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Governing cross-border data flows

Reconciling EU data protection and international trade law

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4. Reconciling data privacy and global data flows the EU way

4.1 Introduction

In Chapter 2 this thesis demonstrated that, if challenged under international trade law, the EU's framework for transfers of personal data outside the EEA might run afoul of the EU's international trade commitments, such as those under the GATS. If found incompatible with those trade commitments, the framework may not be able to be justified under the necessity test of the general exception for the protection of the privacy of individuals in relation to the processing and dissemination of personal data under Article XIV(c)(ii) GATS (for the purposes of this Chapter, referred to as the 'general exception for privacy and data protection'). One of the main reasons for that is that the necessity test, as interpreted by the WTO adjudicating bodies, provides the EU and other WTO members insufficient autonomy – from an EU law perspective – to protect privacy and personal data as fundamental rights. Chapter 2 also shone a spotlight on the EU's constitutional constraints on bringing the EU's legal framework for data transfers into compliance with the current international trade rules and, in particular, with the general exception for privacy and data protection. As a result, if the EU restrictions on transfers of personal data were successfully challenged in the WTO, the EU would face a catch-22 situation, having to choose between compliance with its trade commitments, and upholding its constitutional values. A way to avoid this problem⁷¹⁸ in future trade agreements, as suggested in Chapter 2, is to reform both the general exception for privacy and data protection, and the EU's framework for transfers of personal data. This Chapter explores the possibilities of developing the former, while the next Chapter delves into the options for reforming the latter.

As already briefly mentioned in the Introduction and Section 3.3.4 above, in 2018, to address the international trade law aspect of this issue, the EU developed horizontal provisions on cross-border data flows and the protection of privacy and personal data for its prospective digital trade agreements (for the purposes of this Chapter referred to as the 'proposed horizontal provisions' or the 'proposed model clauses').⁷¹⁹ These clauses, in particular, contain a broader exception for domestic privacy and data protection rules (for the purposes of this Chapter referred to as the 'digital trade exception for privacy and data protection') than warranted by the existing general exception for privacy and data protection. The EU has included these model clauses in its proposals for digital trade chapters in bi-lateral trade agreements, such as those with Australia, New Zealand, Chile,

⁷¹⁸ For a discussion on why this problem has to be addressed, see Section 2.3.1.

⁷¹⁹ EU model clauses on cross-border data flows.

Indonesia and Tunisia,⁷²⁰ and in multilateral negotiations on electronic commerce at the WTO ever since.⁷²¹ The EU continued to do so after the formation of the new European Commission in 2019, as the EU proposal for the digital trade chapter in the bi-lateral trade negotiations with the UK (following Brexit)⁷²² illustrates. In the words of the new European Commission, the horizontal provisions ‘rule out unjustified restrictions, such as forced data localisation requirements, while preserving the regulatory autonomy of the parties to protect the fundamental right to data protection.’⁷²³ They serve the goals of ‘promoting convergence of data protection standards at international level, as a way to facilitate data flows and thus trade,’ on the one hand, and ‘to tackle digital protectionism, on the other hand.’⁷²⁴ This rhetoric is very similar to that of the previous European Commission in relation to the proposed model clauses,⁷²⁵ which illustrates the continuity of the European Commission’s trade policy on the issues of cross-border data flows and the protection of privacy and personal data. Beyond the above-mentioned specific goals, the proposed model clauses are a part of the EU’s broader policy to ground its external relations on the EU’s values and strengthen its technological sovereignty.⁷²⁶ In its recent Data Strategy, the European Commission communicated its vision to maintain an ‘open, but assertive approach to international data flows, based on European values.’⁷²⁷ Similarly,

⁷²⁰ See 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 l’Accord de libre-échange UE-Tunisie UE-Tunisie, Titre [] Commerce Numérique, 9 November 2018; 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-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.

⁷²¹ 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.

⁷²² Draft text of the Agreement on the New Partnership with the United Kingdom, European Commission, 18 March 2020.

⁷²³ Communication from the Commission, *Data Protection Rules as a Pillar of Citizens Empowerment and EU’s Approach to Digital Transition - Two Years of Application of the General Data Protection Regulation*, COM(2020) 264 final, 24 June 2020.

⁷²⁴ *Ibid.* The Commission has articulated these goals in the earlier policy documents. See, e.g., Communication, *A European Strategy for Data*, COM(2020) 66 final, 19 February 2020, p. 23; European Commission, White Paper on Artificial Intelligence. A European Approach To Excellence and Trust, COM(2020) 65 final, 19 February 2020.

⁷²⁵ In the Communication from the Commission to the European Parliament and the Council, *Data Protection Rules as a Trust-Enabler in the EU and Beyond – Taking Stock*, COM(2019) 374 final, 24 July 2019 the European Commission stated that the ‘horizontal provisions rule out purely protectionist measures, such as forced data localisation requirements, while preserving the regulatory autonomy of the parties to protect the fundamental right to data protection’.

⁷²⁶ Communication from the Commission, *Strengthening the Rule of Law Within the Union. A Blueprint for Action*, COM/2019/343 final, 17 July 2019.

⁷²⁷ See Communication, *A European Strategy for Data*, COM(2020) 66 final, 19 February 2020, p. 23.

in its recent White Paper on Artificial Intelligence (AI), the European Commission stated that it ‘will strive to export its values,’ such as the protection of privacy and personal data, ‘across the world’ in its efforts for international cooperation on AI.⁷²⁸ Simultaneously, the EU trade policy ‘champions multilateralism and a rules-based global order’.⁷²⁹

The EU proposed horizontal provisions that consist of three components: an article on cross-border data flows (Article 1), an article on the protection of personal data and privacy (Article 2), and an article on cooperation on regulatory issues with regard to digital trade (Article X⁷³⁰). This proposal is typically included in EU proposals for standalone chapters on digital trade. For the reader’s convenience, this Section includes the text of Articles 1 and 2 below.⁷³¹ Article 1 of the EU’s proposal (referred to in this Chapter as the ‘cross-border data flows provision’) reads as follows:

1. The Parties are committed to ensuring cross-border data flows to facilitate trade in the digital economy. To that end, cross-border data flows *shall not be restricted* between the Parties by:
 - a) requiring the use of computing facilities or network elements in the Party's territory for processing, including by imposing the use of computing facilities or network elements that are certified or approved in the *territory* of the Party;
 - b) requiring the localisation of data in the Party's territory for storage or processing;
 - c) prohibiting storage or processing in the territory of the other Party;
 - d) making the cross-border transfer of data contingent upon use of computing facilities or network elements in the Party’s *territory* or upon localisation requirements in the Party’s territory.

⁷²⁸ European Commission, *White Paper on Artificial Intelligence. A European Approach To Excellence and Trust*, COM(2020) 65 final, 19 February 2020.

⁷²⁹ Borrell (2020) (stating that ‘[t]he EU has a strong stake in maintaining and developing a rules-based international order within the framework of an effective multilateralism – even if others are clearly trying to weaken it. The joint Communication on Multilateralism that we are planning for next year will set out what the EU can do to counter this trend’.) See also European Commission, *A Stronger Europe in the World*; Communication from the Commission, *A Balanced and Progressive Trade Policy to Harness Globalisation*, COM(2017) 492 final, 13 September 2017, p.3 (stating that ‘[t]he EU is committed to open trade anchored in the rules-based multilateral trading system’.)

⁷³⁰ The document containing the model clauses does not explain why this article is numbered as ‘X’ instead of ‘3’. This Section hypothesises that the reason for that is that unlike Arts. 1 and 2 of the model clauses, which are included in Digital Trade chapters, Article ‘X’ is to be included in Chapters on Regulatory Cooperation. Given that the exact number of this article in that chapter could be different depending on the agreement, the drafters of the proposed model clauses preferred to not give this article a specific number.

⁷³¹ Article X is beyond the scope of this thesis because regulatory cooperation is not relevant to the research question addressed in it.

2. The Parties shall keep the implementation of this provision under review and assess its functioning within 3 years of the entry into force of this Agreement. A Party may at any time propose to the other Party to review the list of restrictions listed in the preceding paragraph. Such request shall be accorded sympathetic consideration.

Article 2 on the *protection of personal data and privacy*, includes an *exception* from the provision on cross-border data flows. It reads as follows:

1. Each Party recognises 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.
2. Each Party may adopt and maintain the *safeguards it deems appropriate* to ensure the protection of personal data and privacy, *including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective safeguards.*
3. For the purposes of this agreement, "personal data" means any information relating to an identified or identifiable natural person.
4. For greater certainty, the Investment Court System does not apply to the provisions in Articles 1 and 2 (emphasis added).

Looking ahead, the digital trade exception⁷³² for privacy and data protection is likely to be included *in addition to* the general exception for privacy and data protection, replicating almost verbatim the general exception in the GATS, as the EU proposal for general exceptions in the trade agreement with New Zealand demonstrates.⁷³³

This Chapter questions whether the proposed model clauses would indeed allow the EU to overcome the potential catch-22 compliance deadlock in future trade agreements, while at the same time pursuing the goals of facilitating cross-border data flows and promoting a rules-based multilateral trading system. It argues that superficially the clauses do seem to provide the EU with the broad autonomy to protect privacy and personal data

⁷³² There is a degree of uncertainty as to whether the proposed provision of Art. 2(2) of the model clauses is actually designed as an exception or rather as a carve-out from the scope of the agreement. This uncertainty originates from the lack of any indication in the provision itself of its actual function. However, comparison of this provision with provisions in existing trade agreements, which have similar wording (e.g. the prudential exception in Art. 2(a) of the GATS Annex on Financial Services and the prudential exceptions in Art. 195(1) EU-Central America Association Agreement, Art. 7.38(1) EU-Korea FTA, and Art. 8.50 EU-Singapore FTA) and are consistently interpreted as exceptions in literature and WTO case law suggests that Art. 2(2) of the model clauses should be viewed as an exception. See WTO, Background Note by the Secretariat, Financial Services, S/C/W/312, S/FIN/W/73, 3 February 2010, para. 28; WTO, Panel Report, *Argentina – Financial Services*, para. 7.814; Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), adopted by the Council for Trade in Services on 23 March 2001, S/L/92. For further discussion see Cantore (2014), pp. 1232, 1242; Cottier, Krajewski (2010), pp. 826-827; Leroux (2002); Marchetti (2011); Von Bogdandy, Windsor (2008); Yokoi-Arai (2008); Mitchell, Hawkins Mishra (2016), p. 807.

⁷³³ Art. X.1(2) EU proposal for Chapter X Exceptions of the EU-New Zealand FTA.

as fundamental rights while outlawing a number of measures restricting cross-border data flows. Compared to the US model, already discussed in Chapter 3 – which is the only wording so far incorporated in actual trade agreements, such as the CPTPP, USMCA and the US-Japan Digital Trade Agreement⁷³⁴ – the prohibition of restrictions on cross-border data flows in Article 1 of the proposed model clauses is formulated more narrowly. While the above-mentioned US-led agreements contain a general obligation to allow cross-border data flows, Article 1 of the EU proposed model clauses contains an exhaustive list of restrictions on cross-border data flows that are outlawed by this provision. Article 2(1) of the proposed model clauses asserts that the normative rationale for the protection of personal data and privacy is the protection of fundamental rights. As demonstrated in Section 3.4.2, this rationale safeguards a higher level of privacy and data protection than that afforded by economic reasons for protecting privacy and personal data, and therefore arguably safeguards a broader autonomy to regulate vis-à-vis international trade commitments. This provision is likely to be interpreted as a part of the digital trade exception for privacy and data protection in Article 2(2) of the proposal. In addition, the breadth of this digital trade exception, modelled after the national security exceptions in the WTO Agreements, secures the EU's ability to maintain restrictions on transfers of personal data outside the EEA under the GDPR. In particular, the 'it deems appropriate' threshold of the proposed exception establishes a significantly lower threshold than the necessity test of the general exception (this issue is discussed in more detail in Section 4.2.3 below). In addition, the proposed exception explicitly recognises the rules for cross-border transfers of personal data as an example of the types of measures that would be allowed under the exception. Incorporating the recognition of privacy and personal data protection as fundamental rights in trade agreements, coupled with the possibility of maintaining the above-mentioned GDPR restrictions, serves the goal of exporting EU data protection framework worldwide.⁷³⁵

However, the proposed model clauses suffer from at least three essential flaws that could make them unable to safeguard the fundamental rights to privacy and the protection of personal data, and undermine the goals of the EU digital trade policy, as identified above. First, the unclear relationship of the proposed digital trade exception for privacy and data protection with the general exception, creates legal uncertainty as to the material scope of the proposed exception.

Second, the breadth of the proposed digital trade exception for privacy and data protection may nullify the impact of the provision of Article 1, which outlaws what the EU frames as 'digital protectionism'. More generally, this Chapter contends that using the

⁷³⁴ See Section 3.3.4.

⁷³⁵ See Section 5.3.2.

extremely low threshold of national security exceptions as a model for a digital trade exception for privacy and data protection, could further undermine the stability of the rules-based international trading order. This essentially creates an almost unconditional escape valve from virtually any trade commitment as long as there is at least a remote nexus to the protection of privacy and personal data. Using this threshold outside the national security context creates a *de facto* hierarchy between privacy and data protection, on the one hand, and other public policy objectives, such as protection of the environment or public health (which are still subject to the stricter necessity test of the general exception), on the other hand. This could lead to the replication of the same threshold in exceptions for such other policy objectives. Such replication could, on the one hand, lead to the weakening of the trading system. On the other hand, it could also lead to a more restrictive interpretation of the ‘it considers necessary’ threshold of the national security exception. This, in turn, would reduce the broad autonomy of states to protect their national security in spite of their international trade commitments – the goal for which this low threshold was introduced into international trade law in the first place.

Third, the proposed model clauses are overly EU-centric in the sense that they require a recognition of the protection of privacy and personal data as fundamental rights – a commitment that not all EU trading partners may be willing to accept.

Based on the analysis of the proposed model clauses, this Chapter argues that these clauses could be improved in at least three ways. First, as a minimum, the future trade agreements should include a *provision clarifying the relationship between the general and the digital trade exceptions for privacy and data protection*. As a maximum, although this could be problematic to implement in practice, future trade agreements should contain a single exception for privacy and data protection, which would apply throughout the agreement. Second, in the course of negotiations, the EU should consider replacing the ‘it deems appropriate’ threshold of the digital trade exception for privacy and data protection with a threshold which is higher than the ‘it deems appropriate’ standard but lower than the necessity test standard of the general exception. Third, the provision requiring the recognition of the parties that the protection of personal data and privacy is a fundamental right should be rephrased in a way, which, on the one hand, safeguards the EU’s autonomy to maintain its fundamental rights protection of these rights but, on the other hand, allows other trading partners to adopt a lower level of protection, if they so choose, within international human rights law bounds.

Considering that the proposed digital trade exception for privacy and data protection is only a starting point in negotiations, Section 3 of this Chapter considers alternative thresholds for this exception that the EU could fall back on without compromising on the fundamental rights to privacy and data protection. It looks at other alternatives found in

WTO agreements and bi-lateral and regional trade agreements, which are on the continuum between the ‘necessity’ in the general exception, which is the current test for privacy and data protection, and the ‘it deems appropriate’ test proposed for a digital trade exception for privacy and data protection by the EU. Those alternatives are non-circumvention; non-avoidance; reasonableness; and the prohibition of arbitrary or unjustified restriction on trade. Relying on the interpretation of these thresholds in WTO case law and academic literature, Section 3 of this Chapter demonstrates that the *principles of good faith and the prohibition of abuse of rights are the common denominators of all these thresholds*. The flexibility of these principles is both a blessing and a curse. On the one hand, it gives adjudicating bodies wiggle-room to adjust the application of these thresholds to specific circumstances, but, on the other, it vests adjudicating bodies with broad discretionary powers, which can only be performed responsibly in the presence of appropriate checks and balances. The Chapter then argues that the issue in designing a digital trade exception for privacy and data protection is not only about the wording of the threshold for domestic autonomy to protect these policy interests, but also, and most importantly, about the amount of discretion afforded to the adjudicating bodies. As Chapter 3 has demonstrated, by using their discretion, the adjudicating bodies can – under the influence of a particular discourse — change the breadth of the exception by means of interpretation. Therefore, to ensure more predictability and control for the parties to a trade agreement over the interpretation of the threshold of the digital trade exception, restrictive mechanisms are necessary. In sum, this Chapter argues that the standards of non-circumvention, non-avoidance and reasonableness could be viable alternatives to the ‘it deems appropriate’ standard, provided that they are accompanied by appropriate restrictive mechanisms constraining the discretion of trade adjudicators, and are applied in a nuanced manner. The use of the ‘prohibition of arbitrary or unjustified restriction on trade’ standard, however, is undesirable due to the risks of importation of existing WTO case law on the chapeau of the general exceptions, which, as this Chapter shows, has at times been interpreted in an overly restrictive manner for domestic regulatory autonomy.

This Chapter proceeds as follows. Section 2 explicates the background of the proposed horizontal provisions, exposes the weaknesses of those provisions against the benchmark of their aims as outlined by the European Commission and in light of the broader goal of the preservation of the rules-based international trading system, and outlines ways for remedying those weaknesses. Section 3 discusses possible alternatives for the threshold of the future digital trade exception for privacy and data protection, instead of the proposed ‘it deems appropriate threshold’. Based on their interpretation in WTO case law and academic literature, Section 3 evaluates which of them could be more apt in the light of the above-mentioned goals. Section 4 sums up the main conclusions of the Chapter.

4.2 EU horizontal provisions: a critical evaluation

4.2.1 Background

The proposed model clauses represent a political compromise between what can be seen as the offensive and defensive strategies coexisting in EU trade policy on cross-border data flows and the protection of privacy and personal data. The offensive strategy is the product of the European ‘digital trade’ discourse, grounded in the economic benefits of the absence of restrictions on cross-border data flows *abroad* for European businesses. In contrast, the defensive strategy is the product of the fundamental rights discourse, grounded in the moral value of the fundamental rights to privacy and the protection of personal data *at home*, and geared towards protecting EU data protection legislation, most specifically GDPR’s restrictions on transfers of personal data outside the EEA from being challenged in a trade forum.

Developed under a strong political pressure from the European Parliament, DG Justice, civil society organisations, and academics, the proposed model clauses are not only a set of legal provisions delineating the EU’s starting point in international trade negotiations, but also largely an inward-looking *political statement*.⁷³⁶ In terms of regulatory autonomy for domestic privacy and personal data protection rules, the proposed model clauses go a step further than their predecessor - the 2017 EU Council concept paper on data flows in trade agreements, discussed in Section 4.3.1 below. Unable to reach an internal consensus on the EU Council’s proposal, the EU ultimately refrained, as mentioned elsewhere, from including any commitments on cross-border data flows and the protection of privacy and personal data into the E-Commerce chapter of JEFTA, which was in the final stages of negotiations at that time. In its 2018 statement outlining the key elements of this agreement, the European Commission clearly laid out the EU’s position on this matter: ‘[d]ata protection is a fundamental right in the European Union and is therefore not up for negotiation. Privacy is not a commodity to be traded.’⁷³⁷ This statement, however, as Kanetake and de Vries argue, was largely a narrative maintained by the EU for its own constituencies.⁷³⁸ Although the final version of JEFTA did not cover cross-border data flows or privacy and data protection, these issues were negotiated within the framework of adequacy assessments under the GDPR which unfolded in parallel with trade negotiations.⁷³⁹ The EU and Japan agreed to recognise the ‘essential equivalence’ of each other’s data protection frameworks – the key benchmark of adequacy under the GDPR

⁷³⁶ See also Section 3.3.2.

⁷³⁷ European Commission, Press Release: *Key elements of the EU-Japan Economic Partnership Agreement*, 18 April 2018.

⁷³⁸ Kanetake, de Vries (2018).

⁷³⁹ As explained in Section 2.2.1.3, adequacy decisions adopted by the European Commission constitute a primary mechanism for transfers of personal data outside the EEA under the GDPR.

— on the day when both parties signed the trade agreement. Kanetake and de Vries contend that the fact that the EU awarded an adequacy decision to Japan, despite the gaps between the GDPR and the Japanese data protection framework, demonstrates that contrary to the mainstream narrative of the Commission, privacy and data protection were very much ‘negotiated and traded’.⁷⁴⁰ The weaknesses of the adequacy decision which resulted from these negotiations, in the light of the EU Charter, are addressed in more detail in Chapter 5 of this thesis. It is important to keep in mind that – unlike trade agreements — adequacy decisions, even if adopted ‘mutually’ by two trading partners, are unilateral decisions of each trading partner. This means that they can also be unilaterally revoked without the risk of adverse consequences under the trade agreement. From this perspective, an adequacy decision does not substitute for a binding provision on data flows in a trade agreement.⁷⁴¹

4.2.2 Relationship with the general exception

Unlike most other trade law disciplines, the proposed model clauses – intended to form a part of the future digital trade chapters – apply to information flows in electronic commerce in general, irrespective of whether they are related to goods or services, or constitute part of financial or telecommunication services, and are, in this sense, *horizontal*.⁷⁴² Therefore, the provisions of Articles 1 and 2 would apply *in addition* to other obligations under the trade agreement on trade in goods and services. For example, information flows can also be relevant in the context of trade in database services, and as such can also be captured by more traditional trade disciplines, such as MFN, national treatment and market access.⁷⁴³ As Bartl and Irion rightly concluded, removing a data flow provision from the e-commerce chapter ‘does not remove personal data from the emergent trade law institutions.’⁷⁴⁴ In a similar vein, the general exception for privacy and data protection – modelled after GATS Article XIV(c)(ii) – is typically included in the EU proposals for the Exceptions chapters of the same trade agreements, where the EU includes

⁷⁴⁰ Kanetake, de Vries (2018).

⁷⁴¹ Micallef (2019), p. 867.

⁷⁴² Draft digital trade chapters proposed by the EU define the scope of application of those chapters as ‘trade enabled by telecommunications and/or other information and communication technologies’ (see, e.g., Art. X.1(1) EU proposal for a Chapter on Digital Trade of the EU-Indonesia FTA; Art. 1(1) EU proposal for a Digital trade title in the Trade Part of a possible modernised EU-Chile Association Agreement) or as ‘measures of a Party affecting trade enabled by electronic means’ (see, e.g., Art. 1(1) EU proposal for a Chapter on Digital Trade of the EU-New Zealand FTA; or Art. 1(1) La proposition de l’Union européenne (UE) relative à Accord de libre-échange UE-Tunisie UE-Tunisie, Titre [] Commerce Numérique). The scope of these chapters can be limited. For example, it typically exempts audio-visual services exempting financial services. See, e.g., Art. 1(2) EU proposal for a Chapter on Digital Trade of the EU-New Zealand FTA.

⁷⁴³ Whether these services are captured by national treatment and market access obligations, which represent specific commitments under trade agreements, depends on whether the EU has liberalised these services in each particular trade agreement. These services are included in the EU’s schedules of specific commitments under the GATS. Sen (2018), p. 336.

⁷⁴⁴ Bartl, Irion (2017), p. 14.

the proposed model clauses in the digital trade chapter.⁷⁴⁵ Similarly, ongoing e-commerce negotiations at the WTO,⁷⁴⁶ for which the EU submitted its proposed model clauses, are unlikely to include a revision of the GATS general exceptions. This creates a situation where *two exceptions must cohabit in the same trade agreement* (one in the digital trade chapter and the other in the general exceptions), with significantly different thresholds for justifying privacy and data protection measures inconsistent with the provisions of the agreement, as the following section illuminates.

Despite the difference in the wording of the privacy and data protection interests in the two exceptions, their scope in the context of present-day international trade is nearly identical. The proposed digital trade exception for privacy and data protection exempts domestic measures that ‘ensure the protection of personal data and privacy’. The general exception proposed for the same trade agreement exempts measures protecting ‘the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts.’⁷⁴⁷ Because of their connection to a particular person, individual records and accounts would constitute personal data under most data protection regimes.⁷⁴⁸ Similarly, confidentiality of personal data is a necessary component of most data protection frameworks.⁷⁴⁹ During the Uruguay round (1986-1994), the protection of the privacy of individuals in relation to the processing and dissemination of person data, and the protection of the confidentiality of individual records and accounts could have been different concepts, as at that time many WTO members, including the EU, did not have dedicated data protection laws. Nowadays, the second concept has become a subset of the first, and the difference in wording between the general exception, and the proposed digital trade exception for privacy and data protection is better explained by historical reasons than by the intention of the parties to exempt a different scope of privacy and data protection interests.

The EU proposals for digital trade chapters do not contain any provisions regulating the relationship between the digital trade chapter and other provisions of the trade agreements incorporating such a chapter. These EU proposals do, however, clarify that the general exception, security exception and prudential carve-out also apply to the digital trade chapter.⁷⁵⁰ The absence of a conflict of laws provision in currently proposed digital

⁷⁴⁵ Art. X.1(2) EU proposal for Chapter X Exceptions of the EU-New Zealand FTA. Proposed Chapter on exceptions in other FTAs under negotiation are not available at the time of writing.

⁷⁴⁶ European Commission, 76 WTO Partners Launch Talks on E-Commerce, 25 January 2019.

⁷⁴⁷ See, e.g., Art. XIV(c)(ii) GATS.

⁷⁴⁸ See DLA Piper (2020).

⁷⁴⁹ *Ibid.*

⁷⁵⁰ See also Art. 3 EU proposal for a Chapter on Digital Trade of the EU-Australia FTA; Art. 3 La proposition de l’Union européenne (UE) relative à Accord de libre-échange UE-Tunisie UE-Tunisie, Titre [

trade chapters stands in sharp contrast to the two most recently concluded trade agreements by the EU, namely the JEFTA and the CETA. The electronic commerce chapters of both of these agreements state that in case of any inconsistency between the electronic commerce chapter and other provisions of the trade agreement, those other provisions will prevail to the extent of the inconsistency.⁷⁵¹

If restrictions on transfers of personal data, or any other trade-restrictive privacy or data protection measure are found to be in violation of the trade in services commitments, alone, or together with a violation of Article 1 of the proposed model clauses on cross-border data flows of a digital chapter, which exception will then prevail? Article 1 is unlikely to capture *any* of the EU's restrictions on cross-border transfers of personal data, as such restrictions are not included in the exhaustive list of prohibited restrictions on cross-border data flows. Therefore, if an EU trading partner moved to challenge those restrictions in an international trade forum, it would, most likely, have to invoke one of the non-discrimination provisions or a market access provision in the trade in services chapter.

Because the exception of Article 2(2) of the proposed model clauses is destined for the digital trade chapter, and thus not for the exceptions chapter, one could argue that this exception would only apply if a measure is challenged under the digital trade chapter, while the general exception would apply to measures challenged under other chapters of the same trade agreement. Following this argumentation, the exception of the digital trade chapter would only apply to information flows *in abstracto*, such as flows of employment data between the subsidiaries of a multinational company, and not when such flows constitute an integral part of a digital service or good. In some cases – for example, when a provision of a service involves the application of an algorithmic system dependent on the processing of personal data – it may be impossible to disentangle the provision of the service from the data flows. The approach where the digital trade exception for privacy and data protection serves as a derogation from the obligation on cross-border data flows in the digital trade chapter (and not other chapters such as the one on trade in services) has been implemented in the recent US-led trade agreements. For example, the exception for privacy and data protection included in Article 19.11(2) of the digital trade chapter of the USMCA states that '[t]his Article does not prevent a Party from adopting or maintaining a measure inconsistent with paragraph 1 ...' where paragraph 1 contains a clause prohibiting restrictions on cross-border data flows. This wording suggests that this exception cannot

] Commerce Numérique; EU proposals for Digital Trade chapters for EU-Indonesia FTA and Digital trade title of a possible modernised EU-Chile Association Agreement only contain a placeholder for such a provision. It states that 'such provisions will either apply to this title but be incorporated in another title or be incorporated in this title'.

⁷⁵¹ Art. 8.70(6) JEFTA; Art. 16.7 CETA.

justify a derogation from any other obligation under the trade agreement except for the one regulating cross-border data flows.

The line of reasoning where the scope of the *digital trade exception* for privacy and data protection is limited to the digital trade chapter in the context of the model clauses proposed by the EU could be met, however, by a counterargument that the proposed digital trade exception should be invoked to justify *any* violation of the trade agreement as long as the challenged measure affects trade enabled by electronic means. There are at least two reasons that lend weight to this counterargument. First, the proposed digital trade exception is not worded as an exception solely to the provision on data flows included in Article 1 of the proposed model clauses, but as an independent provision on data protection and privacy, which applies in relation to the whole agreement.⁷⁵² Second, since there is no explicit provision on conflict of laws in the EU proposals for the digital trade chapters or in the general exceptions, the interpretative maxim (also recognised as the general principle of law) on the relationship between general and specialised rules *lex specialis derogat legi generali* should apply.⁷⁵³ This principle has been applied by the WTO adjudicating bodies on several occasions.⁷⁵⁴ According to this maxim, the *lex specialis* – that is that the digital trade exception of Article 2 of the proposed model clauses – should prevail over the general exception if a challenged privacy or data protection measure affects trade enabled by electronic means or, in other words, digital trade. If this argumentation is correct, then a conflict between any provision of the trade agreement, which contains the proposed digital trade exception, and the restrictions on cross-border data flows under the GDPR, should be resolved under the digital trade exception and *not* the general exception. The reason for this is that the GDPR applies to the processing of personal data wholly or partly *by electronic means*,⁷⁵⁵ and thus does not apply to the analogue processing of personal data. This means that any privacy and data protection under the GDPR, if trade restrictive, would mainly affect digital trade. Hence, the *digital trade exception should apply*.

This outcome, however, reduces the scope of the *general exception* for privacy and data protection to the highly unlikely cases of conflicts between domestic measures concerning *analogue* processing of personal data, and international trade norms. As a result, the general exception for privacy and data protection becomes nearly redundant. In *US-Gasoline*, however, the WTO Appellate Body held that:

⁷⁵² Cf. wording of Art. XX GATT, understood broadly — as exception to any other obligation.

⁷⁵³ Koskenniemi (2009), pp. 4-5.

⁷⁵⁴ WTO, Analytical Index, GATT 1994 – General (Jurisprudence), pp. 5-6, quoting WTO, Panel Report, *US – 1916 Act (Japan)*, para. 6.269; WTO, Appellate Body Report, *EC – Bananas III*, para. 204; WTO, Panel Reports, *US – Shrimp (Thailand)*, paras. 7.159-7.162; WTO, Panel Report, *US – Customs Bond Directive*, paras. 7.168-7.171.

⁷⁵⁵ Art. 2(1) GDPR.

[o]ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.⁷⁵⁶

If a trade adjudicating body facing the dilemma of the relationship between the digital trade and the general exceptions for privacy and data protection adhered to the above approach to interpretation, there would be a risk that the *lex specialis* argument would thus not be decisive and the scope of the general exception for privacy and data protection would then be broader than just described. As a result, some of the conflicts between domestic rules on transfers of personal data and international trade disciplines could be still captured by the general exception. Therefore, the question of whether the proposed digital trade exception for privacy and data protection can, in all cases, override the general exception for privacy and data protection remains at least partially open. It is for this reason that the future EU trade agreements – if they were to include both the general exception and the proposed digital trade exception for privacy and data protection – should, as a minimum, clarify the relationship between the two exceptions in a way that makes the general exception inapplicable to domestic measures on the automated processing of personal data.

One may also wonder why the EU does not propose to change the general exception for privacy and data protection instead of adding another exception overriding it. In theory, this would be the most logical way to solve the issue discussed in this Section. It could be that the answer lies in the 'legacy clout' of the general exceptions, which have been replicated in multiple trade agreements for decades.⁷⁵⁷ Recall that the general exceptions typically contain exceptions for other public policy interests besides privacy and data protection. Renegotiation of a general exception for privacy and data protection only, with a view of granting parties to a trade agreement a broader autonomy to regulate these interests, *would bluntly put privacy and data protection above other important policy objectives such as the protection of the environment or public health*. Shifting these renegotiations to another forum – the digital trade chapter, despite this leading to the same result of preferring privacy and data protection to other policy objectives – allows this outcome to be less apparent and avoids the possible discontent of stakeholders defending those other policy objectives on the international trade policy landscape. Therefore it could

⁷⁵⁶ WTO, Appellate Body Report, *US – Gasoline*, p. 23.

⁷⁵⁷ For example, Riffle argues that trade agreement negotiators 'are naturally hesitant to tinker with well-established General Agreement on Tariffs and Trade (GATT) language, unless there is a cogent reason'. Riffel (2018), p. 143.

be more convenient to negotiate a separate exception for privacy and data protection during digital trade negotiations instead of reopening negotiations on the general exception. Additionally, the transaction costs of renegotiating the general exception may simply be too high.

4.2.3 An undesirable parallel with the national security exception

Let us recall that the digital trade exception for privacy and data protection proposed in Article 2(2) allows each Party to ‘adopt and maintain the safeguards *it deems appropriate* to ensure the protection of personal data and privacy’ (emphasis added). The threshold that a trade-inconsistent safeguard must meet is the ‘*it deems appropriate*’ test (emphasis added) – as opposed to the necessity test in the general exception – which is similar to that employed in national security exceptions in the WTO agreements.⁷⁵⁸ For example, under Article XIVbis(1)(b) of the GATS: [n]othing in this Agreement shall be construed:

<....>

(b) to prevent any Member from taking *any action which it considers necessary* for the protection of its essential security interests:

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations.⁷⁵⁹

The phrase ‘it considers necessary’ in the national security exception has been remarkably consistent since the GATT 1947, not only in various WTO Agreements,⁷⁶⁰ but also in post-WTO trade agreements concluded around the world.⁷⁶¹ The wording of the proposed digital trade exception for privacy and data protection allows any safeguards ‘it [each Party] deems appropriate’. It is not identical to the ‘it considers necessary’ phrase contained in the national security exception. Nevertheless, despite this discrepancy in the wording of the two exceptions, the analysis of the national security exception is useful because, based on the definition of ‘appropriate’ and ‘necessary’ in dictionaries and

⁷⁵⁸ See, e.g., Art. XIVbis GATS; Art. XXI GATT 1994.

⁷⁵⁹ (emphasis added)

⁷⁶⁰ Art. XXI GATT; Art. XIVbis GATS; Art. 73 TRIPS; Arts. 2.2, 2.10, 5.4, 5.7 and 10.8.3 TBT Agreement; Art. III:1 Revised Agreement on Government Procurement.

⁷⁶¹ For an overview Cottier, Delimatsis (2008).

scholarly interpretations, ‘it deems appropriate’ seems to afford the same or an even broader margin of appreciation than ‘it considers necessary’.⁷⁶²

In the following paragraphs, this Section first considers the interpretation of the national security exception in general, and its ‘it considers necessary’ test in particular, by the WTO Panels, and then extrapolates the insights to the proposed digital trade exception for privacy and personal data and its ‘it deems appropriate’ test. Based on this analysis it explains why modelling a digital trade exception for privacy and data protection after the national security exception is undesirable in the view of the EU’s goals to liberalise cross-border data flows and, more generally, the goal of maintaining a multilateral rules-based international trading system.

4.2.3.1 Interpretation of the national security exception at the WTO

The national security exception is the broadest of all the existing exceptions in international trade law. It provides almost unlimited autonomy for states to adopt trade law-inconsistent measures to protect their essential security interests. It is for this reason that this exception has been called ‘potentially the biggest loophole’,⁷⁶³ ‘an unreviewable trump card’,⁷⁶⁴ ‘the Achilles’ heel of international law’,⁷⁶⁵ and ‘all-embracing and seemingly omnipotent’.⁷⁶⁶ Until recently, Article XXI GATT had been invoked very infrequently.⁷⁶⁷ Although the openness of the security exception has not been abused before, this is changing,⁷⁶⁸ as the national security exception is being increasingly invoked in WTO disputes. At the time of writing, there are more than twenty pending disputes at

⁷⁶² From the wording of Art. 3(1) DSU it follows that in WTO law ‘necessary’ and ‘appropriate’ have different meaning. Under this provision ‘[a] Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate’. In contrast, however, Cottier and Delimatsis use the words ‘necessary’ and ‘appropriate’ interchangeably in discussing the national security exception. See Cottier, Delimatsis (2008), p. 335 (referring to ICJ and ECJ case law and stating that ‘[a] Member has indeed the flexibility to choose the measure that it deems appropriate to protect its essential security interests’). In the *EC-Sardines*, the WTO Panel interpreted ‘inappropriate’ as referring ‘to something which is not “specially suitable”, “proper” or “fitting”’. WTO, Appellate Body Report, *EC – Sardines*, para. 285 citing WTO, Panel Report, *EC – Sardines*, para. 7.116. See also WTO, Panel Report, *US – Tuna II (Mexico)*, para. 7.723.) Similarly, one of the definitions of ‘appropriate’ in the Oxford English Dictionary, most suitable in the present context, is ‘specially fitted or suitable’. OXFORD ENGLISH DICTIONARY ONLINE, *appropriate* <https://www.oed.com/view/Entry/9870?rskey=uGZYsX&result=1#eid> The same dictionary defines ‘necessary’ as ‘indispensable, vital, essential; requisite’. OXFORD ENGLISH DICTIONARY ONLINE, *necessary*, <https://www.oed.com/view/Entry/125629?redirectedFrom=necessary#eid>. According to the same Dictionary, ‘deem’ and ‘consider’ have synonymous meaning. The Dictionary defines the current use of the verb ‘to deem’ as ‘[t]o form the opinion, to be of opinion; to judge, conclude, think, consider, hold’. OXFORD ENGLISH DICTIONARY ONLINE, *deem*, <https://www.oed.com/view/Entry/48614?rskey=Ujiiag&result=2&isAdvanced=false#eid>

⁷⁶³ Westin (1997), p. 181.

⁷⁶⁴ Alford (2011), p. 698.

⁷⁶⁵ Schloemann, Ohlhoff (1999), p. 426.

⁷⁶⁶ Yoo, Ahn (2016), p. 426.

⁷⁶⁷ Westin (1997), p. 182; Jackson (1989), p. 205; Alford (2011), p. 699.

⁷⁶⁸ Chen (2017), pp. 313-317. For an example of a potential abuse see WTO, Panel Report, *Saudi Arabia – Protection of IPR*.

the WTO involving a national security exception.⁷⁶⁹ To name just a few examples, Russia successfully invoked the exception in a GATT case brought against it by Ukraine; Saudi Arabia – successfully to some extent⁷⁷⁰ – invoked the exception contained in Article 73 of the TRIPS Agreement (almost identical to Article XXI GATT) in a case filed by Qatar to defend piracy of Qatari broadcasts as a national security matter;⁷⁷¹ and the US adopted tariff measures against its trading partners to protect alleged national security interests.⁷⁷² The weak link between the measures adopted by the US and the national security interests invoked by the US, opens the door to invoking this exception as a justification for any trade restrictive measure vaguely related to national security.

There are two key issues in the interpretation of the ‘it considers’ threshold in the national security exception: (1) whether it means the exception is *self-judging*, meaning the WTO adjudicating bodies have no jurisdiction to review measures that a WTO member claims to have introduced within the boundaries of the national security exception, and (2) if the exception is *not* self-judging, what is the margin of appreciation afforded to a WTO member to adopt measures to protect national security, and the standard of review that the WTO adjudicating bodies should exercise in assessing whether a contested measure satisfies the conditions of the exception.

The long-standing controversy on whether the national security exception is self-judging originated in a GATT-1994 dispute between the US and the European Community, regarding the US Helms-Burton Act imposing sanctions against Cuba with extraterritorial effect bound to affect European companies. In that case, the US invoked the exception not only as a substantive justification for its GATT-inconsistent measure, but also as a jurisdictional defence.⁷⁷³ In doing so, the US argued that the WTO, in principle, had no jurisdiction in considering the dispute once this exception has been invoked. The parties ultimately resolved the dispute by agreement and the WTO did not express an opinion on this issue.⁷⁷⁴

In the aftermath of this case, some scholars sided with the US: based on the wording ‘it considers’, they argued that it is ‘free from any judicial review’ and is ‘self-judging’.⁷⁷⁵

⁷⁶⁹ Vidigal (2019), p. 205.

⁷⁷⁰ Saudi Arabia managed to successfully invoke the national security exception in relation to some TRIPS-inconsistent measures, but not the others. See WTO, Panel Report, *Saudi Arabia – Protection of IPR*, paras. 7.285-7.293.

⁷⁷¹ WTO, Panel Report, *Saudi Arabia – Protection of IPR*.

⁷⁷² Pinchis-Paulsen (2020), p. 112-113.

⁷⁷³ WTO, Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/24, 16 October 1996. See WTO, Request for the Establishment of a Panel by the European Communities, United States – The Cuban Liberty And Democratic Solidarity Act. WT/DS38/2, 8 October 1996.

⁷⁷⁴ Vidigal (2019), p. 204.

⁷⁷⁵ Alford (2011), pp. 701-702; See also Jackson (1969); Bhala (1998); Akande, Williams (2003).

Others argued that the security exception cannot be sensibly interpreted to deny the WTO's jurisdiction on the interpretation and application of the exception (distinguishing between the 'authority to define' and 'authority to interpret').⁷⁷⁶ In its *Russia – Traffic in Transit*⁷⁷⁷ report, the WTO Panel held that the exception is not 'totally self-judging' and that the WTO adjudicating bodies have the power to review whether the objective requirements of the exception are met.⁷⁷⁸ The Panel Report has not been appealed by any of the parties and is final. The WTO Panel in *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights* confirmed the general interpretation and the analytical framework established by the Panel in *Russia – Traffic in Transit*.⁷⁷⁹

The Panels introduced a four-step analytical framework to assess whether a contested measure falls under the national security exception.⁷⁸⁰ The discussion below will emphasise the Panels' findings that are most relevant for the analysis of the proposed digital trade exception for privacy and data protection, leaving aside the aspects specific to the wording of the national security exceptions.⁷⁸¹

Prior to the Panel reports, scholars generally considered that the national security exception afforded WTO members a wide margin of appreciation in choosing an appropriate measure to protect national security in spite of their WTO commitments.⁷⁸² In particular, they believed that the state invoking the exception was free to decide *whether* an action was required, no matter how remote the link between the national security and the basis for invoking the exception, and *which* action should be taken: this choice could not be questioned by a trade adjudicating body.⁷⁸³

The WTO Panels in *Russia – Traffic in Transit* and in *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights* generally confirmed that the phrase 'which it considers' allows a WTO member *itself* to determine 'the "necessity" of

⁷⁷⁶ Schloemann, Ohlhoff (1999), pp. 426-427, 438, 443ff; Cottier, Delimatsis (2008), p. 5 (Referring to ICJ and ECJ case law). See also Whitt (1987), p. 616; van den Bossche, Zdouc (2013), p. 596; Yoo, Ahn (2016), p. 428.

⁷⁷⁷ WTO, Panel Report, *Russia – Traffic in Transit*.

⁷⁷⁸ WTO, Panel Report, *Russia – Traffic in Transit*, paras. 7.102-7.104.

⁷⁷⁹ WTO, Panel Report, *Saudi Arabia – Protection of IPR*, para. 7.243.

⁷⁸⁰ This framework is summarised in WTO, Panel Report, *Saudi Arabia – Protection of IPR*, para. 7.241.

⁷⁸¹ For a comprehensive discussion on all the prongs of the assessment developed in *Russia – Traffic in Transit*, see Vidigal (2019).

⁷⁸² Cottier, Delimatsis (2008), p. 4; Westin (1997), pp. 181-182; Jackson (1989), p. 205; WTO, Analytical Index, GATT, Article XXI Security Exceptions, pp. 600-601.

⁷⁸³ Westin (1997), pp. 181-182; Jackson (1989), p. 205; Cottier, Delimatsis (2008); WTO, Analytical Index, GATT, Article XXI Security Exceptions, pp. 600-601; GATT Council, Minutes of Meeting Held in the Centre William Rappard on 7 May 1982. CIM/157, 22 June 1982, p. 10; GATT Council, Minutes of Meeting Held in the Centre William Rappard on 29-30 June 1982. CIM/159, 10 August 1982, p. 19.

the measures for the protection of its essential security interests'.⁷⁸⁴ This test is therefore easier to satisfy than the necessity test of the general exception, as the WTO Panel in *Russia – Traffic in Transit* clarified:

there is no need to determine the extent of the deviation of the challenged measure from the prescribed norm in order to evaluate the necessity of the measure, i.e. that there is no reasonably available alternative measure to achieve the protection of the legitimate interests covered by the exception which is not violative, or is less violative, of the prescribed norm.⁷⁸⁵

The Panels also explained, however, that the clause 'it considers' does not apply to the assessment of the three sets of circumstance under paragraphs (i)-(iii) of Article XXI(b) GATT or Article 73(c) TRIPS, which are subject to *objective* determination by WTO adjudicators.⁷⁸⁶ On the contrary, these paragraphs operate as 'limitative qualifying clauses' that 'qualify and limit the exercise of the discretion accorded to Members under the chapeau to these circumstances.'⁷⁸⁷

Furthermore, the Panels held that both (a) the WTO member's discretion to designate particular concerns as 'essential security interests' and (b) the subjective assessment of 'necessity' in the national security exception are limited by the obligation to *interpret and apply the exception in good faith*, a general principle of law and a principle of general international law envisaged in Article 31 VCLT.⁷⁸⁸ Whether a WTO member met the obligation of good faith is subject to the objective assessment of the WTO adjudicating bodies. This has two implications.

First, a WTO member cannot use the security exception 'as a means to circumvent their obligations under the GATT 1994'.⁷⁸⁹ While each WTO member is free to define what it considers to be its essential security interests, the WTO Panels clarified that such interests 'generally' concern 'those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and

⁷⁸⁴ WTO, Panel Report, *Russia – Traffic in Transit*, para. 146; WTO, Panel Report, *Saudi Arabia – Protection of IPR*, para. 7.249. For a discussion see Vidigal (2019), p. 216. Before *Russia – Traffic in Transit*, scholars were sharply divided on whether the national security is self-judging. Compare, e.g., Alford (2012), p. 701-702 with Schloemann, Ohlhoff (1999), p. 426-427, 438, 443ff.

⁷⁸⁵ WTO, Panel Report, *Russia – Traffic in Transit*, para. 7.108.

⁷⁸⁶ WTO, Panel Report, *Russia – Traffic in Transit*, para. 7.65; WTO, Panel Report, *Saudi Arabia – Protection of IPR*, para. 7.244. See also Wang (2019), p. 711.

⁷⁸⁷ *Ibid.*

⁷⁸⁸ WTO, Panel Report, *Russia – Traffic in Transit*, para. 7.132; WTO, Panel Report, *Saudi Arabia – Protection of IPR*, paras. 7.249-7.250, 7.252. See also Pinchis-Paulsen (2020), p. 189. Several scholars made the same argument before Panel Report in *Russia – Traffic in Transit* was adopted. See, e.g., Schloemann and Ohlhoff (1999), pp. 446-447.

⁷⁸⁹ WTO, Panel Report, *Russia – Traffic in Transit*, para. 7.133.

the maintenance of law and public order internally.⁷⁹⁰ In *Russia – Traffic in Transit* the Panel noted that a ‘glaring example’ of circumvention is when a WTO member tries to ‘release itself’ from its trade commitments by ‘re-labelling trade interests that it agreed to protect and promote ... as “essential security interests”’.⁷⁹¹ To satisfy the good faith requirement in relation to the evaluation of ‘essential security interests’, a WTO member must articulate those interests in the manner ““minimally satisfactory” in the circumstances’, ‘sufficiently to enable an assessment of whether the challenged measures are related to those interests’.⁷⁹² This requirement, however, ‘is not a particularly onerous one, and is appropriately subject to limited review by a panel’, in particular because the Panel is not well-positioned to make such an assessment.⁷⁹³ For example, in *Russia – Traffic in Transit*, the Panel concluded that ‘there [was] nothing in Russia’s expression of [national security] interests to suggest that Russia invoked Article XXI(b)(iii) simply as a means to circumvent its obligations under GATT 1994.’⁷⁹⁴

Second, the connection between the measures at issue and the ‘essential security interests’ must meet the ‘*minimum requirement of plausibility* in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests’.⁷⁹⁵ In *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, failure of Saudi Arabia to meet this prong of the assessment resulted, for the first time in history, in an unsuccessful invocation by a WTO member of the national security exception to justify a trade-inconsistent measure.

This reasoning of the WTO Panels is consistent with the interpretation of the ‘it considers necessary’ test found in scholarly literature preceding the issuance of the Panel reports. For example, Cottier and Delimatsis argued that the breadth of the national security exception was not unlimited as this would be incompatible with a rules-based foundation of international trade legal order.⁷⁹⁶ Most notably, they argued that the margin of appreciation in determining necessity is limited by the doctrine of abuse of rights or good faith, which amounts to an objective assessment.⁷⁹⁷ Similarly, to Sykes ‘Article XXI does

⁷⁹⁰ WTO, Panel Report, *Russia – Traffic in Transit*, para. 7.130; WTO, Panel Report, *Saudi Arabia – Protection of IPR*, para. 7.249.

⁷⁹¹ WTO, Panel Report, *Russia – Traffic in Transit*, para. 7.133

⁷⁹² WTO, Panel Report, *Russia – Traffic in Transit*, paras. 7.134, 7.137; WTO, Panel Report, *Saudi Arabia – Protection of IPR*, paras. 7.250, 7.281.

⁷⁹³ WTO, Panel Report, *Russia – Traffic in Transit*, fn. 826; WTO, Panel Report, *Saudi Arabia – Protection of IPR*, para. 7.281.

⁷⁹⁴ WTO, Panel Report, *Russia – Traffic in Transit*, para. 7.137.

⁷⁹⁵ WTO, Panel Report, *Russia – Traffic in Transit*, para. 7.138; WTO, Panel Report, *Saudi Arabia – Protection of IPR*, para. 7.752. (emphasis added)

⁷⁹⁶ Cottier, Delimatsis (2008).

⁷⁹⁷ Cottier, Delimatsis (2008), pp. 6, 10. See also Bartels (2004), p. 871; Akande, Williams (2003), pp. 389–394; Yoo, Ahn (2016), pp. 429, 442; Schloemann, Ohlhoff (1999), pp. 446–447; van den Bossche, Zdouc (2013), p. 442. See also Hahn (1991), p. 580; Cann (2001); Bonnan (2010); Peng (2015).

not encompass exigencies such as a member government's financial distress or domestic economic crises that are unrelated to war and international emergencies'.⁷⁹⁸ The recourse to 'good faith' by the panels is perhaps understandable,⁷⁹⁹ but fails to provide a clear direction. 'There is no single agreed-upon formulation of a "good-faith test", although 'proposals generally focus on separating genuine security policies from abuse, pretext, and subversion of the treaty.'⁸⁰⁰

4.2.3.2 Interpretation of the digital trade exception for privacy and data protection

Applying the interpretation of the national security exception explained in the previous Section to the proposed digital trade exception for privacy and data protection allows one to make two predictions. First, the proposed digital trade exception is unlikely to be viewed as self-judging and will be subject to the review of trade adjudicating bodies. Second, the 'it deems appropriate' threshold, given its similarity to 'it considers necessary' in the national security exception, is most likely to be interpreted as affording a wide margin of appreciation of what safeguards to protect privacy and personal data are appropriate. In other words, it would allow the defending Party to conduct a subjective assessment of the matter. The fact that the adoption and application of rules on the cross-border transfer of personal data is explicitly mentioned in the proposed exception as an example of 'appropriate safeguards' creates a presumption that such restrictions are covered by the exception. At the same time, a Party's discretion to adopt and maintain such safeguards is limited by an objective assessment by a trade adjudicating body as to whether the Party's behaviour is in good faith and does not constitute an abuse of right. This objective assessment would include (a) a limited assessment of whether particular concerns are articulated as privacy and data protection interests in a minimally satisfactory manner to allow adjudicators to assess their relationship with the contested measures, and (b) an assessment of whether the nexus between the privacy and data protection interests and the contested measure meet a 'minimum requirement of plausibility'. The objective assessment, however, will be narrower than in the national security exception, as the proposed digital trade exception for privacy and data protection does not contain an analogue of the 'limitative qualifying clauses' present in the national security exception. As a result, the proposed digital trade exception affords an even broader regulatory autonomy than the national security exceptions in the WTO agreements. This, of course, could be a function of the fact that this provision is only a starting point in negotiations.

⁷⁹⁸ Sykes (2015), p. 303 (emphasis in the original).

⁷⁹⁹ Cf Art. 31(1) VCLT (stating that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.)

⁸⁰⁰ Heath (2020), p. 1067.

Applying these predictions to the EU's framework for transfers of personal data under the GDPR, one can conclude that such a framework would pass the 'it deems appropriate' threshold. Although the design of the EU's restrictions on transfers of personal data is unlikely to be the least trade restrictive (as explained in Chapter 2), and arguably no longer fit for its constitutional purpose (as explained in Chapter 5), it does aim to protect the fundamental rights to the protection of personal data and privacy. Therefore, one can argue that restrictions on transfers of personal data are formulated in a minimally satisfactory manner and meet the minimum requirement of plausibility under the 'it deems appropriate' test. Furthermore, the formulation of the EU restrictions cannot be considered a means to circumvent the trade interests it agreed to protect. For one thing, these restrictions were designed in 1995 (the design of the framework has not changed since the 1995 Data Protection Directive) – a time when the issue of cross-border data flows was hardly on any country's trade policy agenda.

4.2.4 A different threshold for digital trade exceptions

The previous Sections have demonstrated that the 'it deems appropriate' test of the proposed digital trade exception for privacy and data protection is broader than the necessity test of the general exception. Putting these two thresholds on a continuum from most restrictive to least restrictive for domestic autonomy in international trade, these tests would be at the opposite ends of this continuum. That said, although the 'it deems appropriate' test may provide the ultimate protection to the EU's autonomy to protect privacy and personal data as fundamental rights and maintain the design of its framework for transfers of personal data under the GDPR, there are nevertheless at least three key reasons why the digital trade exception for privacy and data protection should not use this threshold, in view of the goals that the EU pursues by introducing the model clauses and the broader goals of EU's trade policy. First, the risk of undermining the international rules-based trading system. Second, the risk of future replication of the 'it deems appropriate' threshold in exceptions for other public policy objectives. Third, and finally, undermining the EU digital trade policy goal of liberalising cross-border data flows, and in particular, facilitating the inflow of personal data to the EU. This Chapter reviews each one of them below.

The GATT 1947 parties and WTO members have for many years refrained from using the national security exception and from letting the WTO deliver a report on this exception.⁸⁰¹ There was a good a reason: they were wary of opening Pandora's Box, as abuse of the exception could undermine the rules-based trading system.⁸⁰² The reason that

⁸⁰¹ Until the WTO Panel Report in *Russia – Traffic in Transit*, all prior references to the national security exception did not lead to a binding decision by a WTO adjudicating body.

⁸⁰² See Vidigal (2019), p. 204.

the possibility of invoking the national security exception is limited by the ‘limitative qualifying clauses’⁸⁰³ subject to objective assessment, as explained above, was to keep the scope of the national security exception narrow. Adding an exception for personal data and privacy with a threshold very closely resembling that of the national security exception but *without* any ‘limitative qualifying clauses’ broadens the potential for future departures from international trade rules.

The breadth of the possibilities for escaping trade law disciplines under the proposed exception for privacy and data protection is also explained by the broad conceptualisation of the right to the protection of personal data in the EU, as has been explained in the Introduction. The broad understanding of data protection also suggests that data protection interests could be placed on a continuum between those integral to the existence of the democratic society and human dignity, and those which are more economic in nature (akin to consumer protection⁸⁰⁴) and which are routinely ‘traded’ away for online services⁸⁰⁵ by individuals on the basis of consent recognised as a legitimate ground for personal data processing under the EU Charter.⁸⁰⁶ While for some of the data protection rights a wide autonomy within the international trade regime must be warranted, for others, it would not.

This line of reasoning does not imply that measures restricting cross-border data flows cannot be a national security issue. However, in that case, they should be defended on the basis of national security – not a digital trade - exception. Each trade agreement, in which the EU includes its proposed digital trade exception for privacy and data protection, also contains a separate national security exception, which (in the EU’s recent⁸⁰⁷ and prospective⁸⁰⁸ trade agreements) repeats almost verbatim the national security exception

⁸⁰³ WTO, Panel Report, *Russia – Traffic in Transit*, para. 7.65.

⁸⁰⁴ There is a growing volume of literature highlighting the overlap between data protection and consumer law, which is, at its core, economic regulation. See, e.g., Helberger, Zuiderveen Borgesius, Reyna (2017); Van Eijk, Hoofnagle, Kannekens (2017). This research also shows that, for example, when it comes to transparency and unfair terms in privacy policies, consumer law is more effective than data protection due to its flexibility and adaptability to changing circumstances. Van Eijk, Hoofnagle, Kannekens (2017), pp. 11–12; Helberger, Zuiderveen Borgesius, Reyna (2017), pp. 1438–1439.

⁸⁰⁵ From an economic perspective, personal data in two-sided platforms is increasingly compared to a price or consideration for services. See, e.g., Eben (2018); Bataineha, Mizounib, Barachic, Bentahar (2016). The view that personal data could be viewed as consideration for a service is also represented in some EU legislation. For example, Recital 16 European Electronic Communications Code clarifies that providing personal or other data to a service supplier or allowing such supplier to access personal data without actively supplying it (an example of this would be online tracking) in exchange for a service falls under the concept of remuneration. See also Recital 24 and Art. 3(1) Digital Content Directive. But see EDPS, Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, p. 3, sharply criticising this approach.

⁸⁰⁶ Article 8 of the Charter.

⁸⁰⁷ See, e.g. Art. 26.8 CETA; Art. 1.5 JEFTA; Art. 16.11 EU-Singapore FTA.

⁸⁰⁸ See, e.g., Art. X.2 ‘Security exceptions’ EU proposal for Chapter X Exceptions of the EU-New Zealand FTA, 25 June 2019, which incorporates a provision almost verbatim repeating that of Art. XIVbis GATS. Namely, it contains an exhaustive list of ‘essential security interests’ that could justify invocation of the exception.

of the WTO instruments. Paradoxically, because the proposed digital trade exception is broader than the WTO national security exception, defending measures restricting cross-border data flows, in case they are implemented for national security reasons, could be problematic because of the ‘limitative qualifying clauses’ of that exception.

Introducing a broad digital trade exception to ameliorate this deficiency of the national security exception, is however, not an appropriate way forward. Rather, a reform of the national security exception, which was designed in the aftermath of World War II and has remained intact ever since, could be necessary. For example, the most recent US-led trade agreements demonstrate a significant departure from the GATT 1947 and the WTO model of the national security exception. In the national security exception of the USMCA (and the CPTPP initially led by the US) the limitative qualifying clauses are no longer present. To illustrate, the respective part of the national security exception in Article 32.2(1)(b) of the USMCA reads as follows:

1. Nothing in this Agreement shall be construed to:

(b) preclude a Party from applying measures that *it considers necessary* for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, *or the protection of its own essential security interests*.⁸⁰⁹

Unlike the WTO national security exception, this national security exception provides a broader escape valve for any public policy interest that has a nexus to ‘essential security’. It could justify restrictions on data flows on privacy and data protection grounds framed as a national security issue. This scenario is plausible, especially given that the Committee on Foreign Investment in the United States (CFIUS) has already blocked the acquisition of several US companies by Chinese investors by invoking data privacy-related national security concerns.⁸¹⁰ According to some experts, these concerns are primarily driven by fear of content censorship and surveillance over personal information, which can be exploited in a way threatening to national security.⁸¹¹ Whether the US approach to the national security exception is the right way forward is beyond the scope of this thesis. In broad terms, removing any limitations in relation to the circumstances in which national security can be invoked seems to be a dangerous step that could jeopardise the international trading system, as constraining the abuse of the national security exception was precisely

⁸⁰⁹ See also Art. 29.2(b) CPTPP. (emphasis added)

⁸¹⁰ Williams (2019); Lippman (2020).

⁸¹¹ Williams (2019).

the reason why the drafters of the ITO Charter and the GATT 1947 included the limitative clauses in the exception in the first place.⁸¹²

Heath argues that an unintended consequence of the abuse of the exception is that ‘potential for *good-faith but novel* national security claims’ might not be allowed, as the standards that may result from overuse are likely to increase the threshold to maintain at least a semblance of order in international trade rules.⁸¹³ Similarly, the broader use of this threshold for privacy and data protection and other public interests less crucial than national security could lead to the same outcome. The threshold could be narrowed in the interpretation in relation to other public interests, and then this interpretation could be extrapolated back on the national security exception.

If the EU succeeds in introducing an ‘it deems appropriate’ test for the sake of protecting privacy and personal data in its trade agreements, it will create a precedent that will open the door for other countries to introduce similarly broad exceptions for other public policy interests that fit their own cultural, societal, economic and political preferences or sensitivities. National security and defence are public interests that, unlike privacy and data protection, are of vital importance to any country’s existence and, therefore, unique in their primary importance to any party of an international trade agreement.⁸¹⁴ They stand above trade liberalisation goals. National security and defence are also a highly political areas for the states, the ones in which any external interference is generally not tolerated.

If a privacy and data protection exception with a similar threshold were to be introduced, it would be hard to argue that other rights – recognised as fundamental by either the EU or its trading partners – do not deserve a similar level of protection. The EU Charter itself protects multiple other fundamental rights and freedoms besides privacy and the protection of personal data, such as the above-mentioned rights to freedom of expression and the freedom to conduct business.⁸¹⁵ Furthermore, some of the EU’s partners in international negotiations, especially in the WTO setting, may value other policy interests above privacy and data protection and, therefore, may either demand to raise the threshold for privacy and data protection or lower the threshold for other public policy interests. The participation of China, Russia and several developing countries in these negotiations is likely to add several other public policy interests (such as economic security, industrial policy, public health, and information sovereignty) to the mix of sensitive issues to be balanced against the economic benefits of digital trade liberalisation.

⁸¹² Pinchis-Paulsen (2020), p. 192.

⁸¹³ Heath (2020).

⁸¹⁴ Cottier, Delimatsis (2008), p. 1.

⁸¹⁵ Arts. 11, 16 EU Charter.

Each trading partner is likely to strike a different balance between these benefits on the one hand, and other non-trade policy priorities reflecting their own constitutional traditions, the level of digital and economic development and the desire to resist ‘digital colonialism’,⁸¹⁶ on the other hand.

4.2.5 *Undermining the goal of liberalisation of cross-border data flows*

The use of the ‘it deems appropriate’ threshold in the digital trade exception for privacy and data protection could impair the effectiveness of the prohibitions on restrictions of cross-border data flows under Article 1 of the proposed model clauses, which serve the EU’s strategic economic interests.⁸¹⁷ Liberalisation of cross-border data flows is also one of the goals pursued by the proposed model clauses. Recall that Article 1 is already formulated in a way which is unlikely to implicate the EU’s privacy and data protection framework. Rather, these disciplines serve the EU’s economic interests in removing data localisation measures in other countries, such as Indonesia,⁸¹⁸ or prevent their introduction in the first place. In the 2020 European strategy for data, the European Commission once again acknowledged that ‘European companies operating in some third countries are increasingly faced with unjustified barriers and digital restrictions’ and promised to address ‘these unjustified obstacles to data flows in bilateral discussions and international fora – including the World Trade Organization.’⁸¹⁹ By ‘unjustified barriers and digital restrictions’ the Commission means restrictions that cannot be justified by *legitimate* privacy and data protection interests, where ‘legitimate’ clearly refers to the EU-style data protection framework. A broad digital trade exception for privacy and data protection, would not only grant a broad autonomy to protect privacy and personal data as fundamental rights to the EU, but also to its trading partners who may have a different view on what measures are necessary to protect these policy objectives. For example, Russia’s data localisation measures – often criticised as protectionist data localisation⁸²⁰ – are included in Russia’s law on the protection of personal data and are, therefore, framed as data protection measures.⁸²¹ Ultimately, the economic interests of liberalising digital trade that the EU factors in, in the balancing between trade and fundamental rights to privacy and data protection, should not only include the economic gains from liberalising personal

⁸¹⁶ See, e.g., Coleman(2019); Couldry, Mejias (2019).

⁸¹⁷ Micallef (2019), p. 866, arguing that Art. 2 ‘can be used to neutralize the advantages that the first article brings’.

⁸¹⁸ Herbert Smith Freehills LLP (2018).

⁸¹⁹ Communication from the Commission, *A European Strategy for Data*, COM(2020) 66 final, 19 February 2020, p. 23.

⁸²⁰ See, e.g., Newton (2018), arguing that Russia is ‘using data localization laws to provide capital flow to Russian companies by requiring them to pay to store Russian data on Russian servers’ and by doing so is creating barriers to entry for international companies to the Russian market.

⁸²¹ Art. 18(5) Федеральный закон ‘О персональных данных’ от 27.07.2006 N 152-ФЗ (Federal Law on Personal Data of 27 July 2006 No. 152-FZ).

data flows *from* the EU, but also – and perhaps more importantly – the economic gains from personal data flows *to* the EU from its trading partners.

To sum up, the risk that the EU's restrictions will be implicated by the proposed obligation not to restrict cross-border data flows under Article 1 of the model clauses is low. As a result, the chances that the EU will have to resort to Article 2 in defence of its restrictions on transfers of personal data are equally low. Because the prohibitions on data localisation in Article 1 primarily target the EU's trading partners, the exception of Article 2 is also most likely to be invoked by EU's trading partners.

As Chapter 3 of this thesis has explained, exceptions can be seen as a way to distinguish between restrictions on trade that are beneficial for society at large (public interest restrictions) and restrictions on trade captured by domestic industries which create redistribution of welfare and social costs (protectionism). The challenge is to draw a correct line between the two in each particular case, as this balance ultimately affects the balance between the interests of trade liberalisation and other public policy objectives. There will always be false positives and false negatives. The necessity test in the general exception uses multiple safeguards to ensure that trade interests are protected. Putting trade liberalisation above domestic (non-economic) public interests is likely to produce false positives, i.e. to outlaw domestic regulation genuinely pursuing public policy objectives as protectionist. By doing so, the necessity test ends up overprotecting economic trade liberalisation interests. On the other hand, the 'it deems appropriate' test – proposed by the EU for privacy and data protection exception in digital trade chapters – is likely to produce false negatives, as it can potentially filter out only cases (if any) where a state invokes the exception in manifestly bad faith.

Figuratively speaking, if the 'it deems appropriate' threshold is used, as compared to the necessity test of the general exception, the pendulum between trade liberalisation and competing policy objectives would swing to the other extreme. As discussed in Section 3.2.4.3, in the last several decades of the twentieth century, under the influence of neoliberal discourse, the international trading system has suffered from a 'protectionism bias' that favoured trade liberalisation over competing policy objectives. Conversely, the international trading system containing broad exceptions would, in effect, make compliance with trade liberalisation commitments voluntary. The underlying question here is that of the balance between trade liberalisation and other public policy interests, which ultimately harks back to the goals of the international trading system that states want to achieve. This question should be subject to a wide political and societal debate and not buried into the arcane details of negotiations on the wording of one particular exception of a trade instrument.

To sum up, in its proposed digital trade exception for privacy and data protection, the EU should use a threshold different from ‘it deems appropriate’. Nor is the necessity test (currently used in the general exception for privacy and data protection, as Chapter 2 has demonstrated), a suitable option due to its potential incompatibility with the EU’s constitutional framework. Given that the model clauses analysed in this Section are only a starting point in international trade negotiations, the EU still has sufficient wiggle-room to adapt its negotiation strategy. In Section 4.3, this Chapter will take stock of other tests employed in international trade law that strike a balance between trade liberalisation and domestic public policy objectives, in order to find an alternative test that would provide enough autonomy for the EU to protect privacy and personal data, whilst allowing it to pursue the goal of digital trade liberalisation and uphold the rules-based international trading system. In other words, Section 4.3 looks for a standard that lies somewhere between an overly broad ‘it deems appropriate’ or ‘it considers necessary’ tests and an overly restrictive necessity test. But first, the next Section considers the last point of critique of Article 2 of the EU’s proposed model clauses.

4.2.6 Downsides of the EU-centric approach

As mentioned in the introduction to this thesis, the EU stands out for its commitment to a high level of protection of privacy and personal data as binding fundamental rights guaranteed in Articles 7 and 8 of the EU Charter. International and regional human rights law plays only a limited role in international trade law.⁸²² Therefore, for the EU to safeguard its autonomy to regulate privacy and the protection of personal data as fundamental rights vis-à-vis its international trade obligations, it is essential to include in international trade agreements provisions that reflect the normative foundations of privacy and data protection in the EU and accommodate a regulatory design of domestic frameworks most adequate to this normative goal.⁸²³ This seems to be precisely the rationale behind the provisions in the proposed model clauses stating that, first, ‘[e]ach Party recognises that the protection of personal data and privacy is a fundamental right’ and, second, ‘[n]othing in this agreement shall affect the protection of personal data and privacy afforded by the Parties’ respective safeguards’.⁸²⁴ This Section argues, however, that the first provision is overly EU-centric and can be amended without undermining the EU’s autonomy to protect privacy and personal data as fundamental rights in domestic law.

Although privacy is fairly widely recognised as a fundamental right,⁸²⁵ a *sui generis* fundamental right to the protection of personal data is much less common. It is not fully

⁸²² For a discussion, see Yakovleva (2018), pp. 487-489, 499-508.

⁸²³ *Ibid.*

⁸²⁴ Art. 2 EU model clauses on cross-border data flows.

⁸²⁵ The right to privacy is enshrined in Art. 12 UDHR; Art. 17 ICCPR; Art. 8 ECHR.

recognised by the UN⁸²⁶ and reflects to a large degree the European legal tradition. This right is recognised in the Council of Europe Convention 108+ – the only binding international legal instrument on data protection – and the EU legal system.⁸²⁷ Although almost 60% of countries in the world have a data protection law,⁸²⁸ not many of those countries (outside the European Union and the Council of Europe member states) recognise the protection of personal data as a fundamental right. For example, among the countries currently negotiating bilateral trade agreements where the EU has included the proposed model clauses, only Chile⁸²⁹ and Tunisia⁸³⁰ recognise data protection as a fundamental right, while Australia,⁸³¹ Indonesia,⁸³² and New Zealand⁸³³ do not. Similarly, not all WTO members adhere to the fundamental rights approach to the protection of personal data. The most obvious examples of countries that do not recognise this right are China,⁸³⁴ Russia⁸³⁵ and the United States. Although many countries are currently reviewing their data protection framework and are strengthening the protection of personal data, it is unclear whether the protection of this right as a fundamental right will become widely recognised. For example, although the US has recently intensified efforts to adopt a federal privacy law, which would increase the level of protection of personal data in the business context, such protection is still viewed as a consumer – and not a constitutional – right.⁸³⁶ As

⁸²⁶ The UN framework was developed long before the rise of personal data protection frameworks. The UN Guidelines for the Regulation of Computerized Personal Data Files, adopted by General Assembly resolution 45/95 of 14 December 1990 only refer to the human right to privacy. The UN has recently been also working on harmonising the data protection standards of the UN members. See, e.g., Personal Data Protection and Privacy Principles, Adopted by the UN High-Level Committee on Management (HLCM) at its 36th Meeting on 11 October 2018, which, however, also do not mention specifically the right to the protection of personal data, but only the right to privacy.

⁸²⁷ See European Union Agency for Fundamental Rights and Council of Europe. (2018), p. 21ff.

⁸²⁸ 58%, according to UNCTAD. UNCTAD, *Data Protection and Privacy Legislation Worldwide*, https://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Data-Protection-Laws.aspx (accessed 28.11.2020). 57% according to Greenleaf. Greenleaf (2019), p. 4.

⁸²⁹ DLA PIPER, DATA PROTECTION LAWS OF THE WORLD, *Chile*, <https://www.dlapiperdataprotection.com/index.html?c=CL&c2=&go-button=GO&t=law>.

⁸³⁰ DLA PIPER, DATA PROTECTION LAWS OF THE WORLD, *Tunisia*, <https://www.dlapiperdataprotection.com/index.html?t=law&c=TN&c2=>. Tunisia is also a party to Convention 108 since 2017.

⁸³¹ DLA PIPER, DATA PROTECTION LAWS OF THE WORLD, *Australia*, <https://www.dlapiperdataprotection.com/index.html?t=law&c=AU&c2=>

⁸³² DLA PIPER, DATA PROTECTION LAWS OF THE WORLD, *Indonesia*, <https://www.dlapiperdataprotection.com/index.html?t=law&c=ID&c2=>

⁸³³ DLA PIPER, DATA PROTECTION LAWS OF THE WORLD, *New Zealand*, <https://www.dlapiperdataprotection.com/index.html?t=law&c=NZ&c2=>

⁸³⁴ See, e.g., Aaronson, Leblond (2018), p. 263 (showing that China's governance over data is primarily driven by national security and sensorship concerns). At the time of writing, China is in the process of adopting a comprehensive law on the protection of personal data, which is said to be 'inspired' by the GDPR. Zhang, Yin (2020). It does not, however, lead to a recognition of protection of personal data as a fundamental right. See Luo, Wang (2020).

⁸³⁵ Russia's constitution protects the right to privacy but does not mention the protection of personal data (Arts. 23-24 Конституция Российской Федерации от 12.12.1993 с изменениями от 01.07.2020. (Constitution of the Russian Federation of 12 December 1993 as amended on 1 July 2020)).

⁸³⁶ See Kerry (2019); Meyer (2018).

Chander, Kaminski and McGeeveran rightly point out, the fundamental difference between the US and the European approaches to their data privacy regimes is not just the different language used in these two legal systems ('data protection' in Europe versus 'privacy law in the US), but also that 'data protection' is universal in Europe, while most American law focuses on 'consumer protection'.⁸³⁷ They also argue that the California Consumer Privacy Act (CCPA), despite some similarities with the GDPR, is still developed in the American tradition.⁸³⁸ It is the CCPA, in their view, not the GDPR, that is 'catalyzing the development of U.S. data privacy law'.⁸³⁹ More broadly, as Whitman argues, Americans and continental Europeans perceive privacy differently and have two different cultures of privacy. While '[c]ontinental privacy protection, – he argues – are, at their core, a form of protection of a right to respect and personal dignity', in America it 'is much more oriented toward values of liberty, and especially liberty against the state'.⁸⁴⁰ In a similar vein, Schwartz and Peifer conclude that there is a 'conceptual gulf between the data privacy systems of the EU and United States based on the different legal identities that they provide for the individual'.⁸⁴¹ While the 'EU has created a privacy culture around "rights talk" that serves to protect "data subjects" <...> [i]n the United States, the focus is on "marketplace discourse" about personal information and the safeguarding of "privacy consumers."'”⁸⁴²

From this discussion it follows that recognition of the protection of personal data as a fundamental right in paragraph 1 of Article 2 of the proposed model clauses is EU-centric. It induces its foreign trading partners to adhere to the EU's values, which are not necessarily in line with their own legal systems. Viewing privacy and data protection as a norm of governance deeply rooted in a country or region's social, political and democratic structure suggests that, to maintain the integrity of their governance structure, countries must retain the autonomy to pursue such priority interests and values.⁸⁴³ Not every country will see the right to the protection of personal data as a similar public policy target as the EU and its member states, nor can all countries be expected to be cut from the same normative cloth. In other words, it is important to acknowledge that not all differences need to be harmonised, as long as there is a mechanism to ensure that the interests of both sides are respected and taken into account.

This Section, therefore, suggests that the proposed provision requiring each Party to recognise that the protection of personal data and privacy is a fundamental right could be

⁸³⁷ Chander, Kaminski, McGeeveran (2019), pp. 12-13.

⁸³⁸ *Ibid.*, p. 19.

⁸³⁹ *Ibid.*, p. 25.

⁸⁴⁰ Whitman (2004), pp. 1159-1162. See also Petkova (2019), pp. 153-154.

⁸⁴¹ Schwartz, Peifer (2017), p. 156.

⁸⁴² *Ibid.*, p. 119.

⁸⁴³ Reidenberg (2000), p. 1320.

rephrased in the course of trade negotiations as requiring each Party to recognise each other's *autonomy to choose the level of protection* of privacy and personal data, *including their protection as fundamental rights*.

4.3 Thresholds alternative to 'necessity', 'it considers necessary' and 'it deems appropriate' tests

This Section discusses how far the EU can go in tightening the currently proposed 'it deems appropriate' threshold without compromising on the fundamental rights to privacy and data protection. This identifies the potential fallback options for the EU in relation to a threshold of a digital trade exception for privacy and data protection in international trade negotiations. Moving away from the two 'extremes' of 'necessity' in the general exception and 'it deems appropriate' or 'it considers necessary' tests in the proposed digital trade exception for privacy and data protection, this Section explores whether other thresholds could be more suitable in safeguarding the EU's autonomy to protect privacy and personal data as fundamental rights while liberalising cross-border data flows and preserving the rules-based international trading system. Considerations applied in the selection of the relevant thresholds for analysis in this section are: (1) presence of the threshold in an existing trade agreement; (2) relevance to privacy and data protection, in particular, whether the threshold is used in an existing provision for privacy and data protection; and (3) availability of case law and academic literature. Thresholds selected with these considerations in mind and analysed in this Section are: non-circumvention, non-avoidance, reasonableness, and the prohibition of arbitrary or unjustified restriction on trade from the chapeau of the general exception.

This Section makes two arguments. First, that any of the following three thresholds are a better alternative to both the 'necessity' and 'it deems appropriate' tests: non-circumvention, non-avoidance and reasonableness. Second, to ensure more predictability and control for the parties to a trade agreement over the interpretation of the chosen threshold of the digital trade exception, restrictive mechanisms are necessary.

On the first point, interpretation of these three standards in academic literature and (scarce) WTO case law is circular in the sense that the interpretation of one refers to the other. Using prohibition of arbitrary or unjustifiable discrimination or of a disguised restriction on trade as a threshold, however, is undesirable primarily because of the 'legacy clout' of its interpretation by the WTO adjudicating bodies in the chapeau of the general exceptions in the GATT and GATS, which has been, at times, dangerously close to 'necessity' in the past. Principles of good faith and the prohibition of abuse of rights, which are a common denominator in the interpretation of all of the three alternative thresholds, as well the indeterminacy of the meaning of these thresholds in case law and literature,

would allow a dispute-settlement panel to build the interpretation of any of the thresholds in relation to privacy and data protection almost from scratch. The interpretation of these principles in relation to domestic restrictions on transfers of personal data could amount to a nuanced approach where the strictness of the threshold is situated on the continuum between the necessity test of the general exception and the ‘it considers necessary’ test of the national security exception, depending on the interference of the trade rules requiring free data flows with the rights to protection of privacy and personal data under domestic law of the Party to the agreement. In the application to EU law, the strictness of the trade law threshold for domestic privacy and data protection measures would be proportionate to the magnitude of the risk of interference with the fundamental rights to privacy and the protection of personal data. In short, a more lenient test would cover situations where the risk is lower, a more stringent test when the risk is higher, thus mirroring the granular framework for data transfers in EU law proposed in Section 5.4.3 of this thesis.

On the second point, this section argues that the precise wording of the threshold used to construct the exception for privacy and data protection (just as any other exception) matters, but only up to a point. The principles of good faith and the abuse of rights that are used to determine their meaning, are open norms, the exact meaning of which is essentially determined *for each situation* by adjudicators. This insight harks back to the conclusions of the previous Chapter of this thesis – that the discourse governing the interpretation of international trade law norms is just as important, if not more, as their wording. The flexibility of the principles of good faith and the prohibition of the abuse of rights is not only their main advantage, but also their main drawback, as it gives broad discretion to adjudicators.

This Section proceeds as follows. Sections 4.3.1-4.3.4 provide examples of the use of each of the above-mentioned thresholds in WTO and bi-lateral and regional trade agreements, discuss the substance and interpretation of each of them, and compare each threshold to the necessity test of the general exception and the ‘it considers necessary’ test of the national security exception. Section 4.3.5 reflects on the wisdom of using any of them in a digital trade exception for privacy and data protection to replace the currently proposed ‘it deems appropriate’ test, and the possible restrictive mechanisms limiting the adjudicators’ discretion in applying those alternative tests.

4.3.1 Non-circumvention

A non-circumvention clause can be found, for example, in the exceptions from:

(1) the obligation on cross-border information flows in financial services chapters,⁸⁴⁴ and

(2) a horizontal provision on cross-border data flows in digital trade agreements of the 2017 EU Council proposal for a data protection exception in digital trade agreements, which preceded the 2018 proposal mentioned in Section 4.2 of this Chapter.⁸⁴⁵

According to the WTO Understanding on Financial Services,

Nothing in this paragraph restricts *the right of a Member to protect personal data, personal privacy* and the confidentiality of individual records and accounts so long as such right is *not used to circumvent the provisions of the Agreement*.⁸⁴⁶

Similar provisions can be found in several other EU-led trade agreements, including those with Singapore⁸⁴⁷ and Japan.⁸⁴⁸

The ‘non-circumvention’ requirement has never been applied in practice at the WTO. Moreover, it is seldom discussed in literature. According to von Bogdandy and Windsor, although the requirement ‘not to circumvent’ has not been defined, ‘it is reasonably arguable that circumvention is equivalent to avoidance’.⁸⁴⁹ Similarly, on the basis of a non-scientific survey of the WTO and GATT dispute settlement records, Jarreau concluded that “‘to circumvent’ essentially means “‘to avoid’”.⁸⁵⁰ If ‘circumvention’ and ‘avoidance’ are equivalent notions, then the threshold of the data protection exception in the Understanding

⁸⁴⁴ Starting from the 1994 Understanding on Commitments in Financial Services and up to recently concluded CETA, rules in EU-led trade agreements on the liberalisation of trade in financial services contain a provision that requires the parties ‘not to take measures that prevent’ or to ‘permit’ the transfer of information or the processing of financial information, including transfers of data by electronic means, where such transfers of information, processing of financial information are necessary for the conduct of the ordinary business of a financial service supplier (obligation on free flow of financial information). Art. B.8 Understanding on Commitments in Financial Services; EU Schedule of Specific Commitments Supplement 4 Revision GATS/SC/31/Suppl.4/Rev.1. Understanding on Commitments in Financial Services is not a part of the GATS, but is an appendix to the Final Act of the Uruguay Round. Understanding is not legally binding per se, it is ‘an optional and alternative approach to making specific commitments on financial services’. See WORLD TRADE ORGANIZATION, *Financial Services*, https://www.wto.org/english/tratop_e/serv_e/finance_e/finance_e.htm. See also Art. 13.15(1) CETA; Art. 157(1) EU-Colombia-Peru FTA; Art. 22(1) EU-Mexico Coordination and Cooperation Agreement; Art. 7.43(a) EU-Korea FTA; Art. 198(1) EU-Central America Association Agreement; Art. 122(1) EU-Chile Association Agreement; Art. 8.54(1) EU-Singapore FTA.

⁸⁴⁵ Council of the European Union, Concept paper on data flows in trade agreements.

⁸⁴⁶ Art. B.8 Understanding on Commitments in Financial Services, second sentence. (emphasis added)

⁸⁴⁷ Art 8.54(2) EU-Singapore FTA.

⁸⁴⁸ Art. 8.63(2) JEFTA.

⁸⁴⁹ Von Bogdandy, Windsor (2008), p. 658.

⁸⁵⁰ Jarreau (1999), pp. 59-60. Jarreau refers to WTO, Panel Report, *Indonesia – Autos*, paras. 4.24, 4.25; Dispute Settlement Body: Minutes of Meeting, 1997 WL 908915, 30 July 1997, Item 4; GATT, *Canada-Import Restrictions on Ice Cream and Yoghurt*, pp. 68, 79; GATT, *Japan-Trade in Semi-Conductors*, pp. 116, 126.

is functionally the same as the threshold in the prudential exception discussed in the following section.

Another example is useful in shedding additional light on the matter. The provision proposed in the 2017 EU Council's concept paper on data flows reads as follows:

Nothing in the Agreement restricts the right of a Party to protect personal data and privacy so long as such right is not *used to circumvent* paragraph 1.⁸⁵¹

To ensure greater legal certainty, the concept paper contains a footnote setting out a legally binding interpretation of the standard of 'non-circumvention', which explains that:

... circumvention means *the abuse of the right* to protect personal data and privacy by a Party *with the intention to avoid* the Party's obligations under paragraph 1.⁸⁵²

The concept paper explains that the purpose of the 'non-circumvention' clause is to prevent the *intentional* use of the legitimate policy objectives, such as data protection, to *disguise protectionist policies*.⁸⁵³ The concept paper also explains that the anti-circumvention clause must not allow trade adjudicating bodies to doubt the 'necessity of data protection measures in question'.⁸⁵⁴ This suggests that the non-circumvention standard, at least in the EU Council concept paper, is envisaged as a standard *lower* than the 'necessity' test of the general exception.

Although the available tools to interpret non-circumvention do not allow one to fully explain the meaning of this standard, they do make clear that this standard does not require the party invoking the exception to prove the 'necessity' of the contested measure. How different the non-circumvention threshold is from 'it considers necessary' or 'it deems appropriate' tests however, remains unclear. As discussed in section 4.2.3 of this Chapter, a prohibition to intentionally circumvent international trade commitments is also a component of the 'it considers necessary' standard, as applied by the WTO Panels in recent cases. The interpretation of non-circumvention as the use of legitimate policy objectives to 'disguise protectionist policies' offered by the footnote in the EU Council concept paper has little value, therefore, in part because there is no uniform understanding of what 'protectionism' is, as demonstrated in Chapter 3 of this thesis. The discussion of the 'non-avoidance' threshold in the following Section – a standard equivalent to 'non-

⁸⁵¹ (emphasis added) Council of the European Union, Concept paper on data flows in trade agreements, p. 2. Para. 1 referred to in this provision reads as follows: 'No Party may prevent a person of the other Party from transferring, processing or storing data, within or outside the Party's territory, where such activity is necessary for the conduct of that person's business'.

⁸⁵² *Ibid.* (emphasis added)

⁸⁵³ *Ibid.*

⁸⁵⁴ Council of the European Union, Concept paper on data flows in trade agreements, p. 3.

circumvention — brings the investigation of the relationship between non-circumvention standard and ‘it considers necessary’ test a step further.

4.3.2 *Non-avoidance*

The most well-known ‘non-avoidance’ clause appears in the prudential exception (also known as prudential carve-out⁸⁵⁵) of Article 2(a) ‘Domestic Regulation’ of the GATS Annex on Financial Services. It reads as follows:

Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking *measures for prudential reasons* <...>. Where such measures do not conform with the provisions of the Agreement, they shall not be *used* as a means of *avoiding* the Member’s commitments or obligations under the Agreement.⁸⁵⁶

This clause was later reproduced in the prudential exceptions of other trade agreements, for example, in the KORUS trade agreement⁸⁵⁷ and the CPTPP.⁸⁵⁸ This demonstrates that the prudential exception provides a widely accepted example of an exception in trade law not based on the necessity test.

In addition to the prudential exception, the non-avoidance clause also appears in the exception for privacy and data protection in a cross-border data flow provision in the financial services chapter of the CPTPP. That exception reads as follows:

Nothing in this Section restricts the right of a Party to adopt or maintain measures to:

(a) protect personal data, personal privacy and the confidentiality of individual records and accounts; <...>

⁸⁵⁵ As already mentioned above, there is a scholarly debate on whether Art. 2(a) GATS Annex on Financial Services has a function of an exception or, alternatively, carves-out prudential measures from the scope of the agreement. Although the article is entitled ‘Domestic Regulation’ and – according to Cantore’s research into *Travaux Préparatoire* - was intended to work as a ‘provision that excludes the application of other provisions,’ and not an ‘exception,’ this provision is predominantly seen, both by the WTO adjudicative bodies and scholars, as an exception rather than a carve out. Cantore (2014), p. 1242; WTO, Background Note by the Secretariat, *Financial Services*, S/C/W/312, S/FIN/W/73, 3 February 2010, para. 28; WTO, Panel Report, *Argentina – Financial Services*; para. 7.814; WTO, Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), adopted by the Council for Trade in Services on 23 March 2001, S/L/92. For further discussion see Cantore (2014), pp. 1232, 1242; Cottier, Krajewski (2010), pp. 826-827; Leroux (2002); Marchetti (2011); Von Bogdandy, Windsor (2008); Yokoi-Arai (2008); Mitchell, Hawkins, Mishra (2016), p. 807.

⁸⁵⁶ (emphasis added)

⁸⁵⁷ Art. 13.10(1) KORUS, footnote omitted.

⁸⁵⁸ Art. 11.11(1) CPTPP, footnotes omitted.

provided that this right is not used as a means *of avoiding* the Party's commitments or obligations under this Section.⁸⁵⁹

The 'non-avoidance' standard has never been interpreted by the WTO adjudicating bodies. In the only WTO case addressing the prudential exception, neither the Panel nor the Appellate Body reached the second sentence of the provision (which contains the non-avoidance clause).⁸⁶⁰ However, the meaning of this threshold is discussed in a WTO Background Note⁸⁶¹ and in academic literature. There seems to be a consensus that the 'non-avoidance' standard in the prudential exception provides broad autonomy for WTO Members to adopt financial regulatory measures, that is, unless those measures are 'purely or primarily protectionist in effect'.⁸⁶² As explained in the WTO Background Note, the prudential exception is *broader than the general exception*:

In contrast to health and safety, for example, where only 'necessary' measures are excepted [under the general exception], *all* prudential measures are excepted. As a result, a prudential measure may not be challenged on the grounds of whether it is 'necessary' or 'least trade restrictive'.⁸⁶³

The main factors cited as the rationale behind safeguarding such broad regulatory space for domestic financial measures are: first, financial services are crucial for the functioning of today's economies; second, as problems in the financial sector often emerge *ex post*, it is difficult to foresee which measures will be required to address those problems; and third, there is a lack of both coordination and international standards on prudential measures.⁸⁶⁴

Commenting on the meaning of the 'non-avoidance' threshold, the WTO Background Note endorses the approach adopted by Leroux and by von Bogdandy and

⁸⁵⁹ Section B Annex 11-B to Chapter on Financial services CPTPP. It should be recalled that this exception differs from Art. 14.11 CPTPP. (emphasis added) Financial services are explicitly excluded from the scope of the CPTPP e-commerce chapter, thus the general obligation on cross-border transfers as well as the exception from it under Article 14.11 do not apply to financial data flows. Art. 14.2(4) and (5) CPTPP. Fefer claims that those were US financial regulators who 'advocated for the explicit ability to restrict cross-border data flows in TPP, in addition to the flexibility provided by the prudential exception'. Fefer (2017), p. 12. Although the US later withdrew from the TPP, the provision has remained unchanged in the final version of the CPTPP.

⁸⁶⁰ WTO, Panel Report, *Argentina – Financial Services*; WTO, Appellate Body Report, *Argentina – Financial Services*.

⁸⁶¹ WTO, Background Note by the Secretariat, *Financial Services*, S/C/W/312, S/FIN/W/73, 3 February 2010, para. 31. Background notes of the WTO Secretariat are of limited interpretative value and can at most be used as supplementary means of interpretation. See WTO, Panel Report, *Mexico-Telecoms*, para. 7.43.

⁸⁶² Von Bogdandy, Windsor (2008), p. 634-636. See also Jarreau (1999); Mitchell, Hawkins, Mishra (2016); Delimatsis (2012), p. 1337; Cantore (2018), pp. 67-68.

⁸⁶³ WTO, Background Note by the Secretariat, *Financial Services*, S/C/W/312, S/FIN/W/73, 3 February 2010, para. 31. (emphasis added) Referring to Key (2003).

⁸⁶⁴ Mitchell, Hawkins, Mishra (2016), pp. 791, 814; Cantore (2018), pp. 63, 187.

Windsor. The WTO secretariat seconds their opinion that the ‘non-avoidance’ requirement is ‘clearly intended to *avoid abuse* in the use of the exception’.⁸⁶⁵ For Leroux, the purpose of this requirement is ‘to prevent the *abuse of the exception* for prudential measures’ and, as a minimum, to impose ‘an obligation of *good faith* with respect to the adoption and application of prudential measures’.⁸⁶⁶ This interpretation creates a parallel between the ‘non-avoidance’ standard and the chapeau of the general exception and prompts several scholars to argue that the term ‘avoiding’ should take into account the rich case law on the *chapeau* of Article XX GATT 1994, as it performs a similar function.⁸⁶⁷ Scholars also note that the provision can be read ‘as requiring some level of *intent to circumvent* duties under GATS’.⁸⁶⁸

Cantore criticises the interpretation of ‘non-avoidance’ through the principle of good faith as circular. In his view, ‘good faith is not a self-interpretive concept and depends on the time, context and situations in which it is invoked. As such, this approach leaves considerable discretion for panels to make evaluations on a case-by-case basis.’⁸⁶⁹ This thesis will come back to this interesting argument in Section 4.3.5 below, where it analyses and compares the alternative thresholds. Furthermore, Cantore rightly warns of the dangers of importing the WTO case law on *chapeau* in the interpretation of the prudential exception due to the absence of similarity in the wording of both provisions, taking into account also the difference in the function they perform, and the practice of the WTO adjudicating bodies of conducting an analysis of domestic policy strategies. As a result, he argues, this would shrink the regulatory autonomy safeguarded under the prudential exception.⁸⁷⁰ As the WTO Appellate Body confirmed in its 2020 *Australia — Tobacco Plain Packaging (Honduras)* report, ‘it is well established that different words in a treaty are generally intended to convey a different meaning’.⁸⁷¹ Despite the difference in structure and wording, however, several scholars argue that the non-avoidance standard does not substantially differ from the ‘reasonableness’ requirement in other prudential exceptions (the reasonableness requirement is discussed in the following Section).⁸⁷² For example,

⁸⁶⁵ WTO, Background Note by the Secretariat, *Financial Services*, S/C/W/312, S/FIN/W/73, 3 February 2010, para. 30. (emphasis added). Referring to Leroux (2002).

⁸⁶⁶ Leroux (2002), pp. 430-431 (emphasis added). See also von Bogdany, Windsor (2008).

⁸⁶⁷ von Bogdandy, Windsor (2008), p. 635. See also Mitchell, Hawkins, Mishra (2016), p. 812; Thang (2007), pp. 116-117; Barbee, Lester (2014), p. 960; de Meester (2008), p. 29. This position was also advanced by Argentina in WTO, Panel Report, *Argentina – Financial Services*, paras 7.783, 7.791-7.792. But see Cantore (2018), p. 180.

⁸⁶⁸ Von Bogdandy, Windsor (2008), p. 636. (emphasis added).

⁸⁶⁹ Cantore (2018), pp. 71-72.

⁸⁷⁰ *Ibid.*, pp. 71-72, 169, 180-183. For a discussion on the importation of standards of review from other provisions by WTO adjudicating bodies see, more generally, Mavroidis (2013).

⁸⁷¹ WTO, Appellate Body Reports, *Australia – Tobacco Plain Packaging (Honduras and Dominican Republic)*, para. 6.646.

⁸⁷² Cantore (2018), p. 126. Mitchell, Hawkins, Mishra (2016), p. 813.

Mitchell et al contend that the non-avoidance standard implies the reasonableness requirement, which is why the interpretation of ‘reasonableness’ in WTO case law could be used to interpret ‘non-avoidance’.⁸⁷³

Although to invoke the prudential exception the defending party need not prove its necessity or trade restrictiveness, the choice of contested prudential measures is not left to the sole discretion of the defending party but is rather subject to an objective assessment. In *Argentina – Financial Services*, the Panel, whose assessment was not reviewed by the Appellate Body, concluded that:

the use of the word ‘for’ in the phrase ‘measures for prudential reasons’ denotes a rational relationship of cause and effect between the measure and the prudential reason. Thus, the Member taking the measure in question must demonstrate *that in its design, structure or architecture there is a rational relationship of cause and effect* between the measure it seeks to justify under paragraph 2(a) and the prudential reason provided. *A central aspect of this rational relationship of cause and effect is the adequacy of the measure to the prudential reason*, that is, whether the measure, through its *design, structure and architecture*, contributes to achieving the desired effect. Whether a measure has been taken ‘for prudential reasons’, that is, whether there is a rational relationship of cause and effect between the measure and the reason, can only be determined on a case-by-case basis, taking account of the particular characteristics of each situation and each dispute.⁸⁷⁴

In other words, instead of ‘necessity’ (as would be the case under the general exception), the party invoking the prudential exception must demonstrate the ‘adequacy’ of the design, structure and architecture of the measure. While this threshold, based on the interpretation above, is lower than ‘necessity’, it is sufficiently higher than that of ‘it considers necessary’ test, where the nexus between the measure and the national security interests is only subject to a ‘minimum requirement of plausibility’. It is unclear whether the same requirement of adequacy could be extrapolated to other exceptions. In particular, exceptions, which, on the one hand (unlike the national security exception), do not denote in their wording that the choice of the measures is at the discretion of the defending party, and on the other hand, do not use the preposition ‘for’ as in the prudential exception – for example, exceptions mentioned in the previous Section of this thesis. One could, however, argue that the *absence* of a specific wording calling for subjective choice of measures

⁸⁷³ Mitchell, Hawkins, Mishra (2016), p. 813.

⁸⁷⁴ WTO, Panel Report, *Argentina – Financial Services*, para. 7.891 (emphasis added)

opens the door wider for objective assessment of such choice, as compared to where there *is* such specific wording.

To sum up, the interpretation of the ‘non-avoidance’ threshold adds nuance to the interpretation of ‘non-circumvention’ for four main reasons. First, the interpretation favoured by the WTO Secretariat clearly sets the non-avoidance, and therefore the non-circumvention standard, apart from the necessity test of the general exception as safeguarding a broader regulatory autonomy. Second, both the WTO and scholarly interpretation further deepen the link between non-circumvention and non-avoidance, on the one hand, and the doctrines of good faith and the abuse of right, on the other. Unfortunately, besides a proposal to import case law from the chapeau of the general exception to interpret the principle of good faith – which is undesirable – there is no guidance on what good faith means in the context of the prudential exception. As a result, the interpretation of non-avoidance does not shed much more light on the relationship between this standard (and the standard of non-circumvention) with the ‘it considers necessary’ test. Third, unlike the ‘it considers necessary’ test, which clearly reserves the autonomy of the defending party to determine the appropriateness of the measures, the ‘non-avoidance’ threshold does not prevent adjudicating bodies from subjecting the appropriateness of defended measures to a fully-fledged objective assessment. Therefore, ‘non-avoidance’ affords less regulatory autonomy than the ‘it considers necessary’ test. Fourth, some interpretations use the reasonableness standard as a tool to interpret the non-avoidance standard. The following Section turns to this third alternative threshold.

4.3.3 Reasonableness

In several trade agreements, the ‘non-avoidance’ standard in the prudential exception is replaced by the ‘reasonableness’ one. For example, according to Article 13.16(1) of CETA,

This Agreement does not prevent a Party from adopting or maintaining *reasonable* measures *for prudential reasons*, including: <...>⁸⁷⁵

A similar provision is used in the prudential exception of NAFTA (Article 1410(1)).

To the knowledge of this thesis’ author, the prudential exception under NAFTA was only applied once – in an international investment case – and not actually interpreted by the panel on substance owing to judicial economy. In *Fireman’s Fund v Mexico*, the NAFTA investment tribunal only noted that the prudential exception ‘permits reasonable measures of a prudential character even if their effect (as contrasted with their motive or

⁸⁷⁵ Art. 13.16(1) CETA. (emphasis added)

intent) is discriminatory. The Tribunal rejected the contention that a measure discriminatory in effect is *eo ipso* unreasonable.⁸⁷⁶

The tribunal referred to an authoritative interpretation of Chapter 14 of NAFTA by Wethington, the principal US negotiator:

Article 1410(1)(a) . . . carves out of the national treatment and other obligations of the financial services chapter a right to take reasonable measures even though discriminatory in application, to protect the safety and soundness of the financial system.⁸⁷⁷

Analysing this award, Cantore concludes that the ‘reasonableness’ requirement only targets measures ‘that are *manifestly not linked* with a prudential objective and lead to the backhanded *avoidance* of obligations or commitments can be targeted’.⁸⁷⁸ Unlike the necessity test in the general exception, it does not require the assessment of costs and benefits or the evaluation of less restrictive means.⁸⁷⁹

In CETA, the standard of reasonableness of the prudential carve-out⁸⁸⁰ is explained in the Understanding on the application of the prudential carve-out, which provides guidance on the interpretation of the carve-out in investment disputes.⁸⁸¹ This guidance draws a clear parallel between reasonableness and the *chapeau* of the general exception. One of the non-exhaustive principles, outlined in the Understanding, is that ‘a measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investors in like situations, or a disguised restriction on foreign investment’.⁸⁸²

The term ‘reasonable’ actually appears more than 200 times in the text of the WTO Agreements in a variety of contexts, but never as a threshold in an exception from trade rules.⁸⁸³ For example, ‘reasonable’ appears in Article X:3(a) of the GATT 1994. In *Dominican Republic – Import and Sales of Cigarettes*, the WTO Panel defined this term as meaning ‘in accordance with reason, not irrational or absurd, proportionate, having sound judgement’.⁸⁸⁴ However, as Cook explains, WTO adjudicators have also used reasonableness as an unwritten norm, even in the absence of a direct reference to it in a

⁸⁷⁶ ICSID, *Fireman’s Fund v. Mexico*, ICSID Case No. ARB(AF)/02/01, 17 July 2006, para 162.

⁸⁷⁷ *Ibid.*, paras. 163-165. See also Wethington (1994), § 5.07.

⁸⁷⁸ Cantore (2018), p. 129. (emphasis added)

⁸⁷⁹ *Ibid.*

⁸⁸⁰ Although this thesis has used the term ‘prudential exception’ rather than ‘prudential carve-out,’ it does refer to ‘prudential carve-out’ in the context of CETA because this terminology is used in this trade agreement.

⁸⁸¹ Annex 13-B to CETA, Understanding on the Application of Articles 13.16.1 and 13.21.

⁸⁸² *Ibid.*, para. 8(e).

⁸⁸³ Cook (2013), p. 3.

⁸⁸⁴ WTO, Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.385.

particular provision.⁸⁸⁵ The most relevant of such cases is the interpretation of the chapeau of the general exception, which is discussed in the following Section.

Despite the fact that, based on the scarce available literature, the reasonableness standard is very similar to both non-circumvention and non-avoidance, it is important to highlight one notable difference. While both the non-circumvention and non-avoidance requirements typically relate to how a contested measure *is used or applied*, the reasonableness requirement is addressed *to the measure itself*. It could be argued that, for this reason, the reasonableness requirement provides less regulatory autonomy than the other two standards. From this perspective, on the continuum between ‘necessity’ and ‘it considers necessary’ tests, the standard of reasonableness is somewhat closer to ‘necessity’. However, as is explained in the following Section, in investigating how the measure is applied, the WTO adjudicating bodies have also consistently inquired into the architecture and design of the measure.

4.3.4 Prohibition of ‘arbitrary or unjustifiable discrimination’ or a ‘disguised restriction on international trade’

The most well-known provision where the formula stated in the heading of this Section is used is the chapeau of the general exceptions contained in Articles XX GATT and XIV GATS (both of which are reproduced almost verbatim or incorporated *mutatis mutandis* in most post-WTO trade agreements around the world).⁸⁸⁶ Recall from Chapter 2 that the WTO adjudicating bodies follow a two-step assessment of whether a contested measure can be justified under one of the general exceptions.⁸⁸⁷ The chapeau requirement is the second step in that assessment.⁸⁸⁸ The chapeau requires that measures justified under one of the exceptions should not be ‘applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’.⁸⁸⁹

The same wording appears in article 5(d) of the GATS Annex on Telecommunications – together with the necessity test. This provision allows a WTO member to derogate from an obligation to provide access to public telecommunications infrastructure if this is ‘*necessary* to ensure the security and confidentiality of messages,

⁸⁸⁵ Cook (2013), p. 12.

⁸⁸⁶ See, e.g., Art. 28.3(2)(c)(ii) CETA; Art. 8.62(e)(ii) EU-Singapore FTA; Art. 167(1)(e)(ii) EU-Colombia-Peru FTA; Art. 7.50(e)(ii) EU-Korea FTA; Art. 203(1)(e)(ii) EU-Central America Association Agreement; Art. 135(1)(e)(ii) EU-Chile Association Agreement; Art. 23.1(2) KORUS; Art. 21.1(2) US-Singapore FTA; Art. 21.1(2) Dominican Republic-Central America-US FTA; Art. 21.1(2) US – Panama TPA; Art. 32.1(2) USMCA; Art. 29.1(3) CPTPP.

⁸⁸⁷ Section 2.3.2.

⁸⁸⁸ See, e.g., WTO, Appellate Body Report, *US – Gasoline*, p. 22. WTO, Appellate Body Report, *Brazil – Retreaded Tyres*, para. 139; WTO, Appellate Body Report, *US – Shrimp*, paras. 119-120; WTO, Appellate Body Report, *US – Gambling*, para. 292; WTO, Panel Report, *Argentina – Financial Services*, para. 7.586.

⁸⁸⁹ Art. XIV GATS, Art. XX GATT 1994.

subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services'. While the GATS Annex on Telecommunications does not specifically mention privacy, CETA and some of the US-led trade agreements refer to privacy in addition to the security and confidentiality of the communications.⁸⁹⁰ Some Telecommunication chapters in EU-led bi-lateral trade agreements include this wording, but without an accompanying necessity test.⁸⁹¹ In his 2019 article, Micallef proposed complementing Article 2 of the EU model clauses discussed in Section 4.2 of this Chapter with a proviso that the right to protection personal data and privacy 'is not to be unjustifiably used to circumvent rules for cross-border data transfers for reasons other than the protection of personal data'.⁸⁹² Because the provision in the Annex on Telecommunications has not yet been interpreted in practice, however, the rest of this Section focuses solely on the chapeau.

The language of the chapeau has been criticised as unclear,⁸⁹³ 'rife with ambiguity',⁸⁹⁴ and 'the vaguest, and therefore the most problematic' requirement of all those found in exception clauses.⁸⁹⁵ Just like the interpretation of the necessity test, the interpretation of the chapeau in general exceptions has been uneven throughout the years. Back in 1947, during negotiations of the general exceptions in the ITO Charter, the US Executive Committee on Economic Foreign Policy (ECEFP) warned that the language of the chapeau, (which was later included verbatim in the GATT 1947 and subsequently in the GATT 1994 and the GATS), was 'vague and diffuse, making it difficult, if not impossible, to assign specific content to it'.⁸⁹⁶ Furthermore, the ECEFP noted that the broad language of the chapeau could 'preclude the possible application of the exceptions to meet the legitimate circumstances for which the exceptions were designed'.⁸⁹⁷ Fast forward to present day, this characterisation turned out to be not far from the truth.

⁸⁹⁰ Art. 15.3(4) CETA; Art. 9.2(4) US – Singapore FTA; Art. 13.2(4) Dominican Republic-Central America-US FTA; Art. 13.2(4) US – Panama TPA; Art. 13.2(4) US-Chile FTA; Art. 13.2(4) US-Morocco FTA, Art. 14.2(4) US-Peru TPA; Art. 14.2(4) US-Colombia TPA; Art. 18.3(4) USMCA; Art. 13.4(4) CPTPP.

⁸⁹¹ Art. 15.3(4) CETA; Art. 192 EU-Central America Association Agreement.

⁸⁹² Micallef (2019), p. 868.

⁸⁹³ Bartels (2015), pp. 95-125. *Ibid.*, p. 96 (stating that although the disputes in *US—Gasoline*, *US—Shrimp*, *U.S.—Gambling*, *Brazil—Retreaded Tyres*, *EC—Seal Products* 'have given the chapeau a high profile, and yet it is still not clear what it requires'.

⁸⁹⁴ Riffel (2018), p. 143.

⁸⁹⁵ *Ibid.*, p. 176.

⁸⁹⁶ The chapeau in the New York Draft Charter, which was the subject of the critique, was formulated as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

Quoted from: Pinchis-Paulsen (2020), p. 147, fn. 274, p. 151.

⁸⁹⁷ *Ibid.*

Reflecting on the interpretation of the chapeau in WTO case law, Riffel neatly describes the interpretative conflict of the chapeau as revolving around the two extremes:

On one end of the spectrum, the chapeau is read as a stringent threshold requirement, thus reducing the policy space of states to regulate public welfare matters. On the other end, the chapeau reaffirms the tenet of good faith, which guides the performance of every treaty in any event.⁸⁹⁸

Just as the necessity test of the general exception, the standard of the chapeau is fairly hard to meet and has a very low success rate so far.⁸⁹⁹

4.3.4.1 Blurring the borderline between the chapeau and necessity test of the general exception

As is apparent from its wording, the test of the chapeau is meant to address the manner in which a measure is *applied*, rather than the measure itself or its content. This is how this provision was indeed interpreted in one of the earlier cases applying Article XX GATT 1994.⁹⁰⁰ In later cases, however, the Appellate Body departed from this narrow interpretation of the chapeau requirement. In contrast, it clarified that the application of a measure can also ‘most often be discerned from the *design, the architecture, and the revealing structure* of a measure’.⁹⁰¹ A WTO Panel took the same approach in the interpretation of the chapeau under Article XIV GATS.⁹⁰²

In *US-Shrimp*, the Appellate Body underlined that the ‘standards established in the chapeau are ... necessarily broad in scope and reach’. To Cantore, the Appellate Body’s ‘pervasive analyses regarding the design and structure of the measures under scrutiny’ set a high threshold for domestic measures to meet in order to satisfy the test.⁹⁰³ Put differently, it brings the standard of the chapeau dangerously close to the necessity test of the general exception, which, by definition should be different given that the two standards are a part of the same general exception. Similarly, Riffel argues that because of the Appellate Body’s scrutiny of substantive exceptions under the chapeau ‘the distinction between substance and administration of the measure became blurred’.⁹⁰⁴ He warns that ‘false

⁸⁹⁸ Riffel (2018), p. 143.

⁸⁹⁹ See, e.g., *Ibid.*; Public Citizen's Global Trade Watch. (2015).

⁹⁰⁰ WTO, Appellate Body Report, *US – Gasoline*, p. 22. See also WTO, Appellate Body Report, *US – Shrimp*, para. 115; WTO, Appellate Body Report, *Brazil – Retreaded Tyres*, para. 215. The WTO Panel reiterated the same interpretation of Art. XIV GATS chapeau in WTO, Panel Report, *US-Gambling*, para. 6.581.

⁹⁰¹ WTO, Appellate Body Reports, *EC – Seal Products*, para. 5.302, internal footnotes omitted, emphasis added. See also WTO, Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29; WTO, Appellate Body Report, *US-Shrimp*, para. 160.

⁹⁰² Panel Report, *Argentina – Financial Services*, para. 7.748 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.302) and para. 7.761.

⁹⁰³ Cantore (2018), p. 179. See also Mavroidis (2015), p. 390.

⁹⁰⁴ Riffel (2018), p. 176. See also Reid (2015), p. 247.

interpretation’ of the ambiguities of the chapeau ‘could lead adjudicatory bodies to seriously encroach on the Members’ regulatory autonomy’.⁹⁰⁵

4.3.4.2 Chapeau as an expression of the principles of good faith and prohibition of abuse of right

The matter was not clarified much when, in relation to the legal standard set by the requirements of ‘arbitrary discrimination’, ‘unjustifiable discrimination’ and ‘disguised restriction’ on international trade of the chapeau, the Appellate Body in *US-Gasoline* held that, taking into consideration the object and purpose of the provision and the drafting history, their meaning overlaps.⁹⁰⁶ It focused on the ‘fundamental theme’ behind them rather than the exact meaning of each phrase.⁹⁰⁷ The Appellate Body concluded that the ‘purpose and object’ of the chapeau ‘is generally the *prevention of abuse* of the exceptions’ of Article XX GATT and to ensure that the exceptions are not invoked ‘as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement’.⁹⁰⁸ In *US-Shrimp*, the Appellate Body had explained that the chapeau is ‘a fundamental part of *the balance of rights and obligations* struck by the original framers of the GATT 1947’.⁹⁰⁹ This balancing of the rights and obligations the Appellate Body is linked to the principle of good faith:⁹¹⁰

The chapeau of Article XX is, in fact, but one *expression of the principle of good faith*. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. *One application of this general principle*, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right impinges on the field covered by [a] treaty obligation, it must be exercised *bona fide, that is to say, reasonably*.⁹¹¹

⁹⁰⁵ Riffel (2018), p. 173.

⁹⁰⁶ WTO, Appellate Body Report, *US – Gasoline*, p. 25. This interpretation has been repeated in relation to Art. XIV GATS chapeau in WTO, Panel Report, *US-Gambling*, paras. 6-579-6.580. See also Cantore (2018), p. 173.

⁹⁰⁷ *Ibid.*

⁹⁰⁸ WTO, Appellate Body Report, *US – Gasoline*, p. 22, 25. (emphasis added). See also WTO, Panel Report, *US-Gambling*, paras. 6-579-6.580.

⁹⁰⁹ WTO, Appellate Body Report, *US – Shrimp*, paras. 157-159.

⁹¹⁰ Whether good faith here is applied as a general principle of international law, or is implied in the text of the chapeau, or by way of interpretation of the chapeau in good faith under Art. 31(1) VCLT, is debatable. For further discussion see Cottier, Schefer (2000), pp. 64-65; Panizzon (2006), pp. 109-110; Yoo, Ahn (2016), p. 442/ See also van den Bossche, Zdouc (2013), p. 573; Kiss (2006), para. 14.

⁹¹¹ WTO, Appellate Body Report, *US – Shrimp*, paras. 158-159, internal footnotes omitted, emphasis added. See also WTO, Appellate Body Report, *US – Gasoline*, p. 22. The same ‘reasonableness’ requirement the Appellate Body read in Art. XIV GATS the chapeau in WTO, Appellate Body Report, *US – Gambling*, para. 339.

In the same report, the Appellate Body also explained that the location of the ‘line of equilibrium’ between the rights and obligations of the Members, which the chapeau aims to achieve, ‘is not fixed and unchanging; *the line moves* as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.’⁹¹² The ‘actual contours and contents’ of ‘arbitrary or unjustifiable discrimination’ and ‘disguised restriction on trade’ themselves vary depending on the type of measure under examination and the public policy interest which that measure aims to protect.⁹¹³ Generalising the application of the good faith and abuse of right standards to the chapeau by the WTO adjudicators, Panizzon concludes that these standards’ primary function is to control or push back ‘expansive or creationist readings of the exceptions to the liberalization obligation of GATT Article XX’, in other words, ‘to separate the “wheat” of real trade disputes from the “chaff” of non-trade disputes’.⁹¹⁴ This approach at least suggests that what the standard of the chapeau means is impossible to define *in general*, that is, without its application to the facts of a particular dispute.

4.3.4.3 Factors in assessment of ‘arbitrary or unjustifiable discrimination’

Turning to the assessment of whether discrimination is ‘arbitrary’ or ‘unjustifiable’, the Appellate Body has primarily considered the cause or the rationale of the discrimination in light of the objectives listed in paragraphs of Article XX.⁹¹⁵ In *US-Tuna II* the Appellate Body also considered whether ‘discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.’⁹¹⁶ These are, however, not the only factors that could be relevant in the assessment of ‘unjustifiable discrimination’, depending on the nature of the measure and the circumstances at hand, the effects of the discrimination⁹¹⁷ as well as other factors could be relevant for the assessment.

Looking at the cause or rationale behind a contested measure, the Appellate Body considered, in particular, the following factors:⁹¹⁸ (a) whether the contested measure was a ‘rigid and unbending requirement’ in that it required other countries to adopt a regulatory

⁹¹² WTO, Appellate Body Report, *US – Shrimp*, paras. 158-159, emphasis added.

⁹¹³ WTO, Appellate Body Report, *US – Shrimp*, para. 120. For a discussion see McRae (2000), p. 225.

⁹¹⁴ Panizzon (2006), p. 115.

⁹¹⁵ WTO, Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 225, 229-230; WTO, Appellate Body Report, *US – Tuna II (Mexico) Art. 21.5*, para. 7.316.

⁹¹⁶ WTO, Appellate Body Report, *US – Tuna II (Mexico) Art. 21.5*, para. 7.316 (quoting WTO, Appellate Body Reports, *EC – Seal Products*, para. 5.321.) See also WTO, Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.99.

⁹¹⁷ WTO, Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 229-230.

⁹¹⁸ WTO, Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225 (referring to WTO, Appellate Body Report, *US – Shrimp*, paras. 163-166, 172, and 177). These factors were also reiterated in WTO, Appellate Body Reports, *EC-Seal Products*, para. 5.305.

programme that is ‘*essentially the same*’ as opposed to ‘*comparable in effectiveness*’;⁹¹⁹ (b) whether the contested measure took into account different circumstances that may occur in territories of other WTO members;⁹²⁰ and (c) whether the defending party negotiated seriously with all WTO members, as opposed to doing so with some but not with others.⁹²¹ In prior cases, the Appellate Body considered a requirement to adopt an ‘essentially the same’ regulatory framework, as failure to take into account different circumstances in other WTO members and negotiating with some but not with others as inconsistent with the chapeau requirement.⁹²²

In *US-Gambling*, in applying the chapeau of Article XIV GATS, the key factor that the WTO panel considered in the assessment of ‘arbitrary and unjustifiable discrimination between countries where like conditions prevail’ and/or a ‘disguised restriction on trade’ was the *consistency* of the contested measure in which it was applied and enforced domestically.⁹²³ In that particular case, the Panel concluded that the contested measure did not meet the chapeau requirement because of inconsistency between the US federal measure prohibiting the remote supply of gambling and betting services and the interstate measure that permitted interstate pari-mutuel wagering over the telephone or other modes of electronic communication.⁹²⁴

4.3.5 Towards the goldilocks exception for privacy and data protection in future EU trade agreements

Building on the discussion in Sections 4.3.1-4.3.4 above, this Section explains, first, why any of the standards of non-circumvention, non-avoidance and reasonableness are better equipped as a prototype for a new threshold in the future digital trade exception than the standard of the chapeau of the general exception; and, second, it argues that the wording of the exception matters only up to a point and that a limiting mechanism ensuring more predictability and parties’ control over the interpretation of the exception is needed.

4.3.5.1 Undesirability of replicating the standard of chapeau in digital trade exception for privacy and data protection

As explained in the previous Sections, the interpretation of the prohibition of ‘arbitrary or unjustifiable discrimination’, or of a disguised restriction on international trade’ contained in the chapeau of the general exceptions is much more elaborate and

⁹¹⁹ Appellate Body Report, *US – Shrimp*, para. 177(emphasis added); see also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 163.

⁹²⁰ WTO, Appellate Body Report, *US – Shrimp*, paras. 163- 165.

⁹²¹ *Ibid.*, paras. 166 and 172.

⁹²² WTO, Appellate Body Report, *US-Shrimp*, paras. 166, 172.

⁹²³ WTO, Panel Report, *US-Gambling*, para. 6.584, 6.607.

⁹²⁴ *Ibid.*, para. 6.599.

nanced then the current understanding of the other three standards considered in Sections 4.3.1-4.3.3 above. However, it is precisely the availability of extensive WTO case law on the chapeau that presents the biggest risks in replicating the same standard in the future digital trade exception for privacy and data protection.

First, on the face of it, the standard of the chapeau appears to be less stringent than that of the necessity test of the general exception, because it aims at the assessment of the administration of a contested measure rather than its content and does not require that the measure should be the least trade restrictive. However, in practice, its interpretation was dangerously close to the necessity test. The latter, as explained in Chapter 2 of this thesis, does not leave the EU enough regulatory autonomy to protect privacy and the protection of personal data in line with its constitutional framework. Second, one of the factors in the assessment of ‘arbitrary or unjustifiable discrimination’, namely, whether the contested measure requires other countries to adopt a regulatory framework that is ‘*essentially the same*’ as opposed to ‘*comparable in effectiveness*’, is likely to be at odds with the requirement of ‘essential equivalence’ that the EU constitutional framework (as interpreted by the CJEU) imposes on other countries’ legal frameworks as a condition for unrestricted transfers of personal data from the EEA to their territory.⁹²⁵

In relation to these risks, one could make two objections. First, that ‘unjustifiability’, which appears in the standard of the chapeau, imposes a lower threshold for contested measures than ‘necessity’. As the Appellate Body explained in *Australia — Tobacco Plain Packaging (Honduras) Report* in relation to Article 20 of the TRIPS Agreement (which prohibits unjustifiable encumbrance on the use of trademarks) and the ‘necessity’ requirement in other provisions of the TRIPS Agreement:

reference to the notion of justifiability rather than necessity in Article 20 suggests that the degree of connection between the encumbrance on the use of a trademark imposed and the objective pursued reflected through the term “unjustifiably” is lower than it would have been had a term conveying the notion of “necessity” been used in this provision. Accordingly, a consideration of whether the use of a trademark has not been “unjustifiably” encumbered should not be equated with the necessity test within the meaning of Article XX of the GATT 1994 or Article 2.2 of the TBT Agreement.⁹²⁶

⁹²⁵ For a discussion about the ‘essential equivalence’ requirement in EU data protection law, see Section 5.2.2.

⁹²⁶ WTO, Appellate Body Report, *Australia – Tobacco Plain Packaging (Honduras and Dominican Republic)*, para 6.647.

This insight could be used to argue that the standard of the chapeau – due to the absence of similarity with ‘necessity’ – imposes a lower threshold than ‘necessity’.

The second objection is that despite similarity of wording, even if the chapeau standard is replicated in the future digital trade exception for privacy and data protection, it will not necessarily have the same meaning. For example, in *Australia — Tobacco Plain Packaging (Honduras)*, the Appellate Body also held that ‘arbitrary or unjustifiable discrimination’ in the chapeau of Article XX of the GATT 1994 ‘does not imply that the meaning imparted to this term in other contexts can be easily transplanted to the interpretation of Article 20 of the TRIPS Agreement’.⁹²⁷ Similarly, the WTO Secretariat, in its Note on ‘Necessity Tests’ in the WTO, explained that ‘even if there are similar thematic issues arising in the “necessity tests” in the different provisions in the WTO agreements, an interpretation developed in the context of a specific case or specific provision is *not necessarily transposable* to other provisions.’⁹²⁸ As a result, ““necessity tests” contained in different WTO Agreements or in different provisions of the same Agreement cannot necessarily be used interchangeably’.⁹²⁹

In response to these objections, this thesis contends that, although the meaning of the same terms is not ‘easily’ or ‘necessarily’ transplantable or transposable, such transplantation or transposition is not impossible, especially when the same words are used in another exception. WTO practice contains several circumstances in which this has happened. For example, there has been extensive cross-pollination between the interpretation of the notion of ‘likeness’ in the MFN, and national treatment provisions in the GATT 1994 and the GATS (despite the differences between them⁹³⁰), as well as between the general exceptions in Article XX GATT 1994 and Article XIV GATS – irrespective of the public policy objective involved – in WTO case law.⁹³¹ Even outside the WTO system, WTO case law is likely to be very influential on adjudicators appointed in the framework of bilateral and regional trade agreements. For example, the EU proposal for the Dispute Settlement Chapter for the EU-New Zealand trade agreement, explicitly states:

⁹²⁷ *Ibid.*, para. 6.646. See also *Ibid.*, para. 6.627.

⁹²⁸ WTO, Note by Secretariat, ‘Necessity tests’ in the WTO, S/WPDR/W/27, 2 December 2003, para. 12 (emphasis added).

⁹²⁹ *Ibid.*, para. 83.

⁹³⁰ See, e.g., Cossy (2006), p. 4.

⁹³¹ On cross-pollination between the interpretation of the general exceptions in the GATT and the GATS, see Section 2.3.2. On cross-pollination between the interpretation of ‘likeness’ in the GATT and the GATS, see, e.g., WTO, Appellate Body Report, *Argentina – Financial Services*, para. 6.119, referring to WTO, Appellate Body Reports, *EC – Seal Products*, paras. 5.90, 5.87-5.88 and 5.101 (noting that ‘[its] interpretation of Articles II:1 and XVII of the GATS chimes with the Appellate Body’s interpretation of the most-favoured-nation and national treatment obligations in the context of the GATT 1994’.) Appellate Body Report, *Argentina – Financial Services*,

The panel shall also take into account relevant interpretations in reports of WTO panels and the Appellate Body adopted by the Dispute Settlement Body of the WTO.⁹³²

Prevailing uncertainty on whether, and to what extent, trade adjudicators may import the WTO case law on the chapeau of the general exception when interpreting the digital trade exception on privacy and data protection weighs strongly against the use of the chapeau's threshold in such exception.

4.3.5.2 The need for a restrictive mechanism in the digital trade exception for privacy and data protection

As opposed to the standard of the chapeau, the non-circumvention, non-avoidance, and reasonableness standards would be more suitable than the 'it deems appropriate' test to achieve the EU's goals in liberalising cross-border data flows while preserving its autonomy to protect privacy and the protection of personal data as fundamental rights, as well as the broader goal of preserving the rules-based international trading system. This thesis argues that *any* of these three standards are suitable, because, as illustrated above, each of them is interpreted through reference to the other. In content, each of the standards affords broader regulatory space than the necessity test of the general exception on the one hand, and narrower regulatory space than the 'it considers necessary' test of the national security exception (and, therefore, the 'it deems appropriate test' proposed in the EU model clauses), on the other hand. The fact that the principles of good faith and the prohibition of abuse of right constitute the common denominator for the interpretation of these thresholds ensures their flexibility and the possibility of tailoring their interpretation to different situations.

This flexibility, however, also has drawbacks. For example, the WTO case law on the chapeau and the national security exceptions – the bodies of WTO jurisprudence interpreting the principles of good faith and the abuse of right in relation to exceptions from trade obligations – elucidate that the content of these principles is a moving target. Academic research on these principles confirms this conceptualisation.

Good faith is a 'broad and value oriented concept'.⁹³³ When interpreting good faith, the WTO adjudicators usually uncover the underlying conflict of interests, which they then balance according to the case-by-case context.⁹³⁴ The legal value that the principle of good faith has in a particular (WTO) trade dispute depends on the functions of adjudicators, and ranges between regulative (*infra legem*, in particular as applied in the *US-Shrimp* by the

⁹³² Art. X 22 EU proposal for a Chapter [XX] on Dispute Settlement of the EU-New Zealand FTA, 13 June 2018.

⁹³³ Ziegler, Baumgartner (2015), p. 31-32; Kotzur (2009), para. 26.

⁹³⁴ Panizzon (2006), pp. 109-110. See Ziegler, Baumgartner (2015), p. 31-34; Kiss (2006), para. 4.

Appellate Body), corrective or jurisdictional (*contra legem*, in particular as embodied by the principle of prohibition of the abuse of right), and gap-filling or constitutive (*praeter legem*) functions.⁹³⁵ Panizzon rightly notes in relation to the abuse of right that its “elasticity” risks giv[ing] too much power into the hands of international tribunals’.⁹³⁶ Kotzur emphasises that given the abstractness of the principle of good faith ‘it may inevitably contain the risk of an all too ambitious judicial activism’.⁹³⁷ These risks are exacerbated by the absence of ‘checks and balances to guarantee that international tribunals will dispose of this power responsibly’.⁹³⁸ It is for these reasons that even the proponents of the good faith doctrine, such as Lauterpacht, call for its application with caution and restraint.⁹³⁹ Ziegler and Baumgartner likewise warn that ‘in the absence of limitations on the adjudicatory mandate, tribunals should be careful not to engage in an overly broad use of the principle of good faith, which could negatively impact the quality of the legal reasoning and thus the legitimacy of the arbitral process.’⁹⁴⁰ What ‘careful’ and ‘responsibly’ means in international trade context is a judgement call. For Panizzon, this means ‘in accordance with the requirements of international peace and justice and in the light of the “growing integration of the international community,” as opposed to giving in to unilateral pressure by militaries or economically superior world powers’.⁹⁴¹ In practice, the normative values guiding trade adjudicators in the application of these general concepts, as Chapter 3 has demonstrated, are predetermined by the dominant discourse adopted by those adjudicators.

To sum up, the circular interpretation of ‘non-circumvention’, ‘non-avoidance’, and ‘reasonableness’ and their ultimate anchoring in the general principles of good faith and the prohibition of abuse of right, which, as interpretative tools, allow adjudicators to determine the meaning of these standards on a case-by-case basis. This also means that, after a trade agreement has been negotiated, the parties to such an agreement have little influence on the interpretation of the agreement. This thesis contends that it is to a large extent the lack of trust in international trade adjudication, as well as internal policy agenda, that has led the EU to use the broadest of trade law exceptions – the national security exception – as a prototype for the digital trade exception for privacy and data protection to

⁹³⁵ Panizzon (2006), p. 110, relying on the work of Schwarzenberger.

⁹³⁶ *Ibid.*, p. 34.

⁹³⁷ Kotzur (2009), para. 26; Ziegler, Baumgartner (2015), p. 10 (noting that ‘good faith has a firm place as both a facilitating and a restraining agent’. Yet, as ‘an inherently abstract notion,’ it leaves ‘a broad margin of discretion to the person deciding whether the principle of good faith has been respected’.)

⁹³⁸ Panizzon (2006), p. 34.

⁹³⁹ Lauterpacht (1958), p. 164 (stating that ‘[t]he doctrine of abuse of rights is therefore an instrument which, apart from other reasons calling for caution in the administration of international justice, must be wielded with studied restraint’.)

⁹⁴⁰ Ziegler, Baumgartner (2015), p. 36.

⁹⁴¹ Panizzon (2006), p. 34.

minimise the risk that trade adjudicators will shift the meaning of the exception towards a higher threshold for domestic privacy and data protection rules than intended by the drafters. This argument ties into the broader debate on the WTO legitimacy crisis and the rule-making power of adjudicating bodies.⁹⁴²

To ameliorate such lack of trust, the use of ‘non-circumvention’, ‘non-avoidance’ or ‘reasonableness’ thresholds in the future digital trade exception (rather than the ‘it deems appropriate’ threshold) should be accompanied by a restrictive mechanism controlling for the adjudicators’ power of interpretation. One example of such a mechanism is the Understanding on the interpretation of the prudential carve-out in CETA, already mentioned above.⁹⁴³ On the one hand, the Understanding contains high level principles intended to guide the interpretation of the prudential carve out by investment tribunals. For example, Principle 8.a states that ‘a Party may establish and enforce measures that provide a higher level of prudential protection than those set out in common international prudential commitments’, while Principle 8.b requires investment tribunals to ‘defer to the highest degree possible to regulations and practices in the Parties’ respective jurisdictions and to the decisions and factual determinations, including risk assessments, made by financial regulatory authorities.’

On the other hand, the Understanding regulates the role of the Financial Services Committee (which includes representatives of authorities in charge of financial services policy with expertise in the field)⁹⁴⁴ in investment disputes concerning the prudential carve out. In particular, the Understanding determines that the Committee ‘shall decide whether and, if so, to what extent the prudential carve-out is a valid defence to a claim’. This decision, as well as the decision of the CETA Joint Committee (which is competent to make this decision if the Financial Services Committee does not provide its position within a specified term), is binding on the investment tribunal in the dispute in question.⁹⁴⁵ Thus, if the Financial Services Committee or the CETA Joint Committee conclude that the prudential carve-out is the valid defence to all parts of the claim in their entirety, the ‘investor is deemed to have withdrawn its claim and the proceedings are discontinued’.⁹⁴⁶

⁹⁴² For a discussion, see e.g., Venzke (2012), pp. 190-195. See also Esty (2002); Weiler (2001); Howse (2002); Lang (2011), p. 313ff; Elsig (2007); Howse, Nicolaidis (2003); Howse (2016), pp. 11, 75.

⁹⁴³ Annex 13-B CETA, Understanding on the Application of Articles 13.16.1 and 13.21.

⁹⁴⁴ Art. 13.18 CETA. For Canada, the Committee representative is an official from the Department of Finance Canada or its successor, for the European Union the Committee representative is an official of the Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA). See Leblond (2016), p. 3.

⁹⁴⁵ Annex 13-B CETA, Understanding on the Application of Articles 13.16.1 and 13.21; Art. 13.21(4) CETA.

⁹⁴⁶ Art. 13.21(4) CETA.

Looking ahead, if the EU should decide to create a committee for privacy and data protection in a future trade agreement, further research is required to determine what the structure and composition of such a committee should be. This research is, however, beyond the scope of this thesis. What can be said at this juncture is that it is important to ensure that the conferral of certain powers on such a committee does not overstep the EU's competence and constitutional boundaries.⁹⁴⁷

4.4 Conclusion

This Chapter has addressed the international trade aspect of the Catch-22 problem identified in Chapter 2 of this thesis, represented by a possible clash between the EU's constitutional framework on privacy and data protection, on the one hand, and existing international trade commitments relating to cross-border data flows, on the other. It has demonstrated that the model clauses on cross-border data flows and the protection of privacy and personal data, proposed by the European Commission in 2018 are not the most optimal way to achieve the goals of the EU's digital trade policy on data. In other words, they are unlikely to contribute to the liberalisation of cross-border data flows from other countries into Europe and may contribute to further undermining of the rules-based international trading system. This Chapter has proposed several ways to improve the model clauses with a specific focus on the threshold of the future digital trade exception for privacy and data protection. It has argued that a 'non-circumvention', 'non-avoidance' or 'reasonableness' threshold, anchored on the principles of good faith and prohibition of abuse of rights, and complemented by a restrictive mechanism controlling for trade adjudicators' rule-making power, are better suited to achieve the EU's digital trade policy goals, as compared to the 'it deems appropriate' threshold proposed in the EU's model clauses.

⁹⁴⁷ For a discussion on this issue see, e.g., Weiß (2018).