Article 1; EDPS, Opinion 4/2015, Towards a new digital ethics data, dignity and technology, 11 September 2015, p. 12; Rodotà (2009), p. 80; Hoofnagle, Van der Sloot, Zuiderveen Borgesius (2019), pp. 69–72.

<sup>652</sup> For a discussion, see González Fuster (2014), p. 198; van Hoboken (2014b), p. 5.

<sup>653</sup> Communication from the Commission, *Completing a Trusted Digital Single Market for All*, COM (2018) 320 final, 15 May 2018, p. 4.

<sup>654</sup> Communication from the Commission, *Completing a Trusted Digital Single Market for All*, COM (2018) 320 final, 15 May 2018, p. 2–3 (emphasis added). Similarly, in the explanatory memorandum to the proposal for the GDPR, the European Commission notes, on the one hand, that building a stronger and more coherent data protection framework in the European Union is essential for building the pan-European digital economy, and, on the other hand, emphasises the protection of the right to protection of personal

In a similar vein, the European Union’s most recent model clause on cross-border data flows, discussed above, states that ‘the protection of personal data and privacy is a *fundamental right* and that high standards in this regard contribute to *trust in the digital economy* and to the development of trade.’<sup>655</sup> This illustrates that the Commission does not separate the economic and moral approaches to privacy and data protection and seems to assign equal importance to each.

In contrast to the European Commission, the CJEU has grounded the EU restrictions on transfers of personal data in the international context solely on a fundamental rights basis.<sup>656</sup> This despite the fact that Chapter V of the GDPR, which regulates such transfers, as well as the same rules in the earlier Data Protection Directive, are, in theory, guided by the exact same economic and non-economic rationales envisaged in Article 1 of the GDPR.<sup>657</sup> As the CJEU explained in the 2015 *Schrems I* judgement, limitations on transfers of personal data outside the EEA constitute a part of the European Union’s ‘constitutional’ data protection framework and are necessary to avoid circumvention of such a framework.<sup>658</sup>

Although the European Union embraces both the economic and moral value approaches to the protection of privacy and personal data, the latter will always prevail because, as already explained in Chapter 2, the European Union may neither conclude nor implement through an EU legislative act, an international agreement or decision of an international adjudicating body if it does not comply with the EU Charter.<sup>659</sup> This matters because, although the economic and moral value rationales are complementary, the crucial difference between them is, as the next Section elaborates, that the economic justification warrants a lower level of protection than the moral value justification.

### 3.4.2 Limitations of the economic approach to privacy and data protection

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data as a fundamental right. Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), /\* COM/2012/011 final - 2012/0011 (COD), p. 2.

<sup>655</sup> See EU model clauses on cross-border data flows, Art. 2 (emphasis added).

<sup>656</sup> CJEU, *Schrems I*, paras. 38–39, 42.

<sup>657</sup> See Art. 1; Art. 1 Data Protection Directive.

<sup>658</sup> In the *Schrems I* ruling, the CJEU stated that ‘[the adequacy requirement] implements the express obligation laid down in Article 8(1) of the Charter to protect personal data and . . . is intended to ensure that the high level of that protection continues where personal data is transferred to a third country’. CJEU, *Schrems I*, para. 72 (referring to Art. 25(6) Data Protection Directive). However, this does not affect the analysis because Art. 45 GDPR preserved the essential features of the adequacy approach. Bygrave (2002), pp. 79–80. (‘The chief aim of these rules is to hinder data controllers from avoiding the requirements of data protection laws by shifting their data-processing operations to countries with more lenient requirements (so-called “data havens”)’.) This approach is now explicitly incorporated in Art. 44 GDPR, which requires that the limitations on transfers of personal data outside the EEA ‘shall be applied in order to ensure that the level of protection of natural persons guaranteed by [the GDPR] is not undermined’.

<sup>659</sup> Vidaschi (2018) pp. 138–39.

There are at least two problems with fitting privacy and data protection's non-economic value (as opposed to the economic value of ensuring consumers' trust in digital trade) into the economic digital trade discourse. First, non-economic interests in general, are difficult to quantify for use in the wealth maximisation calculus; it is not always possible to find convincing proof justifying the economic necessity of ensuring a certain level of privacy and data protection.<sup>660</sup> For example, in *Brazil – Retreaded Tyres*, the Appellate Body held that the selection of a methodology to assess a measure's contribution to the claimed objective in the necessity assessment in the context of a general exception 'ultimately also depends on the *nature, quantity, and quality of evidence* existing at the time the analysis is made'<sup>661</sup> (emphasis added). The elaborate discussion on the discrepancy between the levels of protection claimed and actually achieved by the EU Seal Regime in addressing public moral concerns in the EU on seal welfare, demonstrates that a defending party in a WTO dispute cannot merely assert a high level of protection.<sup>662</sup> While in that particular case, arguably because the justification of the EU Seal Regime was based on the public morals exception, rather than on the exceptions aimed at *protection* of other non-economic objectives, both the WTO Panel and the Appellate Body have agreed that it was not necessary to identify 'the exact content of the public morals standard at issue.'<sup>663</sup> In contrast, the Appellate Body noted that while 'such risk-assessment methods do not appear to be of much assistance or relevance in identifying and assessing public morals,' 'the focus on the dangers or risks to human, animal, or plant life or health in the context of Article XX(b) may lend itself to scientific or other methods of inquiry.'<sup>664</sup> One could argue that in respect to the general exception for privacy and data protection in Article XIV(c)(ii) GATS, the analogy of Article XX(b) is closer to than that of a public morals exception. The analysis of the *EC - Seals* case by Howse and Langille, already quoted in Section 2.3.2 above, illustrates that such methods of assessment 'that employ instrumental rationality, such as means/ends reasoning, simply does not work to establish the non-pretextual character of noninstrumental moral regulation.'<sup>665</sup> Although some

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<sup>660</sup> See Irwin (1996), p. 221 (showing that empirical evidence 'either played virtually no role' or 'played a small and unproductive role . . . in evaluating the substance of an economic argument for protection' and that, rather, the debate about these issues was a 'conceptual debate over economic logic').

<sup>661</sup> WTO, Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

<sup>662</sup> This discrepancy, in particular, was at the core of the Appeal by Canada and Norway of the WTO Panel Decision in the case. For example, Norway contended that 'the Panel thus erred by holding the alternative measure *up to a benchmark level of contribution that was higher than the contribution achieved by the EU Seal Regime*. This error, Norway argues, compromised the Panel's analysis of whether the contribution of the alternative was equal to or greater than the level actually achieved by the EU Seal Regime, and of whether the alternative was reasonably available'. (emphasis added). WTO, Appellate Body Reports, *EC – Seal Products*, para. 2.78.

<sup>663</sup> WTO, Appellate Body Reports, *EC – Seal Products*, para. 5.199.

<sup>664</sup> WTO, Appellate Body Reports, *EC – Seal Products*, para. 5.198. Howse, Langille, Sykes (2015), p. 429.

<sup>665</sup> Howse, Langille (2012), p. 429.

empirical research exists examining the costs of insufficient privacy protection,<sup>666</sup> the aspects of privacy protection contributing to consumers' trust in digital ecosystems,<sup>667</sup> and the value (or price) of privacy,<sup>668</sup> such research has an inherent limitation: privacy and personal data protection cannot be precisely estimated because consumers' valuation of privacy is highly context-dependent and prone to behavioural biases.<sup>669</sup>

The second problem is that even if privacy and personal data protection can be priced, an 'optimal' level of protection from an economic perspective, as this Chapter argues below, will be lower than the optimal level of such protection determined from the legal (fundamental rights) approach to privacy and data protection, because the economic calculus does not factor in the intrinsic value of privacy and data protection as a fundamental right.

From an economic perspective, the line between privacy and data protection as preconditions of trade, and as trade barriers, should be drawn based on the considerations of Pareto efficiency.<sup>670</sup> Efficiency is defined as the maximisation of social welfare,<sup>671</sup> where social welfare is the aggregated welfare of individual members of society.<sup>672</sup> There is no consensus on how to define welfare; money or utility are the most widely-used proxies to evaluate welfare and suggest the most optimal regulatory option.<sup>673</sup> In their well-known *Harvard Law Review* article *Fairness Versus Welfare*, Kaplow and Shavell introduce one of the most comprehensive definitions of 'welfare' that incorporates 'in a positive way everything that an individual might value,' including a taste for fairness, and

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<sup>666</sup> For empirical research attempting to quantify the chilling effects of governmental surveillance see, e.g., PEN America. (2013), p. 3; Penney (2016), pp. 145–161; Marthews, Tucker (2017), pp. 2–3.

<sup>667</sup> See, e.g., World Economic Forum. (2014), p. 21.

<sup>668</sup> See, e.g., Jentzsch, N., Preibusch, S., Harasser, A. (2012), p.1; Acquisti, John, Loewenstein (2013), p. 250; Cvrcek, Kumpost, Matyáš, Danezis (2006), p. 110; Huberman, Adar, Fine (2005), p. 22; Dinev, Hart (2006), p. 61; Wathieu, Friedman (2007), pp. 1–2.

<sup>669</sup> See Acquisti, John, Loewenstein (2013), p. 252 (challenging the premise that privacy valuations can be precisely estimated based on theories from behavioural economics and decision research); *ibid.*, p. 257 ('The dichotomy between [willingness to pay] and [willingness to accept payment] . . . suggests that ordinary studies investigating privacy valuations may not tell us much about whether, or how much, consumers will actually pay to protect their data'.); see also Acquisti, Brandimarte, Loewenstein (2015), pp. 505–510; Wasastjerna (2018), pp. 436 (stating that privacy lacks quantifiable metrics due to the subjectivity of consumer preferences about privacy).

<sup>670</sup> See Shavell (2004), p. 2; Schäfer, Ott (2004), pp. 46–47; Parisi (2004), p. 262. Empirical research shows that people are more willing to share their information and participate in digital transactions if they trust the provider. See, e.g., Tsai, Egelman, Cranor, Acquisti (2011), p. 266; see also Joinson, Reips, Buchanan, Paine Schofield (2010), pp. 4–5, 17.

<sup>671</sup> See Schäfer, Ott (2004), p. 8; see also Posner (2014), pp. 14–15.

<sup>672</sup> See Schäfer, Ott (2004), p. 8.

<sup>673</sup> See Fabbri, Britto (2018), p. 8 (noting that welfare economics theory traditionally maximises utility, while law and economics tends to 'prefer using wealth as the object of maximization'.); Kerkmeester (2000), pp. 386–387; Posner (1985), pp. 86–87.

in a negative way anything that the ‘individual might find distasteful’.<sup>674</sup> However, even this inclusive understanding of welfare does not (and should not, according to Kaplow and Shavell) include the notion of fairness *as a value in itself*.<sup>675</sup> Kaplow and Shavell emphasise that welfare, defined in this way, should be the sole concern of legal policy makers; they criticise the legal method, which views fairness as an *independent evaluative principle* that should be upheld even at the expense of individuals’ well-being, because it can sometimes lead to a decrease of social welfare and make society worse-off.<sup>676</sup> Similarly, the economic approach is unable to fully capture the moral value of personal data protection as a fundamental right.<sup>677</sup>

A privacy and data protection policy designed with both economic and non-economic considerations in mind should arguably ensure a higher level of personal data protection than one designed with only economic efficiency considerations in mind.<sup>678</sup> Put differently, the goal of privacy and personal data protection predetermines, in part, both the desired optimal level of protection and the design of the regulatory framework.<sup>679</sup> If the goal is economic and instrumental, then it is justified *only to the extent necessary* to generate and preserve consumers’ trust (‘bottom-up regulation design’).<sup>680</sup> Driven by their bottom lines, companies will only invest in privacy and data protection up to the point where the marginal costs of generating more trust will equal marginal benefits.<sup>681</sup> The problem is that trust is a subjective notion. The subjective level of consumer trust that is sufficient for consumers to enter into digital transactions does not always accurately reflect the actual

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<sup>674</sup> Kaplow, Shavell (2001), pp. 980–982:

The notion of well-being . . . incorporates in a positive way everything that an individual might value—goods and services that the individual can consume, social and environmental amenities, personally held notions of fulfillment, sympathetic feelings for others, and so forth. Similarly, an individual’s well-being reflects in a negative way harms to his or her person and property, costs and inconveniences, and anything else that the individual might find distasteful. Well-being is not restricted to hedonistic and materialistic enjoyment or to any other named class of pleasures and pains. The only limit on what is included in well-being is to be found in the minds of individuals themselves, not in the minds of analysts . . . . We further note a particular source of well-being . . . , namely, the possibility that individuals have a taste for a notion of fairness, just as they may have a taste for art, nature, or fine wine.

<sup>675</sup> *Ibid.*, pp. 1011–1017. Kaplow and Shavell succinctly summarise the argument: ‘whenever a notion of fairness leads one to choose a different rule from that favored under welfare economics, everyone is necessarily worse off as a result’. *Ibid.*, p. 1012.

<sup>676</sup> *Ibid.*, p. 967 (stating, as their central claim, that ‘the welfare-based normative approach should be exclusively employed in the evaluating legal rules. That is, legal rules should be selected entirely with respect to their effects on the well-being of individuals in society’.)

<sup>677</sup> See Kerber (2016), p. 857 (‘[E]conomic analysis usually focusses on welfare effects alone, which might not always grasp sufficiently the normative dimension of privacy as a fundamental right’.); see also Acquisti (2010), p. 4 (arguing that not all externalities caused by the use of personal data can be captured in economic terms); Acquisti, Brandimarte, Loewenstein (2015), p. 509.

<sup>678</sup> See Acquisti, Brandimarte, Loewenstein (2015), p. 509.

<sup>679</sup> See Kerber (2016), pp. 863–864.

<sup>680</sup> Milberg, Smith, Burke (2000), p. 49; Yakovleva (2018), p. 483.

<sup>681</sup> See Kerber (2016), p. 865.

trustworthiness of digital businesses, as consumers may not have full information or understanding on how well their personal data is actually protected by the company.<sup>682</sup> This means that by pursuing their strategic self-interest, companies may not necessarily improve the actual trustworthiness of their digital goods or services.<sup>683</sup> In contrast, if the protection is granted *for its own sake* as independent normative significance (‘top-down regulatory design’), the level of protection will tend to be higher than the level that is necessary to advance social welfare from the welfare economics perspective.<sup>684</sup>

In sum, the protection of personal data as a fundamental right is a type of protection that is not necessarily efficiency-enhancing in an economic sense, but it can create both economic and non-economic effects beneficial for society at large. Setting the economic approach, as just discussed, as the *proper realm* of the discourse (and thus economic efficiency as the proper benchmark) predetermines the outcome.<sup>685</sup> An emphasis on efficiency brands a broader range of domestic policies as protectionist.

When it comes to cross-border transfers of personal data, economic efficiency (or maximisation gains from international digital trade) is not the only goal of protection or restrictions.<sup>686</sup> Even if limitations on personal data transfers, such as those imposed by the European Union, do factually restrict trade, a country may well be willing to sacrifice some gains in order to protect its constitutional, cultural, or societal values.<sup>687</sup> As Bhagwati rightly acknowledged, when non-economic objectives, such as the intrinsic value of specific policy objectives, enter the scene, ‘free trade will generally cease to be the optimal solution’.<sup>688</sup> Moreover, a country’s international trade policy cannot be viewed in clinical

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<sup>682</sup> See Acquisti, Brandimarte, Loewenstein (2015), pp. 512–513 (showing that the perceived and the actual levels of privacy may not coincide, and that providing users with explicit control mechanisms over their personal data may lead to sharing more sensitive data by users); see also Joinson, Reips, Buchanan, Paine Schofield (2010), pp. 16–17.

<sup>683</sup> See Rodrik (2011), p. 227 (‘Corporations, after all, are motivated by the bottom line. They may be willing to invest in social and environmental projects if doing so buys them customers’ goodwill. Yet we shouldn’t assume their motives align closely with those of society at large, nor exaggerate their willingness to advance societal agendas. The most fundamental objection to labelling and other market-based approaches is that they overlook the *social* dimension of standard-setting’.)

<sup>684</sup> Shavell (2004), p. 610. Shavell illustrates the point by the following example: ‘[I]f promise-keeping is granted independent significance, more promises will be kept than would be best if the goal were to keep promises only to advance individuals’ utilities, and whatever utility-based measure of social welfare one endorses will likely be lower than it could be’. *Ibid.*; Yakovleva (2018), p. 483.

<sup>685</sup> See Acquisti, Brandimarte, Loewenstein (2015), p. 509.

<sup>686</sup> See Kuner (2015a), p. 2097.

<sup>687</sup> Kuner makes a similar point. See *ibid.*, p. 2096 (arguing that the central question that the criticism of the economic effects of data nationalism asks is: ‘[W]hat if a country has decided that it wants to sacrifice a certain amount of economic efficiency in exchange for promoting other legitimate values that it believes are furthered by data nationalism?’).

<sup>688</sup> Bhagwati, (1993b), p. 19 (arguing that ‘[w]hen “non-economic” objectives (such as the *valuation in themselves* of specific outputs such as manufactures or high-tech industry so that a dollar worth of output is valued at four, for instance) are admitted into the analysis, free trade will generally cease to be the optimal solution’.) (emphasis added).

isolation from other domestic policies and objectives. In common with all other policies, it is (or at least should be) guided by a shared set of normative values of governmental policy in general, normative goals that are typically safeguarded by domestic constitutions.<sup>689</sup> For the European Union, these principles are those contained in Articles 2, 3(5) and 21 of the Treaty on European Union, and include the universality and indivisibility of human rights and fundamental freedoms, as well as respect for human dignity, for the principles of the United Nations, and for international law. Undoubtedly, societies and governments have goals other than welfare.<sup>690</sup> Susan Strange argued that efficiency falls under only one of the four basic values pursued by a politically organised society – wealth, order, justice and freedom – and in all politically organised societies, these values will be combined differently and lead to different outcomes.<sup>691</sup>

The EU data protection framework – the result of a difficult political compromise between, at that time, twenty eight-member states with distinct cultures and values – may not be the best regulation, but regulation can never be perfect.<sup>692</sup> In a narrow effects-based definition of ‘protectionism’ generated by neoliberal discourse, the EU framework indeed may be viewed as protectionist due to its restrictive effects on international trade.<sup>693</sup> However, because of the limitations of economic discourse, this framework is not appropriate when fundamental rights are at stake.<sup>694</sup> The neoliberal conception of protectionism that once drove the world trading system towards globalisation has reached a turning point where it has become a victim of its own success.<sup>695</sup> A new pluralist discourse is necessary in order to allow each trading party to strike the right balance between globalisation (economic gains from digital trade and the right to conduct business), democratic politics, and domestic autonomy to pursue domestic values such as fundamental

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<sup>689</sup> See Kuner, (2015a), p. 2097.

<sup>690</sup> Strange (1985), p. 236 (‘The basic premise that state policy should, or even can, be based on the single criterion of maximizing efficiency in the production of goods and services for the market is demonstrably false’.)

<sup>691</sup> *Ibid.*, p. 237:

Efficiency, in short, is only one of four basic values that any politically organized society seeks to achieve for its members. Wealth, order, justice, and freedom; these are the basic elements of political compounds just as hydrogen, oxygen, and carbon are the essential elements of some chemical compounds. And just as chemical elements can be combined differently to produce oil, wood, or potatoes, so basic values will be combined differently in all politically organized societies to produce, for example, fast-growing authoritarian states or slow-growing democracies, or conversely, fast-growing democracies or slow-growing police states.

See also Polčák, Svantesson (2017), p. 209 (‘While the Internet is often seen as borderless in nature and global in scope, the physical work and the people that inhabit that world are still divided by fundamentally different cultures and values; and even where common values are found, those values are weighted in different ways’.)

<sup>692</sup> See Burri, Schär (2016), pp. 488–489.

<sup>693</sup> United States International Trade Commission (2017), p. 276.

<sup>694</sup> Burri, Schär (2016), p. 500.

<sup>695</sup> Rodrik (2011), p. xvii–xviii.

rights to privacy and data protection.<sup>696</sup>

Yet European integration and the resulting economic power of the European Union not only directs its energies inwards, but is also, to a large extent, an outward-looking strategy: while it improves internal trade within the European Union, it also improves the European Union's negotiating positions in external economic relations and in the negotiations of international treaties.<sup>697</sup> It also contributes to the expansion of European standards and values around the world, a phenomenon labelled by Anu Bradford as the 'Brussels Effect'.<sup>698</sup> The presence of political and economic rationales for the unification of data protection rules in the European Union, however, does not diminish the fact that the level of data protection guaranteed by the unified rules is a projection of a European vision of governance and cultural values.<sup>699</sup>

Schwartz and Peifer attest that '[t]here is no constitutional right to information privacy in the United States analogous to the EU's right to data protection.'<sup>700</sup> The Fourth Amendment<sup>701</sup> only applies to government searches and seizures; it does not apply to government processing of personal data in already existing data bases.<sup>702</sup> Neither does it apply to the processing of personal data in the commercial context.<sup>703</sup> In the commercial sphere, protection of information privacy tends to be anchored in the 'marketplace discourse'.<sup>704</sup> It is aimed at protecting consumer welfare rather than constitutional rights.<sup>705</sup> The legal weight of such protection is thus lower than, for example, that of the

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<sup>696</sup> *Ibid.*, p. 200 (pointing at a 'fundamental political trilemma of the world economy,' meaning that it is impossible to simultaneously pursue democracy, national self-determination, and hyper-globalization).

<sup>697</sup> See Bradford (2012), pp. 47–48.

<sup>698</sup> See *ibid.*

<sup>699</sup> See Reidenberg (2000), pp. 1319–1320 ('[S]pecific privacy rules in any particular country have a governance function reflecting the country's choices regarding the roles of the state, market, and individual in the country's democratic structure. Under this governance theory of privacy, national differences derive from distinct visions of governance, and privacy rules strive to protect a state's norm of governance, whether it be a liberal market norm or a socially-protective, citizen's rights norm'.); see also Milberg, Smith, Burke (2000), p. 47 (based on the empirical study of samples from nineteen different countries, the authors concluded that '[a] country's cultural values are associated strongly with the privacy concerns that are exhibited by its populace (Hypothesis 1) and are associated marginally with its regulatory approach (Hypothesis 2)').

<sup>700</sup> Schwartz, Peifer (2017), p. 132.

<sup>701</sup> Amendment IV to the US Constitution reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>702</sup> Schwartz, Peifer (2017), p. 133.

<sup>703</sup> *Ibid.*, p. 132-133.

<sup>704</sup> *Ibid.*, p. 136.

<sup>705</sup> See Reidenberg (2000), p. 1318; Schwartz, Peifer (2017), pp. 136-137.

constitutional right to freedom of expression.<sup>706</sup> Recall, in addition, that a more liberal approach to data protection in the United States not only echoes US cultural values, but also factors in the US strategy of preserving global dominance in the information technology industry.<sup>707</sup>

To sum up, the core of the debate between the European Union and its trading partners is not about *whether* the protection of privacy and personal data is legitimate as such, but rather about *what level* of protection is legitimate. As differences in data protection approaches (including to the issue of cross-border transfers of personal data), are fundamentally rooted in a delicate balance between the different values pursued by a politically organised society, a related question arises: whether international trade should be tasked with the mission to reduce or remove this diversity, and if so, how to determine the right level of protection and the right level of deference to domestic interests and values?

### **3.5 Concluding remarks: towards a new digital trade regime**

This Chapter has demonstrated that it is not possible to strike the right balance between digital trade liberalisation and the protection of data privacy by simply ruling out ‘protectionism’. It has argued that the choice of the right discourse for policy conversations on domestic privacy and the protection of personal data in the context of negotiating and interpreting international trade law is crucial. The value structures attending it will ultimately predetermine where the line will be drawn between legitimate privacy and personal data protection, and illegitimate protectionism, both in the relevant provisions of international trade agreements and in the interpretation of such provisions by trade adjudicating bodies.

Deliberations on the distinction between protection and protectionism show that it is not clear-cut: drawing a line beyond which protection *should* be viewed as protectionism is ultimately a judgement call.<sup>708</sup> On a spectrum between the two extremes, there is a grey

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<sup>706</sup> Schwartz, Solove (2014), pp. 880–881 (stating that the right to privacy in the United States ‘may even be secondary to other concerns, such as freedom of speech’.); see also Schwartz (2013), pp. 1976–1977 (‘The First Amendment’s protections for freedom of expression . . . help define the U.S. orientation to privacy regulation’.) Although in some cases the First Amendment can ‘bolster privacy,’ most of the time it is used to limit privacy: ‘statutes that limit information sharing on privacy grounds are subject to constitutional scrutiny of their impact on the speech of the data processor’. *Ibid.* (emphasis omitted). See also Petkova (2019); Whitman (2004).

<sup>707</sup> See Section 3.3.3.

<sup>708</sup> Cf. Marceau, Trachtman (2014), p. 352 (‘The distinction between a protectionist measure—condemned for imposing discriminatory or unjustifiable costs—and a non-protectionist measure restricting trade incidentally (and thus imposing some costs) is sometimes difficult to make’.); see Sykes (1999), p. 33 (‘[I]t is exceedingly difficult to devise a workable and palatable legal rule to condemn regulatory measures that are necessary to nonprotectionist regulatory goals but that are nevertheless undesirable because of their trade

area that includes domestic measures, with an element of uncertainty as to what type of regulatory goal is at stake: protectionism in disguise or genuine protection, which only incidentally benefits domestic industries.<sup>709</sup> Whether measures in this grey area should fall under the label of ‘protection’ or ‘protectionism’ – in other words, whether trade adjudicating bodies should err on the side of protection or protectionism — essentially depends on the discourse. Within an economic discourse, where free trade alone is high on the value scale, such regulation should be excluded as protectionist. In contrast, in a pluralist discourse where equal value is assigned to free trade and protection of fundamental rights, letting some disguised protectionist measures slip through in order to safeguard states’ domestic autonomy to adopt socially beneficial regulation may be a preferred approach.

This Chapter contends that the distinction between privacy and personal data protection, and protectionism is in part a *moral* question, that is, not just a question of economic efficiency. As Romer, a Nobel Prize winning economist explains, ‘[s]cientific authority never conveys moral authority. No economist has a privileged insight into questions of right and wrong, and none deserves a special say in fundamental decisions about how society should operate.’<sup>710</sup> Therefore, when a policy conversation, such as the one on cross-border flows of personal data, involves non-economic spill-over effects to individual rights, such conversation should *not* be confined within the straightjacket of trade economics, but rather placed in a broader normative perspective. The economic digital trade discourse, advanced by some states (most notably the United States), and reflected in the recently concluded CPTPP, USMCA and US-Japan Digital Trade Agreement, subordinates non-economic values, such as the protection of privacy and personal data taken as moral values, to efficiency and to ill-defined welfare enhancement goals.<sup>711</sup> As a result, only an economically justified – and lower – level of privacy and data protection, as compared to that warranted by a pluralist discourse, is able to qualify as not protectionist.<sup>712</sup> This thesis argues that the political economy arguments against privacy and data protection beyond economic necessity should be taken with a grain of salt, precisely

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impact. As a result, this task is left to case-by-case bargaining’.); see also Howse (2012), pp. 441–443 (‘Regulations serve diverse objectives and reflect compromises between different groups. In such circumstances, it is not simple to draw a line between internal policies that are legitimate exercises of domestic regulatory autonomy (even if they have some trade-restrictive effects) and those that can be considered a form of protectionism or “cheating” on the WTO bargain, in that they undermine the market access reasonably expected from commitments on liberalization of border measures in the multilateral trading system’.); Howse (2002), p. 96.

<sup>709</sup> Marceau, Trachtman (2014), p. 352.

<sup>710</sup> Romer (2020).

<sup>711</sup> Additionally, these goals often do not reflect negative externalities of economic growth (e.g., environmental degradation) and thus take a narrow view of ‘welfare’.

<sup>712</sup> See Section 3.3.4.

because those who are putting them forward may themselves be suffering from capture by those profiting from unrestricted cross-border data flows.

From a global perspective, the inchoate use of the terms ‘protectionism’ and ‘digital protectionism’ in different discourses by the European Union and the United States exposes a deeper challenge to the present day multilateral trade negotiations.<sup>713</sup> Having chosen digital protectionism as the main stumbling block on the path of digital trade, trading partners focus more on these labels and their definition, while shying away from more fundamental questions about the goals and values of future (digital) trade. This thesis contends that this path is misguided: there exist as many definitions of (digital) protectionism as there are discourses, which the EU and US examples clearly demonstrate. Using the same terminology, these trading partners advance utterly different discourses built upon different views on where the balance between trade and privacy should be struck. Against this backdrop, this Chapter contends that countries should rethink the goals of international trade for the twenty-first century.<sup>714</sup>

On the subject of restrictions on cross-border flows of personal data, this thesis argues that such restrictions are, and will remain, necessary.<sup>715</sup> Unless approaches to data protection and privacy are harmonised (which, arguably, is not the route to follow due to the lack of a (political) basis for such harmonisation, differences between countries, and the danger of settling for the lowest common denominator), countries need more regulatory space to determine the design of domestic data protection regimes. It is precisely because data protection standards in other countries are low (perhaps, strategically low) that countries with higher standards need to impose restrictions on personal data transfers.<sup>716</sup> When it comes to the consequences of removing restrictions on cross-border flows of personal data in domestic privacy and data protection regimes and the ways to avert them, one could draw a parallel with restrictions on financial data flows, which are essential to ensure financial stability in a country. Rodrik has eloquently argued the following:

Financial globalization in effect neutralizes differences in national regulations. This is what is known in the trade as “regulatory arbitrage,” a race to the bottom in finance. For this reason, a commitment to regulatory

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<sup>713</sup> See Section 3.3.

<sup>714</sup> See Lang (2011), p. 353.

<sup>715</sup> See also Section 5.2.5 arguing that these restrictions constitute part of the essence of the fundamental rights to privacy and the protection of personal data.

<sup>716</sup> On the prospects of harmonising data protection regimes, see, e.g., Milberg, Smith, Burke (2000), p. 53 (‘What will or will not meet “societal expectations” is highly contingent on a society itself. Thus, a universal regulatory approach to information privacy seems unlikely and would ignore cultural and societal differences’); see also Kuner (2011), p. 8; Keller (2011), p. 348–351. But see Mattoo, Meltzer (2018a), p. 769 (arguing that a common privacy framework could be based on the OECD and APEC data protection frameworks).

diversity has a very important corollary: the need for restrictions on global finance . . . Governments should be able to keep banks and financial flows out—not for financial protectionism but to prevent the erosion of national regulations. Hence a new global financial order must be constructed on the back of a minimal set of international guidelines and with limited international coordination. Most important, the rules would explicitly recognize governments’ right to limit cross-border financial transactions, insofar as the intent and effect are to prevent foreign competition from less strict jurisdictions from undermining domestic regulatory standards.<sup>717</sup>

This line of reasoning, this thesis argues, applies equally to restrictions on cross-border transfers of personal data. Deep harmonisation of domestic privacy and data protection standards would also require a more extensive form of global governance.

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<sup>717</sup> See Rodrik (2011), p. 263–265.