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Privacy Protection(ism): The Latest Wave of Trade Constraints on Regulatory Autonomy

Svetlana Yakovleva

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Privacy Protection(ism): The Latest Wave of Trade Constraints on Regulatory Autonomy

SVETLANA YAKOVLEVA *

Countries spend billions of dollars each year to strengthen their discursive power to shape international policy debates. They do so because in public policy conversations labels and narratives matter enormously. The “digital protectionism” label has been used in the last decade as a tool to gain the policy upper hand in digital trade policy debates about cross-border flows of personal and other data. Using the Foucauldian framework of discourse analysis, this Article brings a unique perspective on this topic. The Article makes two central arguments. First, the Article argues that the term “protectionism” is not endowed with an inherent meaning but is socially constructed by the power of discourse used in international negotiations, and in the interpretation and application of international trade policy and

* PhD candidate at the Institute for Information Law (IViR) at the University of Amsterdam and Senior Legal Adviser at De Brauw Blackstone Westbroek (Amsterdam). The Author thanks her PhD supervisors, Professors Joris van Hoboken and Ingo Venzke, as well as Professor Daniel Gervais for helping to develop ideas for this Article and for their helpful comments and guidance. An earlier version of this Article was presented at the 10th Annual Privacy Law Scholars Conference, Washington D.C., May 2018 (PLSC 2018), the Amsterdam Privacy Conference 2018, Amsterdam, the Netherlands, Oct. 2018 (APC 2018), and the Twelfth International Conference Computers, Privacy and Data Protection: Data Protection and Democracy, Brussels, Belgium, Jan.-Feb. 2019 (CPDP 2019). The Author is grateful to Professors Chris Hoofnagle, William Kovacic, Mark McCarthy, Paul Ohm, Kenneth Propp, and other participants of the PLSC 2018, APC 2018 and CPDP 2019 for their thoughtful feedback. The Author also thanks the editorial team of *University of Miami Law Review* for their meticulous editing and helpful comments. All errors and opinions expressed are the Author’s own.

rules. In other words, there are as many definitions of “(digital) protectionism” as there are discourses. The U.S. and E.U. “digital trade” discourses illustrate this point. Using the same term, those trading partners advance utterly different discourses and agendas: an economic discourse with economic efficiency as the main benchmark (United States), and a more multidisciplinary discourse where both economic efficiency and protection of fundamental rights are equally important (European Union). Second, based on a detailed evaluation of the economic “digital trade” discourse, the Article contends that the coining of the term “digital protectionism” to refer to domestic information governance policies not yet fully covered by trade law disciplines is not a logical step to respond to objectively changing circumstances, but rather a product of that discourse, which is coming to dominate U.S.-led international trade negotiations. The Article demonstrates how this redefinition of “protectionism” has already resulted in the adoption of international trade rules in recent trade agreements further restricting domestic autonomy to protect the rights to privacy and the protection of personal data. The Article suggests that the distinction between privacy and personal data protection and protectionism is a moral question, not a question of economic efficiency. Therefore, when a policy conversation, such as the one on cross-border data flows, involves non-economic spill-over effects to individual rights, such conversation should not be confined within the straightjacket of trade economics, but rather placed in a broader normative perspective. Finally, the Article argues that, in conducting recently restarted multilateral negotiations on electronic commerce at the World Trade Organization, countries should rethink the goals of international trade for the twenty-first century. Such goals should determine and define the discourse, not the other way around. The discussion should not be about what “protectionism” means but about how far domestic regimes are willing to let trade rules interfere in their autonomy to protect their societal, cultural, and political values.

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INTRODUCTION

Labels and framing matter in public policy discussions. So much so, in fact, that they often dictate the outcome of the discourse. For example, China spent billions of dollars a year over the past several years to strengthen its *discursive power* to shape specific international policy debates,¹ especially in artificial intelligence (“AI”), which is an area where countries race for global technological and policy dominance.² Similarly, the “digital protectionism” label has

¹ David Shambaugh, *China’s Soft-Power Push: The Search for Respect*, FOREIGN AFF., July-Aug. 2015, at 99, 99–100.

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

Id. See Hung-jen Wang, *Contextualizing China’s Call for Discourse Power in International Politics*, CHINA: INT’L J., Dec. 2015, at 172, 173 n.4. (“Point 5 in Section 7 of ‘Decision of the Central Committee of the Communist Party of China on Major Issues Pertaining to Deeping Reform of the Cultural System and Promoting the Great Development and Flouring of Social Culture’ states that China needs to ‘strengthen international discourse power, and properly respond to external world concerns.’”); see also JACOB TURNER, ROBOT RULES: REGULATING ARTIFICIAL INTELLIGENCE 234–35 (2019) (citing recommendation III from Chapter 6 of China’s “Artificial Intelligence Standardization White Paper” of January 18, 2018, which advocates “promotion of international standardization work on artificial intelligence, gathering domestic resources for research and development, participating in the development of international standards, and improving *international discourse power*.”) (emphasis added); Paul SN Lee, *The Rise of China and Its Contest for Discursive Power*, 1 GLOBAL MEDIA & CHINA 102, 113 (2016) (“Since Xi took over the reins of power in 2013, there have been signs of a shift in China’s foreign policy from one that accommodates the existing international rules to a policy that makes new rules and institutions on China’s terms.”).

² See, e.g., Tim Dutton, *An Overview of National AI Strategies*, MEDIUM (June 28, 2018), <https://medium.com/politics-ai/an-overview-of-national-ai-strategies-2a70ec6edfd> (illustrating the global race for artificial intelligence (“AI”) dominance by the fact that between 2016 and 2018 Canada, China, Denmark, the E.U. Commission, Finland, France, India, Italy, Japan, Mexico, the Nordic-Baltic region, Singapore, South Korea, Sweden, Taiwan, the United Arab Emirates, and the United Kingdom published their strategies on AI).

been used in the last decade as a tool to gain control in the domain of “digital trade”³ policy debate in relation to personal data protection, and specifically to influence policy outcomes in the European Union, where privacy and personal data are well protected.⁴ Perhaps even too well protected for those whose business models turn on personal data.⁵ The view that domestic restrictions on international flows of data generally, and more specifically of personal data, is a form of protectionism is now front and center as the focus of international trade negotiations shift to digital trade.⁶ From this angle, unrestricted cross-border data flows promise global economic growth, and are often perceived as a *bonum in se*.⁷ However, the tendency of international trade law to liberalize international data flows appears to be at odds with some domestic legal regimes that restrict such flows on privacy and data protection grounds, especially in the European Union.⁸ As a result, the data flow issue has

³ There is no universally-accepted definition of “digital trade”. See Susan Ariel Aaronson & Patrick Leblond, *Another Digital Divide: The Rise of Data Realm and Its Implications for the WTO*, 21 J. INT’L ECON. L. 245, 248 (2018) (citing Javier López González & Marie-Agnes Jouanjean, *Digital Trade: Developing a Framework for Analysis*, at 6, OECD TRADE POLICY PAPERS No. 205 (July 27, 2017), <http://dx.doi.org/10.1787/524c8c83-en>) (defining “digital trade” as encompassing “digitally-enabled transactions in trade in goods and services that can be either digitally or physically delivered involving consumers, firms, and governments.”). For the purposes of this Article, I will use this term as defined by Aaronson & Leblond, *id*.

⁴ See *infra* Part II.A.

⁵ See Carole Cadwalladr & Duncan Campbell, *Revealed: Facebook’s Global Lobbying Against Data Privacy Laws*, GUARDIAN (Mar. 2, 2019, 9:00 AM), <https://www.theguardian.com/technology/2019/mar/02/facebook-global-lobbying-campaign-against-data-privacy-laws-investment> (revealing Facebook’s lobbying around the world, particularly in the United Kingdom, against data privacy legislation).

⁶ See *infra* Part II.C.

⁷ See *infra* Part II.B.

⁸ See, e.g., PETER SWIRE & ROBERT E. LITAN, NONE OF YOUR BUSINESS: WORLD DATA FLOWS, ELECTRONIC COMMERCE, AND THE EUROPEAN PRIVACY DIRECTIVE 188–93 (1998); ROLF H. WEBER & DOMINIC STAIGER, TRANSATLANTIC DATA PROTECTION IN PRACTICE 58–59 (2017); Lucas Bergkamp, *EU Data Protection Policy: The Privacy Fallacy: Adverse Effects of Europe’s Data Protection Policy in an Information-Driven Economy*, 18 COMPUTER L. & SECURITY REV. 31, 39–40 (2002); Joel R. Reidenberg, *E-Commerce and Trans-Atlantic Privacy*, 38 HOUS. L. REV. 717, 735–38 (2001); Svetlana Yakovleva & Kristina Irion, *The Best of Both Worlds? Free Trade in Services*

become “the new battlefield”⁹ of domestic legal regimes, not only between the United States and the European Union, but also between the European Union and its other trading partners.¹⁰

and EU Law on Privacy and Data Protection, 2 EUR. DATA PROTECTION L. REV. 191, 202–07 (2016). But see Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 YALE J. INT’L L. 1, 46–51 (2000) (arguing that a hypothetical U.S. claim regarding World Trade Organization inconsistency of European Union’s framework for personal data transfers “would likely not prevail”); Maria Veronica Perez Asinari, *Is There Any Room for Privacy and Data Protection Within the WTO Rules?*, 9 ELECTRONIC COMM. L. REV. 249, 277 (2002); Yi-Hsuan Chen, *The EU Data Protection Law Reform: Challenges for Service Trade Liberalization and Possible Approaches for Harmonizing Privacy Standards into the Context of GATS*, 19 SPANISH Y.B. INT’L L. 211, 218–19 (2015) (admitting that, although the E.U. regime for transfers of personal data may violate the European Union’s WTO commitments, such violation can be justified under the general exception).

⁹ Mira Burri, *The Regulation of Data Flows Through Trade Agreements*, 48 GEO. J. INT’L L. 407, 408 (2017) [hereinafter Burri, *The Regulation of Data Flows*].

¹⁰ For example, provisions on cross-border flows of information, including personal data, have been a contentious point in the negotiations of the Economic Partnership Agreement between the European Union and Japan (“JEFTA”). See MARIJA BARTL & KRISTINA IRION, UNIV. OF AMSTERDAM, *THE JAPAN EU ECONOMIC PARTNERSHIP AGREEMENT: FLOWS OF PERSONAL DATA TO THE LAND OF THE RISING SUN 2* (2017), https://pure.uva.nl/ws/files/21047289/Transfer_of_personal_data_to_the_land_of_the_rising_sun_FINAL.pdf. Not being able to reach an agreement in trade negotiations, instead of such provisions, the parties included a three-years review clause in the final version of the agreement. Aaronson & Leblond, *supra* note 3, at 261. Cross-border flows of personal data from the European Union to Japan were ultimately regulated through a mutual adequacy decision. Commission Implementing Decision (EU) 2019/419 of 23 January 2019 Pursuant to Regulation (EU) 2016 of the European Parliament and of the Council on the Adequate Protection of Personal Data by Japan Under the Act on the Protection of Personal Information, 2019 O.J. (C 304) 1, 2. For its data protection to be recognized as “adequate” under E.U. law, Japan has amended its legislation and has undertaken additional commitments in the adequacy decision. *Id.* at 2–3. The adequacy decision was adopted on January 23, 2019, shortly before JEFTA took effect. European Commission Press Release IP/19/421, *European Commission Adopts Adequacy Decision on Japan, Creating the World’s Largest Area of Safe Data Flows* (Jan. 23, 2019).

“‘Protectionism’ has become a dirty word.”¹¹ Yet, discursively, that is far from obvious: in a broader societal context, the term “protection” (the root of “protectionism”) is often seen in a positive light, especially when it refers to shelter, safety, or harm prevention. But when it comes to protecting privacy and personal data, trade policy and fundamental rights discourses often seem to work on separate, parallel tracks. Paraphrasing Yale Law School Professor Daniel Esty, while the word “protection” “warms the hearts” of those seeing data protection and privacy as fundamental rights, it “sends chills down the spines of free traders.”¹²

This Article asks where we should draw the line between protection and (digital) protectionism. Set against a discursive backdrop where the label “protectionism,” or “digital protectionism,” is increasingly used in academic, societal, and political debates to refer to regulation that aims to protect privacy and personal data,¹³ this Article considers the implications of this distinction for the autonomy afforded to domestic regulators to protect privacy and personal data by international trade rules and the rules’ interpretation. Further, it asks how the framing of the debate on privacy and data protection in terms of (digital) protectionism affects the normative foundations of domestic regulation on privacy and personal data, and the optimal level of privacy and personal data protection.

This Article tackles these questions through the application of “discourse analysis,”¹⁴ channeling the work of Michel Foucault,

¹¹ DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* 252 (2011).

¹² See DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 36 (1994) (Emphasizing the “clash of cultures” between environmentalists and free traders and noting that “the word ‘protection’ warms the hearts of environmentalists but sends chills down the spines of free traders.”).

¹³ See *infra* Section II.C.

¹⁴ See JAMES PAUL GEE, *AN INTRODUCTION TO DISCOURSE ANALYSIS: THEORY AND METHOD* 8 (3d ed. 2010) (ebook).

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

whose leading scholarship underscores the relationship between discourse and power.¹⁵ According to Foucault, discourse is a “system that makes possible and governs” the formation of knowledge; it predetermines the objects of knowledge, statements, concepts, and theoretical options as well as the rules of their production.¹⁶ Dis-

Id.

¹⁵ See, e.g., Seumas Miller, *Foucault on Discourse and Power*, THEORIA: J. SOC. AND POL. THEORY, Oct. 1990, at 115, 120–25.

¹⁶ MICHEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE AND THE DISCOURSE OF LANGUAGE 72 (A. M. Sheridan Smith trans., Pantheon Books, 1972) (1971) [hereinafter FOUCAULT, ARCHEOLOGY].

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

Id. According to Foucault, “[I]n every society the production of discourse is at once controlled, selected, organised and redistributed according to a certain number of procedures, whose role is to ward off its powers and its dangers, to gain mastery over its chance events, to evade its ponderous, formidable materiality.” MICHEL FOUCAULT, THE ORDER OF DISCOURSE (1971), reprinted in UNTYING THE TEXT: A POST-STRUCTURALIST READER 52 (Robert Young ed., 1981) [hereinafter FOUCAULT, DISCOURSE]. See also Julia Black, *Regulatory Conversations*, 29 J.L. & SOC’Y 163, 168 (2002).

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

Id. See also Iara Lesser, *Discursive Struggles Within Social Welfare: Restaging Teen Motherhood*, 36 BRIT. J. SOC. WORK 283, 285 (2006) (defining discourses

course is not determined once and for all—it controls the very *production* of knowledge at a particular moment in history and can evolve over time.¹⁷ Discourse has power to “*mediate* the dominant view of what constitutes normality or deviance” and to “produce[] behaviour that is in conformity with the dominant standard of normality or acceptability.”¹⁸ Language, as Julia Black puts it, “frames thought, and produces and reproduces knowledge” and is “intimately related to power.”¹⁹ The use of language places the production of knowledge in a particular discourse, which defines the meaning of terms according to shared practices in line with ideologies of the social groups controlling the discourse.²⁰ In other words, control over discourse ultimately translates into control over the production of “truth” at a particular point in time, and allows to suppress the views outside of the prevailing discourse. The power of discourse, or discursive power, is often mentioned in academic, political, and

as “systems of thoughts composed of ideas, attitudes, courses of actions, beliefs and practices that systematically construct the subjects and the worlds of which they speak.”).

¹⁷ See FOUCAULT, *ARCHEOLOGY*, *supra* note 16, at 73.

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

Id.

¹⁸ Ivan Manokha, *Foucault's Concept of Power and the Global Discourse of Human Rights*, 23 *GLOBAL SOC'Y* 429, 430 (2009).

¹⁹ Black, *supra* note 16, at 165.

²⁰ *Id.* at 165–69. See also Teun A. Van Dijk, *Ideology and Discourse Analysis*, 11 *J. POL. IDEOLOGIES* 115, 138 (2006) (“Defined as socially shared representations of groups, ideologies are the foundations of group attitudes and other beliefs, and thus also control the ‘biased’ personal mental models that underlie the production of ideological discourse.”).

journalistic sources in the context of international relations,²¹ domestic trade policy formation,²² and the functioning of international organizations.²³ As noted above, states (or governments) use discursive power to advance certain narratives and to shape international discourses and rules on particular topics. In a narrower sense, discourse can also be controlled by “disciplines” or, put differently, by social groups practicing such disciplines.²⁴

Julia Black’s work shows that discourse forms the basis of regulation in several respects: it influences regulation by, *inter alia*, defining the problem and operational categories; it determines the goals that regulation aims to achieve; and it “produces shared meanings as to regulatory norms and social practices which then form the basis for action (for example, the formation of regulatory interpretive communities).”²⁵ Discourse analysis is, thus, a particularly useful tool to trace how and why the definition of “protectionism” evolved, and how the interpretation of the legal norms embedding this term in the body of international trade law have evolved over time, especially because international trade rules are often phrased in broad and ambiguous terms,²⁶ which are operationalized through interpretation by the adjudicating bodies (in case of World Trade

²¹ See, e.g., CHARLOTTE EPSTEIN, *THE POWER OF WORDS IN INTERNATIONAL RELATIONS* 2–4, 11–14, 16, 19–20, 22–23 (Peter M. Haas & Sheila Jasanoff eds., 2008); A.J. Paolini, *Foucault, Realism and the Power Discourse in International Relations*, 28 *AUSTL. J. POL. SCI.* 98, 98–99 (1993); Jennifer Milliken, *The Study of Discourse in International Relations: A Critique of Research and Methods*, 5 *EUR. J. INT’L REL.* 225, 225–26 (1999).

²² See, e.g., Gabriel Siles-Brügge, *The Power of Economic Ideas: A Constructivist Political Economy of EU Trade Policy*, 9 *J. CONTEMP. EUR. RES.* 597, 605–13 (2013).

²³ See, e.g., Dongsheng Zang, *Divided by Common Language: ‘Capture’ Theories in GATT/WTO and the Communicative Impasse*, 32 *HASTINGS INT’L & COMP. L. REV.* 423, 425–28 (2009) [hereinafter Zang, *Divided by Common Language*].

²⁴ FOUCAULT, *DISCOURSE*, *supra* note 16, at 59–60. By “discipline,” Foucault meant “a domain of objects, a set of methods, a corpus of propositions considered to be true, a play of rules and definitions, of techniques and instruments.” *Id.* According to Foucault, a discipline controls the production of discourse by recognizing true and false propositions within itself, thus pushing back “a whole teratology of knowledge beyond its margins.” *Id.*

²⁵ Black, *supra* note 16, at 165, 178, 188.

²⁶ See *infra* Section I.A.

Organization (“WTO”) law, by the WTO Panels and Appellate Body).

The Article makes two arguments using the theoretical framework of Foucauldian discourse analysis to answer the questions formulated above. First, this Article argues that “protectionism” is not endowed with an inherent meaning but is socially constructed by the power of discourse controlling the negotiation, application, and interpretation of anti-protectionist international trade policy and rules. It explicates how shifts in the dominant discourse in the past resulted in redefining protectionism as “new protectionism,” which triggered the expansion of the scope of domestic policies viewed as protectionist by international trade institutions and elites and, respectively, the shrinking of domestic autonomy to regulate in the public interest. By extrapolating these historical insights to current policy conversations surrounding digital trade negotiations by the European Union and the United States (referred to here as “digital trade” discourse(s)), this Article shows that, despite the fact that both the E.U. and the U.S. rhetoric on the issue are centered around the same term, “digital protectionism,” the trading partners advance different discourses based on diverging values, which translate to a different baseline between privacy and data protection and protectionism. Second, this Article contends that coining the term “digital protectionism” to refer to domestic information governance policies that are not yet fully covered by trade law disciplines is *not a logical step* to respond to objectively changing circumstances, but a *product of a certain economic “digital trade” discourse*, advanced, in particular, by the United States. This Article then demonstrates how the shift from “protectionism” to “digital protectionism” has already resulted in the adoption of international trade rules further restricting domestic autonomy to protect the rights to privacy and the protection of personal data.

This Article also suggests that the discourse controlling regulatory conversations on privacy and personal data protection predetermines the baseline between privacy protection and protectionism and, as a result, affects the level of such protection considered to be optimal and legitimate from a trade perspective. The optimal level of protection is determined by the benchmarks of economic utility

maximization within the economic discourse of digital trade.²⁷ Any protection beyond what is economically efficient is viewed as protectionist.²⁸ Therefore, conducting policy conversations on domestic regulation protecting privacy and personal data within the boundaries of a purely economic “digital trade” discourse puts such regulation in an *a priori* defensive position.²⁹ In contrast, within a multidisciplinary discourse, which internalizes non-economic grounds for protecting privacy and personal data as fundamental rights, the optimal level of protection will be higher.³⁰ As a result, some of the policies viewed as protectionist in the digital trade discourse will be viewed as protection. Image One illustrates this point:

²⁷ See Paul M. Schwartz & Karl-Kikolaud Peifer, *Transatlantic Data Privacy Law*, 106 GEO L.J. 115, 117, 119, 121–23, 127, 130, 132, 136–137, 157, 178 (2017).

²⁸ See Susan Strange, *Protectionism and World Politics*, 39 INT’L ORG. 233, 235 (1985); see also Schwartz & Peifer, *supra* note 28, at 118 (“In the United States, there has been scepticism about E.U. privacy rights and whether they are merely disguised protectionism.”).

²⁹ See, e.g., EUROPEAN CENTRE FOR INTERNATIONAL POLITICAL ECONOMY, U.S. CHAMBER OF COMMERCE, *THE ECONOMIC IMPORTANCE OF GETTING DATA PROTECTION RIGHT: PROTECTING PRIVACY, TRANSMITTING DATA, MOVING COMMERCE* 4–9, 20–21 (2013), https://www.uschamber.com/sites/default/files/documents/files/020508_EconomicImportance_Final_Revised_Ir.pdf.

³⁰ See, e.g., Schwartz & Peifer, *supra* note 27, at 121 (comparing the European Union’s multidisciplinary, fundamental rights-based approach to data protection with the United States’ consumer-based approach).

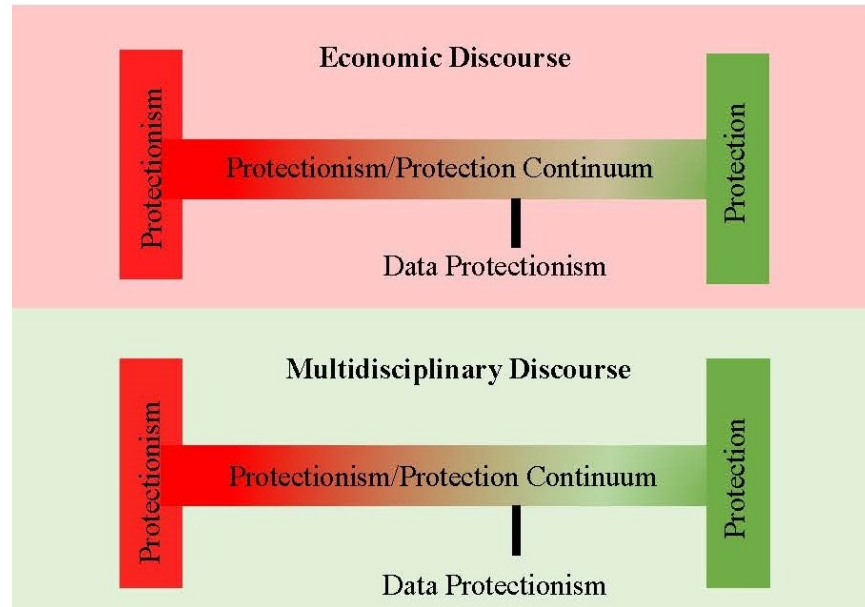


Image One

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

On January 25, 2019, seventy-six members of the WTO launched talks on electronic commerce, which, among other things, will cover rules on cross-border flows of data.³¹ This multilateral dialog, having emerged within the discourse(s) of digital trade, aims at “long-standing, high-standard trade principles to digital trade.”³²

³¹ See 76 WTO Partners Launch Talks on E-commerce, EUR. COMM’N (Jan. 25, 2019), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1974&title=76-WTO-members-launch-talks-on-e-commerce>; Kimberley Botwright, *Davos Participants Call for Digital Trade Deal*, WORLD ECON. F. (Jan. 23, 2019), <https://www.weforum.org/agenda/2019/01/davos-participants-call-for-digital-trade-deal/>; Rana Foroohar, *Nations Move to Avoid Global Ecommerce ‘Splinter-net’*, FIN. TIMES (Jan. 24, 2019), <https://www.ft.com/content/3a8b7458-1fe5-11e9-b2f7-97e4dbd3580d>. See also Adam Behsudi, *WTO E-Commerce Talks Could Be a Long Slog*, POLITICO (Nov. 8, 2019, 10:00 AM), <https://www.politico.com/newsletters/morning-trade/2019/11/08/wto-e-commerce-talks-could-be-a-long-slog-782169> (indicating that e-commerce talks are likely to take a very long time).

³² Botwright, *supra* note 31.

The parties to these negotiations include countries and regions that have different domestic policy priorities and that are situated at different levels of the ladder of economic development—Australia, China, the European Union, Japan, New Zealand, the United States, and Russia are examples.³³ This Article suggests that, to be able to yield any meaningful results, the parties to this multilateral effort should not proceed from the dominant discourse of digital trade as a starting point. Instead, first and foremost, the parties to the effort should agree on the goals of the international trading system in the digital age and the place afforded to essential domestic policy goals in this system. Negotiations conducted within a discourse based on such a mutual understanding would have a much higher chance of producing meaningful results.

The Article proceeds as follows. Part I focuses on the most important milestones in the evolution of the notion of “protectionism” from the mid-eighteenth century until the early-twenty-first century using the lens of discourse analysis. Part II discusses the controversy around the E.U. restrictions on cross-border data flows and introduces the discourse of digital trade labelling any such restriction as “(digital) protectionism.” Then, it extrapolates the logic of reconstruction of the term “protectionism” on the claims to redefine “protectionism” as “digital protectionism.” Part III explicates how discourse affects the baseline between privacy protection and protectionism and predetermines the underlying normative rationale behind regulation of privacy and personal data protection.

I. THE EXPANSION OF THE NOTION OF “PROTECTIONISM”

Although the notions of “free trade” and “protectionism” are among the oldest in economics,³⁴ there is still no uniform understanding of what constitutes “protectionism.”³⁵ This Part analyzes of the notion of protectionism and shows that protectionism is not a

³³ See *Joint Statement on Electronic Commerce*, WTO Doc. WT/L/1056 (Jan. 25, 2019).

³⁴ JOHANNES OVERBEEK, *FREE TRADE VERSUS PROTECTIONISM* viii (1999).

³⁵ Susan Ariel Aaronson, *What Are We Talking About When We Discuss Digital Protectionism?* 1–4, 16, 19, (Inst. for Int’l Econ. Policy, Working Paper No. 13, 2018) [hereinafter Aaronson, *What We Are Talking About*].

natural phenomenon—it is a concept socially constructed within a particular discourse.

The core issue in defining protectionism is where to draw the line between regulation that is a precondition for trade (such as state intervention aimed at correcting market failures, which is economically efficient and socially more productive), and protectionist regulation which creates market failures and stifles trade.³⁶ As Jagdish Bhagwati, one of the leading twentieth-century trade theorists, noted,

[S]ince all policies will inevitably affect (directly or indirectly) comparative advantage and (in this sense) there is therefore no purely ‘natural’ or ‘market-determined’ comparative advantage, where *should* one draw the line and say that autonomy in this set of policies is fine but not in others?³⁷

Eleven years later, NYU Professor Robert Howse argued along similar lines that “[t]here is no natural or self-evident baseline or rule that can solve this basic dilemma.”³⁸ Defining what constitutes a precondition for free trade and what is a barrier to trade is, indeed, “an interpretive act,” to use the terminology of Professor Andrew Lang of Edinburgh Law School.³⁹ As former Federal Reserve Board

³⁶ See, e.g., JAGDISH BHAGWATI, PROTECTIONISM 126 (1988) [hereinafter BHAGWATI, PROTECTIONISM].

³⁷ See Jagdish Bhagwati, *Threats to the World Trading Regime: Protectionism, Unfair Trade et al*, in INTERNATIONAL TRADE AND GLOBAL DEVELOPMENT: ESSAYS IN HONOUR OF JAGDISH BHAGWATI 237, 240–41 (Ad Koekkoek & Loet B. M. Mennes eds., 1991) [hereinafter Bhagwati, *Threats to the World Trading Regime*].

³⁸ See Robert Howse, *From Politics to Technocracy—And Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT’L L. 94, 95–96 (2002) [hereinafter Howse, *From Politics to Technocracy*].

³⁹ See ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM 169–70 (2011) [hereinafter LANG, AFTER NEOLIBERALISM].

Since virtually every conceivable form of governmental action has some direct or indirect impact on trade, the selection of a particular set of measures as “barriers to trade” involves the application of principles of selection and categorization Similarly, we draw distinctions between government actions which constitute trade “distortions” on the one hand, and other kinds

member Daniel Tarullo explained, determining what constitutes a trade barrier and what does not depends on the assumption of “‘normal’ conditions of competitive markets” that is used as a benchmark to identify the deviations.⁴⁰ It is the discourse that predetermines what Lang calls “collective habits of interpretation”⁴¹ or “the characteristic mindsets and ways of thinking”⁴² that ultimately determines what the normal market is and what constitutes protectionism. In other words, *defining protectionism is an act of interpretation that occurs within a certain discourse*. Using a particular theoretical construction of protectionism has two important practical implications. First, such construction informs the design of international trade rules—an example of this would be the non-discrimination provisions found in current international trade agreements.⁴³ Second, since these provisions are often phrased in broad and ambiguous terms, which are neither explained nor defined in the agreements,⁴⁴ *interpretation* by adjudicating bodies plays a crucial role in

of government actions which correct pre-existing market distortions on the other.

Id. at 170.

⁴⁰ Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 549 (1987) [hereinafter Tarullo, *Beyond Normalcy in the Regulation of International Trade*] (discussing trade laws of general application).

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

Id. See also LANG, AFTER NEOLIBERALISM, *supra* note 39, at 227 (referring to a notion of an “imagined ideal of a market” that is used as a reference point to characterize a particular governmental policy as a precondition for free trade or “protectionism”).

⁴¹ LANG, AFTER NEOLIBERALISM, *supra* note 39, at 170.

⁴² *Id.* at 173.

⁴³ See, e.g., General Agreement on Tariffs and Trade art. 1(1), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947] (non-discriminatory most-favored nation provision); North American Free Trade Agreement art. 301(2), Dec. 8–17, 1992, 32 I.L.M. 289 (1993) (non-discriminatory national treatment provision).

⁴⁴ See Daniel K. Tarullo, *Logic, Myth, and the International Economic Order*, 26 HARV. INT’L. L.J. 533, 535–36 (1985) [hereinafter Tarullo, *Logic, Myth, and*

recognizing particular domestic policies and rules as “legitimate” or “protectionist.”⁴⁵ Hence, non-discrimination provisions will be interpreted broadly or narrowly *depending on the discourse* governing such interpretation.

Against this backdrop, this Part shows how the shifts in the dominant discourse have affected the (re)construction of the notion of protectionism, and how such (re)construction influences both the substance and interpretation of international trade rules.⁴⁶ This Part also underscores how the change in the discourse has transformed the very goal of the international trade system over time—from economic stability to liberalization of trade—and how this transformation has led to a shrinking regulatory space left to domestic legal regimes by international trade rules.⁴⁷ It is, however, not the purpose of this Article to provide a comprehensive account of all aspects of protectionism in a historical perspective, for this would require at least an entire book. Instead, this Part focuses on the key milestones of the evolution of protectionism in order to illustrate how the boundaries of discourse and its underlying goals and values affect the predominant conceptualization of protectionism and the functioning of the international trading system.⁴⁸ It starts in the mid-eighteenth century from the birth of the classical free trade idea, fast-forwards to the 1940s, the time of the formation of the first multilat-

the International Economic Order] (arguing that “legal principles are generally indeterminate” and that “[p]olitical or ideological choices are embodied in doctrines that promise a faithful implementation of the principles themselves.”). Using Article I of the GATT, which codifies the principle of non-discrimination in international trade, Tarullo illustrates that the non-discrimination principle “cannot be administered without political choices about legitimate national policies [and t]he rule cannot be explained or justified simply by reference to the aim of increased trade or the principle of equality.” *See id.* at 536–41.

⁴⁵ *See, e.g.*, Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 *EUR. J. INT’L L.* 9, 47 (2016) [hereinafter Howse, *The World Trade Organization 20 Years On*] (“The text of the national treatment provisions of the GATT requires that the adjudicator decide whether less favourable treatment is provided for ‘like’ imported products and/or, in the case of taxation measures only, whether dissimilar treatment is provided for directly competitive and substitutable products.”).

⁴⁶ *See infra* Sections I(A)–(D).

⁴⁷ *See infra* Sections I(B)–(D).

⁴⁸ *See infra* Sections I(B)–(D).

eral trading system, and ends with a discussion of the neoliberal discourse originating in the late 1960s.⁴⁹ But, before moving on to a historical account of the evolution of protectionism, let us pause for a moment and introduce the key disagreements on the notion of protectionism woven like a red thread throughout the discussion.

A. *Defining Protectionism: Key Disagreement*

Historically, the main disagreement in understanding what protectionism is lies in the determination of whether protectionism is a subjective or an objective notion. This general disagreement is apparent in the question of whether the regulatory intent underlying a domestic regulatory measure that discriminates against foreign competitors matters for the purpose of qualifying such measure as protectionist.⁵⁰ Related questions are *how much* or *how little* protection of domestic industries is sufficient to render regulation protectionist and who bears the burden of proof that a particular regulation is protectionist: the foreign state affected by the measure or the state that has adopted the regulation? As the Article shows, the answer to these questions has a profound effect on the breadth of the regulatory autonomy left to domestic regulatory regimes by international trade law in order to pursue important societal or public policy objectives, such as protection of human health, the environment, and public morals.⁵¹

⁴⁹ See *infra* Sections I(B)–(D).

⁵⁰ Compare Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 3 (1999) (taking an objective approach to protectionism; defin[ing] ‘regulatory protectionism’ as any cost disadvantage imposed on foreign firms by a regulatory policy that discriminates against them or that otherwise disadvantages them *in a manner that is unnecessary* to the attainment of some genuine, *nonprotectionist* regulatory objective”; specifically underscoring that in order to qualify as protectionist such regulatory policy “need not be deliberate and may result simply from regulators’ failure to appreciate the trade impact of their policies”) (emphasis added), with DOUGLAS A. IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* 5 (1996) (defining a policy of protection as governmental policies discriminating against imported goods “in favor of those produced within the country, *usually with the aim* of sheltering domestic producers from foreign competition through tariffs, quantitative restrictions, or other import barriers.”) (emphasis added). While the definition of Sykes puts an emphasis on the *effects* of a regulatory policy, that of Irwin focuses on the *aim* of such policy.

⁵¹ See *infra* Section I(D); Part II.

An objective approach to defining protectionism captures a much broader range of regulatory measures, namely any measure that may *de facto* result in discrimination between domestic and foreign firms irrespective of its aim, even if such discrimination is incidental.⁵² An objective approach also tends to impose the burden of proving that regulation is not protectionist on the party that has adopted the regulation.⁵³ The subjective approach, in contrast, only covers regulation intending to shelter domestic markets from foreign competition, and places the burden of proof of such intent on the party alleging the protectionist nature of another party's measure.⁵⁴

B. Protectionism and the Classical Free Trade Idea

As a driver of policy, free trade dates back to the classical doctrines based on the theories of absolute and comparative advantage developed by Adam Smith and David Ricardo, who argued that, just like individuals, countries could gain from international trade by exchanging goods that each country can produce at a lower cost.⁵⁵ As

⁵² See Sykes, *supra* note 50, at 3–4 (providing examples of “facially neutral regulation[s]” that instituted not *de jure* but *de facto* discrimination, for example, a pharmaceutical regulation “requir[ing] foreign pharmaceutical manufacturers to engage in more testing and clinical trials than domestic manufacturers with no apparent health justification for this difference in treatment.”).

⁵³ See, e.g., LANG, AFTER NEOLIBERALISM, *supra* note 39, at 268–69 (illustrating WTO panel cases that exemplify how the country that has adopted the challenged regulation has had to show that the regulation is not protectionist, for example, one case regarding Thailand's “import restrictions and internal taxes on imported cigarettes” and another case regarding France's “ban on products containing asbestos for public health reasons”).

⁵⁴ See, e.g., *id.* at 211–14 (illustrating WTO panel cases in which the challenging country had to argue why the other country's measures were intentionally discriminatory and thus illegitimate, for example, one regarding a Pakistani challenge to an Indian measure that Pakistan believed intentionally discriminated against Pakistan, and another regarding a Danish and Norwegian challenge to a Belgian measure that Denmark and Norway believed intentionally discriminated against Denmark and Norway).

⁵⁵ Adam Smith, *Of the Opinion that No Expense at Home Can Be Hurtful*, in LECTURES ON JUSTICE, POLICE, REVENUE AND ARMS 207, 209 (Edwin Cannan ed., Clarendon Press 1869) (1763) [hereinafter Smith, *Of the Opinion*] (advocating that eighteenth-century Britain should be “a free port,” government should not interfere in free trade by measures “of any kind,” and “free commerce and liberty of exchange should be allowed with all nations, and for all things.”). See Adam Smith, *Of the Balance of Trade*, in LECTURES ON JUSTICE, POLICE, REVENUE AND

summarized by Douglas Irwin, “free trade describes a policy of the nation-state toward international commerce in which *trade barriers are absent*, implying no restrictions on the import of goods from other countries or restraints on the export of domestic goods to other markets.”⁵⁶ While free trade is associated with efficiency gains, barriers to trade are seen as sources of forgone gains from trade.⁵⁷ The main benchmarks around which classical economic discourse on free international trade revolves are economic efficiency and welfare.⁵⁸ However, focusing primarily on the enhancement of aggregate national wealth, the logic of comparative advantage does not take into account the concerns of distributive justice or morals.⁵⁹

ARMS 204, 204 (Edwin Cannan ed., Clarendon Press 1869) (1763) [hereinafter Smith, *Of the Balance of Trade*] (“All commerce that is carried on betwixt any two countries must necessarily be advantageous to both.”); Howse, *From Politics to Technocracy*, *supra* note 38, at 94 (“The Ricardian theory of comparative advantage dictated the removal of import restrictions in almost all circumstances, regardless of any commitment of one’s trading partners to liberalize *their* imports.”).

⁵⁶ IRWIN, *supra* note 50, at 5 (emphasis added).

⁵⁷ See Howse, *From Politics to Technocracy*, *supra* note 38, at 94.

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

Id. See also JAN TUMLIR, PROTECTIONISM 4 (1985) [hereinafter TUMLIR, PROTECTIONISM] (“Protection imposes costs on the trading economies; when trade restrictions begin to multiply among the main markets, the costs are compounded. When restriction nears the extent indicated, these costs could be large enough to be considered a major cause of the decline in economic growth . . .”).

⁵⁸ See IRWIN, *supra* note 50, at 4.

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

Id.

⁵⁹ See generally *id.* at 40–41 (providing examples of “noneconomic arguments for protection that are a perennial feature of trade policy debates”). “Critics of the economic approach frequently contend that the criterion of wealth is too

In classical economics, the doctrines of free trade and protectionism are, thus, fundamentally opposed as they offer radically different perspectives on the best way to promote a nation's (and the world's) welfare: free trade, by maintaining the utmost freedom of trade between the countries, and protectionism (or mercantilism), by restricting imports, promoting domestic industries, and maintaining self-sufficiency from other countries.⁶⁰

Developed in the age of the formation of nation-states in Europe, mercantilist theory aimed to strengthen the power of the state and the accumulation of wealth by stimulating exports and limiting imports.⁶¹ The free trade paradigm developed by Smith and Ricardo was used to oppose and then supplant mercantilism,⁶² which dominated trade policy in the early eighteenth century.⁶³ This shift in the dominant economic ideology was not purely a result of progress in economic thought, but also a reflection of a “shared vision’ among political economists of Britain’s economic future” that happened to

narrowly materialistic and excludes other more important societal considerations.” *Id.*

⁶⁰ OVERBEEK, *supra* note 34, at viii (“[T]he two doctrines of free trade and protectionism are fundamentally opposed.”).

⁶¹ *Id.* at 1–2 (“The two major aims of mercantilist theory and policy were (1) the strengthening of the power of the state (political) and (2) the accumulation of wealth (economic) [M]any of the policy proposals of mercantilist writers consisted of recommendations as to how to stimulate exports and hamper imports.”).

⁶² See Howse, *From Politics to Technocracy*, *supra* note 38, at 94 (“Smith and Ricardo were concerned in the first instance to disprove the conventional or established mercantilist view that national wealth was reduced by (unilateral) free trade”); David Schmitz, *Adam Smith on the Dark Side of Capitalism*, 11 *GEO. J. L. & PUB. POL’Y* 371, 378 (2013) (“Smith is remembered as a defender of free trade, but his practical goal was to repudiate mercantilism’s way of protecting domestic industry.”); see also Nadia E. Nedzel, *Rule of Law v. Legal State: Where Have We Come From, Where Are We Going To?*, in *THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHSTAAT)* 289, 306 (James R. Silkenat et al, eds., 2014) (“Adam Smith, in the *Wealth of Nations* (1776), challenged mercantilism.”).

⁶³ See NEDZEL, *supra* note 62, at 305 (suggesting the prevalence of mercantilism in the eighteenth century) (“From the sixteenth to the eighteenth century, it was assumed that the amount of gold and silver amassed indicated a nation’s wealth and power, and that the world’s capital was static.”).

coincide with the views of certain interest groups in Britain at that time.⁶⁴

C. Protectionism and “Embedded Liberalism” of GATT 1947

During the interwar period, protectionism was mostly conceptualized in its narrow form, namely as tariffs, import quotas, and exchange controls.⁶⁵ In addition, protectionism was associated with political nationalism, heavy interference by government in economic life, and the quest for increased self-sufficiency that characterized the developed countries’ domestic policies at the time.⁶⁶

In 1947, the General Agreement on Tariffs and Trade (“GATT 1947”)⁶⁷ was signed.⁶⁸ It incorporated the trade policy chapter of the charter of the International Trade Organization (“ITO”), the treaty establishing an organization that never saw the light of day.⁶⁹ As a

⁶⁴ LEONARD GOMES, THE ECONOMICS AND IDEOLOGY OF FREE TRADE 45–46 (2003) (“The attitude to foreign trade encapsulated in the principle of comparative costs sprang not only from developments in economic theory but reflected a ‘shared vision’ among political economists of Britain’s economic future. It so happened that this coincided with the *interests of the new and rising industrial bourgeoisie*.”) (emphasis added); see also Joan Robinson, *What Are the Questions?* 15 J. ECON. LITERATURE 1318, 1336 (1977) (“When Ricardo set out the case against protection, he was supporting British economic interests.”).

⁶⁵ See, e.g., Barry Eichengreen & Douglas A. Irwin, *The Slide to Protectionism in the Great Depression: Who Succumbed and Why?*, 70 J. ECON. HIST. 871, 871 (“The Great Depression of the 1930s was marked by a severe outbreak of protectionist trade policies. Governments around the world imposed tariffs, import quotas, and exchange controls to restrict spending on foreign goods.”).

⁶⁶ See OVERBEEK, *supra* note 34, at 633–34 (stating that up to 1939, “the belief in political and economic classical liberalism was broken. The prevailing climate of opinion moved increasingly towards a greater role for government, which meant more neo-mercantilism, statism and interventionism”). In the late 1920s and early 1930s, the United States adopted the interventionist New Deal; England ended its free trade policies introduced in the late nineteenth century; Russia, Germany, Italy and Japan “adopted totalitarian institutions, subordinating the individual to the state.” *Id.*

⁶⁷ GATT 1947, *supra* note 43. Throughout the Article, GATT 1947 refers to the legal text. GATT (without the year) refers to the organization that administered GATT 1947, as well as the agreements and codes that came later, until 1995 when the WTO took over.

⁶⁸ Press Release, WTO, Fiftieth Anniversary of the Multilateral Trading System (Oct. 27, 1997), <https://www.wto.org/english/newse/pres97e/pr81e.htm>.

⁶⁹ See JOHN H. JACKSON, THE WORLD TRADE ORGANIZATION 17 (1998).

legal instrument, GATT 1947 codified efforts to curb protectionist policy. However, GATT 1947 had broader purposes as well. It was executed to avoid future trade wars, similar to those that occurred in the 1930s, and were, in part, seen as a cause of WWII;⁷⁰ to preserve international peace; and to prevent the spread of Communism.⁷¹ The newly created trade rules were not about “comparative advantage as such,” but rather about “the avoidance of protectionist *summum malum*” (or “beggar-thy-neighbor” policies), that is, when trade barriers introduced by one country led to a chain reaction of trade barriers

Since the GATT was designed to be merely a multilateral treaty, it would be similar to the bilateral treaties that preceded it, but designed to operate under the umbrella of the ITO, when the ITO came into being. The general clauses of GATT were the same as those in the chapter of the draft ITO charter which was devoted to trading rules, which in turn had been heavily influenced by clauses in bilateral trade treaties.

Id. See also LANG, AFTER NEOLIBERALISM, *supra* note 39, at 28 (referring to the Havana Charter, which was the draft of the ITO).

⁷⁰ See DOUGLAS A. IRWIN, PETROS C. MAVRODIS, ALAN O. SYKES, THE GENESIS OF THE GATT 5–6 (2008) [hereinafter IRWIN ET AL., THE GENESIS OF THE GATT].

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

Id. See also LANG, AFTER NEOLIBERALISM, *supra* note 39, at 196–97 (“GATT was in part understood as a way of maintaining Western unity during the Cold War, by placing it on a firm and stable economic footing The fundamental and primary purpose of the post-war regime was international stability, in the specific sense of preventing a repeat of the disastrous trade wars of early 1930s.”); Howse, *From Politics to Technocracy*, *supra* note 38, at 94–95 (“A paramount goal is the avoidance of a protectionist *summum malum*—the situation where domestic social or economic pressures lead some states to *increase* or *reinstiate* barriers to trade, thus triggering a competitive reaction in kind by other states, and eventually a “race to the bottom” that is disastrous for the global economy.”).

⁷¹ See LANG, AFTER NEOLIBERALISM, *supra* note 39, at 196 n.4.

introduced by other states.⁷² In this sense, the post-war trading system only partially remained faithful to the (neo)classical free trade idea.⁷³

The discursive foundations of the GATT 1947 were not monochromatic, they were laid as a compromise between two discourses (or “philosophies,” according to Andrew Lang)⁷⁴ that influenced its development.⁷⁵ On the one hand, the discourse advanced by the United States argued that protectionism was to blame for the Great Depression of the 1930s and the trade wars that “led in a straight line to the outbreak of the Second World War,” and that discriminatory trade undermined peace.⁷⁶ On the other hand, another discourse advanced by the United Kingdom and influenced by Keynesian thinking emphasized the boundaries that the international trade regime should not cross in relation to domestic policies affecting trade; in particular, the discourse advocated that an important aspect of an international trade regime is the ability of the state to impose trade restrictions to ensure full employment and domestic economic stability.⁷⁷ The delicate compromise between these two views

⁷² Howse, *From Politics to Technocracy*, *supra* note 38, at 103 (“After all . . . trade law in its original postwar form was not about comparative advantage as such, but about constraining destructive interdependence—of which a race to the bottom is one form.”). *See id.* at 94–95; *see also* LANG, *AFTER NEOLIBERALISM*, *supra* note 39, at 190–92.

⁷³ *See* Howse, *From Politics to Technocracy*, *supra* note 38, at 94–95 (discussing how international trade law was not only concerned with “the classic insights about the gains to wealth and welfare from free trade,” but also the “interdependency of different states’ trade and other economic policies . . .”) “The postwar trade and financial order was therefore mainly designed to enable states to manage their domestic economies, in a manner consistent with political and social stability and justice, without the risk of setting off a protectionist race to the bottom.” *Id.*

⁷⁴ LANG, *AFTER NEOLIBERALISM*, *supra* note 39, at 192.

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

Id. For further discussion, *see id.* at 24–29 and 192–94.

⁷⁵ *See id.* at 192.

⁷⁶ *See id.* at 192–93.

⁷⁷ *See id.* at 194.

shaped the discourse of “embedded liberalism”⁷⁸—the term coined by John Ruggie (from the Kennedy School of Government),⁷⁹ which he described as follows:

The essence of embedded liberalism . . . is to devise a form of *multilateralism* that is *compatible with the requirements of domestic stability*. Presumably, then, governments so committed would seek to encourage an international division of labor which, while multilateral in form and reflecting some notion of comparative advantage (and therefore gains from trade), also promised to minimize socially disruptive domestic adjustment costs as well as any *national economic and political vulnerabilities that might accrue from international functional differentiation* However, as neoclassical trade theory defines the term, the overall *social profitability of this division of labor will be lower* than of the one produced by *laissez-faire*.⁸⁰

Hence, contrary to the (neo)classical case for free trade discussed above, the discourse of “embedded liberalism” leaned towards the subjective—and, therefore, narrower—understanding of “protectionism.”⁸¹ This matters because “embedded liberalism” was not only reflected in the characteristics and design of the GATT 1947,⁸² but it also governed the GATT 1947’s operation for at least

⁷⁸ See *id.*

⁷⁹ See John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order International Organization*, 36 INT’L REGIMES 379, 392 (1982) (“The liberalism that was restored after World War II differed in kind from that which had been known previously. My term for it is ‘embedded liberalism.’”) (emphasis added).

⁸⁰ *Id.* at 399 (emphasis altered).

⁸¹ See IRWIN, *supra* note 50, at 5 (defining the subjective understanding of protectionism) (defining a policy of protection as governmental policies discriminating against imported goods “in favor of those produced within the country, usually with the aim of sheltering domestic producers from foreign competition through tariffs, quantitative restrictions, or other import barriers.”) (emphasis added).

⁸² See LANG, AFTER NEOLIBERALISM, *supra* note 39, at 195 (“Key players in the negotiations shared a common view of the legitimacy of state intervention to secure domestic stability, even if they disagreed on the precise form and depth

two decades after its inception.⁸³ Put differently, during that period, trade *liberalization* was less important as a goal in itself; it was a component of a broader societal goal of maintaining economic stability.⁸⁴

Although the non-discrimination provisions of the GATT 1947 were formulated broadly,⁸⁵ in the first two decades of the GATT 1947's existence and the dominance of the discourse of "embedded

that that intervention should take in particular circumstances."); *see also* Howse, *From Politics to Technocracy*, *supra* note 38, at 94–95.

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

Id. at 95.

⁸³ *See* LANG, AFTER NEOLIBERALISM, *supra* note 39, at 205 ("These shared ideas were reflected in a set of characteristic institutional forms, social practices, and legal structures which more or less endured over the first two decades of the GATT's existence."). These "shared ideas", however, represented the compromise of the Global North and did not factor in the views of countries from the Global South, such as India. Instead of being normalized, Global South countries' preferences were framed as "special and differential treatment." *See* Nicolas Lamp, *How Some Countries Became 'Special': Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking*, 18 J. INT'L ECON. L. 743, 745–52, 770 (2015).

⁸⁴ *See* LANG, AFTER NEOLIBERALISM, *supra* note 39, at 197.

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

Id.

⁸⁵ *See id.* at 208 ("It takes only a moment's reflection to see how broad and intrusive these disciplines had the potential to be."); *see also, e.g.*, ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 121 (2d ed. 1990) (stating that paragraph 4 of Article III GATT 1947, which contains a national treatment provision, "covered every internal law and regulation affecting commercial movement of goods, an area that is virtually unlimited in scope.").

liberalism,” they were interpreted narrowly.⁸⁶ Only those discriminatory measures that were “explicitly or implicitly motivated by a protectionist *intent*” were considered to violate the non-discrimination provisions and thus qualified as protectionism.⁸⁷ In other words, the subjective view based on regulatory intent had legal significance in the assessment of the protectionist character of a domestic measure challenged under the GATT 1947.⁸⁸

The discourse of “embedded liberalism”—reflecting the broad consensus on the goals of the multilateral trading system—also governed the practice of challenging other countries’ domestic regulations.⁸⁹ In the first decades after the GATT 1947’s formation, domestic policies that only indirectly intervened with international trade typically were not challenged as inconsistent with international

⁸⁶ See LANG, AFTER NEOLIBERALISM, *supra* note 39, at 211 (arguing that orientation towards embedded liberalism “produced a field of trade law and policy which was narrowly defined (relative to the present day), focused on tariffs and other kinds of trade measures understood at the time as quantitative restrictions, and unwilling to scrutinize ‘internal’ measures except in the clearest circumstances of circumvention of liberalization commitments.”).

⁸⁷ See *id.* at 254 (“From this perspective, the non-discrimination norm contained in Article III of the GATT is essentially an ‘anti-protectionism’ norm and ought to be applied solely to those internal measures which are expressly or implicitly motivated by a protectionist intent.”) (emphasis added); see also Howse, *From Politics to Technocracy*, *supra* note 38, at 97 (“The notion of ‘discrimination’ against trading partners seems closely linked to the very idea of protectionism, though in some cases one may discriminate for non-protectionist reasons, which is why at least as a preliminary sorting or sifting mechanism, the nondiscrimination norm has a certain durability and putative legitimacy.”).

⁸⁸ See LANG, AFTER NEOLIBERALISM, *supra* note 39, at 211; Howse, *From Politics to Technocracy*, *supra* note 38, at 97.

⁸⁹ See Ruggie, *supra* note 79, at 399 (describing the “essence of embedded liberalism”); LANG, AFTER NEOLIBERALISM, *supra* note 39, at 195, 205, 211 (arguing that orientation towards embedded liberalism “produced a field of trade law and policy which was narrowly defined (relative to the present day), focused on tariffs and other kinds of trade measures understood at the time as quantitative restrictions, and unwilling to scrutinize ‘internal’ measures except in the clearest circumstances of circumvention of liberalization commitments.”) (“Key players in the negotiations shared a common view of the legitimacy of state intervention to secure domestic stability, even if they disagreed on the precise form and depth that that intervention should take in particular circumstances.”) (“These shared ideas were reflected in a set of characteristic institutional forms, social practices, and legal structures which more or less endured over the first two decades of the GATT’s existence.”).

trade rules.⁹⁰ In line with this consensus, contracting parties to the GATT 1947 did not resort to trade disciplines in order to “reshape domestic state-market relations.”⁹¹

D. *The New Protectionism and the Neoliberal Discourse: Towards an Ever-Broader Conceptualization of “Protectionism”*

1. THE “NEW PROTECTIONISM”

Starting in the early 1970s, the notion of protectionism has gradually become much more capacious. In trade economics literature, the term “new protectionism” was coined to refer to a broader range of domestic measures restricting international trade.⁹² Unlike traditional protectionism, the new version included not only the more traditional or mercantilist restrictions on trade, but also non-tariff barriers (“NTBs”) (or “behind the border” barriers) to trade, such as negotiated or “voluntary” export restraining arrangements, and measures allegedly abusing the GATT 1947 non-discrimination provisions, such as anti-dumping measures.⁹³

⁹⁰ For a discussion, see *id.* at 214–16.

⁹¹ *Id.* at 215–16 (“[T]oo intrusive an application of GATT disciplines on internal regulation would *undermine* that purpose, as it would run the risk of itself upsetting the delicate balance of concessions embodied in the original agreement, and undermining support for the trading system as a whole.”).

⁹² See Dominick Salvatore, *Protectionism and World Welfare: Introduction*, in PROTECTIONISM AND WORLD WELFARE 1, 1 (Dominick Salvatore ed., 1993) (“This phrase, coined in the mid 1970s, refers to the revival of ‘mercantilism’ whereby nations, particularly the industrial nations, attempt to solve or alleviate their problems of unemployment, lagging growth, and declining industries by imposing restrictions on imports and subsidizing exports.”).

⁹³ See BHAGWATI, PROTECTIONISM, *supra* note 36, at 43–53 (conceptualizing NTBs in the form of domestic regulation on countervailing duties and anti-dumping provisions that was seen as being restrictively used against foreign suppliers); see also Bhagwati, *Threats to the World Trading Regime*, *supra* note 37, at 239 (distinguishing between two classes of non-tariff barriers: 1) barriers bypassing the GATT’s rules, which include visibly and politically negotiated voluntary export restraints and other export restraining arrangements (e.g. import quotas, non-automatic licensing, and variable levies); and 2) protectionist “captured” provisions that have a legitimate role in a free trade regime (e.g. countervailing duties and anti-dumping provisions) but are used to “harass unfairly their successful foreign rivals and thus to deter fair competition and free trade.”); OVERBEEK, *supra* note 34, at 555.

Trade economists also viewed the “new protectionism” as different in another important respect.⁹⁴ While the old protectionism of the 1930s was characterized as “unsystematic, improvised, and at the end, a result of panic,” the “new protectionism” was seen to be *driven by strong politically organized forces* representing interests of domestic industries.⁹⁵ This approach, as the Article shows in greater detail below, had a major impact on the acceptability (under trade law) of key domestic policy measures.

Trade economists often attributed the rise of non-tariff barriers as a form of circumvention of GATT 1947 disciplines,⁹⁶ linked to the tendency of the United States to palliate the decline of its economic dominance (a “diminished giant syndrome,” in the words of Professor Bhagwati)⁹⁷ and to suppress increasing competition from less developed, newly industrializing countries.⁹⁸ A number of those

⁹⁴ See TUMLIR, PROTECTIONISM, *supra* note 57, at 38–39.

⁹⁵ See *id.* (“Protectionism in the 1930’s was unsystematic, improvised, and at the end, a result of panic. . . . The new protectionism is a very different animal. It has been growing gradually. Industries have used intelligent, long-term planning in creating an expanded system of protection. . . . [T]he new protectionism is politically stronger because it accommodates a broader range of interests.”).

⁹⁶ Robert E. Baldwin, *The New Protectionism: A Response to Shifts in National Economic Power*, at 1 (Nat’l Bureau of Econ. Research, Working Paper No. 1823, 1986), <https://www.nber.org/papers/w1823.pdf> [hereinafter Robert Baldwin, *The New Protectionism*] (“The international trading economy is in the anomalous condition of diminishing tariff protection but the increasing use of nontariff trade-distorting measures.”).

⁹⁷ See, e.g., Jagdish Bhagwati, *The Diminished Giant Syndrome*, FOREIGN AFF., Spring 1993, at 22, 22 [hereinafter Bhagwati, *The Diminished Giant Syndrome*] (“America has been struck by a ‘diminished giant syndrome’—reinforced by the slippage in the growth of its living standards in the 1980s. This affliction has caused a loss of confidence in America’s inherited postwar trade policies.”); see also Jagdish N. Bhagwati, *Fair Trade, Reciprocity, and Harmonization: The Novel Challenge to The Theory and Policy of Free Trade*, in PROTECTIONISM AND WORLD WELFARE 17, 39 (Dominick Salvatore ed., 1993) [hereinafter Bhagwati, *Fair Trade*] (“Many of my examples [of demands for fair trade] come from the United States where the diminished giant syndrome has prompted an acute search for unfair trade by others.”).

⁹⁸ Robert Baldwin, *The New Protectionism*, *supra* note 96, at 1, 20 (“[N]ew nontariff protectionism [is related] to significant structural changes in world industrial production that have brought about a decline in the dominant economic position of the United States, a concomitant rise to international economic prominence of the European Economic Community and Japan, and the emergence of a group of newly industrializing developing countries (NICs).”).

countries imposed barriers to U.S. exports in areas where the United States had a comparative advantage, especially knowledge-intensive industries and services.⁹⁹ In addition, new protectionism was viewed as a means of alleviating domestic stability issues, such as growing unemployment and inability, due to economic decline, to deliver on the social obligations of the expanded welfare states.¹⁰⁰ Recall from Section I.C that it was precisely these measures that were seen as legitimate and not, therefore, protectionist in the “embedded liberalism” discourse.¹⁰¹

In new protectionism, free trade theorists saw a threat to the legitimacy and the very existence of the multilateral trading system associated with the post-war prosperity and economic growth.¹⁰² Recalling the disastrous consequences of protectionism in the 1930s, economists warned that new protectionism would, just like its predecessor, trigger beggar-thy-neighbor policies and result in new trade wars.¹⁰³

⁹⁹ See Howse, *The World Trade Organization 20 Years On*, *supra* note 45, at 17 (“[M]any barriers worldwide hampered America in exploiting its apparent contemporary comparative advantage in knowledge-intensive industries and services. In some, intellectual property was largely unprotected; in most, competition in network services, such as in telecommunications and finance, was severely restricted or limited, while many others still imposed byzantine and archaic regulatory requirements on products, both imported and domestic. In many cases, a business presence in the other country was necessary for the full exploitation of comparative advantage, and here American firms faced severe foreign investment restrictions.”).

¹⁰⁰ See Salvatore, *supra* note 92, at 9; see also OVERBEEK, *supra* note 34, at 553–55.

¹⁰¹ See, e.g., LANG, AFTER NEOLIBERALISM, *supra* note 39, at 29, 192–205; Ruggie, *supra* note 79, at 399.

¹⁰² Robert Baldwin, *The New Protectionism*, *supra* note 96, at 1 (“[New protectionism] is taking place largely outside the framework of GATT and threatens to undermine the liberal international trading regime established after World War II.”). For further discussion, see Bhagwati, *Threats to the World Trading Regime*, *supra* note 37, at 238–44.

¹⁰³ See Bhagwati, *Threats to the World Trading Regime*, *supra* note 37, at 238–44. *But see* Strange, *supra* note 28, at 254–55 (1985) (“[T]he next few years will show whether world trade can continue to survive despite the deadlock in the GATT and despite a certain amount of increased protectionism. My contention is that a combination of political and economic interests, reinforced by structural change in the international division of labor brought about by the mobility of capital and technology, is preventing a world depression from seriously arresting or reversing the steady growth in world trade.”).

2. "FAIR TRADE"

a. *The "New Protectionism" in "Fair Trade" Clothing*

Beginning at approximately the same time as the emergence of the new protectionism discourse (the 1970s) within U.S. business and governmental circles, measures characterized as new protectionism were increasingly re-framed as means to curtail "unfair trade practices" from (primarily) developing countries.¹⁰⁴ From this perspective, trade-restricting practices, such as import controls and voluntary export restraints, labeled as new protectionism by trade economists, were presented as *responses* to unfair trade.¹⁰⁵ Implicitly using its domestic market as a primary reference point, the United States used the "fair trade" discourse to argue that any commercially significant institutional or regulatory difference between its domestic regime and other countries distorted the conditions of competition and constituted barriers to U.S. exports.¹⁰⁶ Trade theo-

¹⁰⁴ Subsidies, dumping practices, and other discriminatory rules disfavoring U.S. (and other) imports are examples of such "unfair trade practices." See Robert Baldwin, *The New Protectionism*, *supra* note 96, at 16–19; see also *id.* at 18 ("The emphasis on the great need for fair trade is evident in the 1974 legislation authorizing U.S. participation in the Tokyo Round of multilateral negotiations.") (emphasis added).

¹⁰⁵ See *id.* at 18–19 ("The most important protectionist action taken by the United States since the late 1960's, namely, the gradual tightening of controls over steel imports, has also been justified mainly on the grounds of unfair trade practices by foreign producers. . . . When a series of voluntary export restraint agreements with leading steel-exporting nations were concluded in late 1984, a spokesperson for the U.S. Trade Representative stated, 'We are responding to unfair trade in the U.S.; defending yourself against unfair trade is not, in our opinion, protectionism.' The unfair trade argument has been used in support of most other trade-restricting or trade-promoting actions taken by the United States in recent years.").

¹⁰⁶ LANG, *AFTER NEOLIBERALISM*, *supra* note 39, at 227 ("In practice, when one country alleges that another country's measure is an unfair trade practice (or trade distortion), it will implicitly use the institutional form of its own domestic market as the primary reference point against which fairness and distortions are measured. . . . The result is that the notion of a 'trade distortion' comes to be equated in practice with the existence of a commercially significant institutional or regulatory difference between countries.").

rists, in contrast, viewed these claims as nothing more than a different rhetoric of protectionist demands in order to make lobbying efforts more successful.¹⁰⁷

Guided by the new fair trade narrative, the U.S. government saw the changing mission of international trade law as the elimination of unfair trade practices through, in particular, the harmonization (or “globalization”) of a broad range of domestic regulatory frameworks that affect international trade.¹⁰⁸ Demands for “level playing fields,” “harmonization,” and “fair trade” more generally worried trade economists, who saw in such demands a threat to the legitimacy and feasibility of free trade: not only did they consider it to be impossible to harmonize every aspect of domestic regulation, but they argued that it was in these differences of domestic regimes that lay the source of the comparative advantages that make trade beneficial in the first place.¹⁰⁹

¹⁰⁷ See e.g. Bhagwati, *Threats to the World Trading Regime*, *supra* note 37, at 239 (“[I]f protectionists demand protection, they will today confront politicians who are generally hesitant to supply it because it is not comfortable to be called ‘protectionist’. However, if you cry ‘foul’ and allege that the foreign rival is resorting to ‘unfair’ trade practices and therefore you need protection, your chances of successful lobbying are much greater. Protectionists have increasingly come to appreciate this and to shift their style of complaints accordingly to ‘unfair trade,’ opening this notion to ever more areas of concern (e.g. workers’ rights enforcement by foreign countries.)”; see also BHAGWATI, PROTECTIONISM, *supra* note 36, at 123–24 (“The insidious growth of the ‘fairness’ issue poses a yet more disturbing threat to freer trade.”).

¹⁰⁸ Robert Baldwin, *The New Protectionism*, *supra* note 96, at 18 (“In reshaping the proposal of the president [for the Tokyo Round of multilateral negotiations], the Congress stressed that the president should seek ‘to harmonize, reduce, or eliminate’ nontariff trade barriers and tighten GATT rules with respect to fair trading practices. Officials in the executive branch supported these directives not only on their merits but because they deflected attention from more patently protectionist policies.”).

¹⁰⁹ See Bhagwati, *Fair Trade*, *supra* note 97, at 18 (“[T]he true and greater crisis that we face with regard to the theory and policy of free trade today comes . . . from the growth of demand for ‘level playing fields,’ ‘harmonization,’ ‘fair trade,’ etc., all of which are variously undermining insidiously the legitimacy and feasibility of free trade since it is virtually impossible to harmonize everything so that playing fields are truly level in every way. There will always be something that an opponent of free trade will be able to find that is *different* in the country of one’s successful rival and hence can be argued to make free trade unfair and therefore illegitimate and unacceptable.”); see also Bhagwati, *Threats to the*

In sum, the “new protectionism” in “fair trade” clothing “provided the enabling conditions and leverage for a radical renegotiation of the international rules that had undergirded the profound global economic transformations of the previous era.”¹¹⁰

b. “Fair Trade” and the Human Rights Movement

Another, non-economic, string of “fair trade” debate dealt with background conditions affecting the cost of production in developing countries, such as environmental and labor standards.¹¹¹ As the

World Trading Regime, *supra* note 37, at 240 (“If differences in national institutions and policies can affect comparative advantage, as they surely can, and if these are now increasingly cited as sources of unfair trade (as they are), then we may be seriously eroding the possibility of free trade and leading towards ‘managed trade’ or towards free trade only when a great deal of policy harmonization has occurred (as in the European Community (EC)).”).

¹¹⁰ Andrew Lang, *Protectionism’s Many Faces*, 44 YALE J. INT’L L. ONLINE 1, 3 (2019) (“What “new protectionism” signaled above all . . . [was] an attempt by many States to rewrite the rules of global trade to establish a new international division of comparative advantage and secure their preferred places in that order In retrospect, the “new protectionism” is therefore best understood . . . as a successful attempt to transform the system from one type of open global trading order to another.”).

¹¹¹ See Jagdish Bhagwati, *The Demands to Reduce Domestic Diversity Among Trading Nations*, in 1 FAIR TRADE & HARMONIZATION 9, 10–11 (Jagdish Bhagwati & Robert E Hudec eds., 1996) [hereinafter Bhagwati, *The Demands to Reduce Domestic Diversity*] (stating that non-economic fair trade arguments are based on three concerns: a sense of a “transborder” obligation towards others living in nation-states with lowers standards; concerns of distributive justice that amount to the fear that freer trade with poor countries with abundant unskilled labor will immiserate working people in those countries; and concerns of fair competition that require that costs attributed to environmental and labor standards should not differ across countries in free trade.); see also JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 133–34 (2007) [hereinafter BHAGWATI, IN DEFENSE OF GLOBALIZATION]; Robert Howse & Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labor, and the Environment*, 16 INT’L REV. L. & ECON. 61, 74 (1996) (“Unlike the arguments for trade restrictions on environmental and labor rights grounds . . . which have a normative reference point external to the trading system itself, competitiveness-based ‘fair trade’ claims focus largely on the effects on domestic producers and workers of other countries’ environmental and labor policies, and not *per se* on the effects of those policies on the environment and on workers elsewhere.”); Robert Wai, *Countering, Branding, Dealing: Using Economic and Social Rights in and Around the International Trade Regime*, 14 EUR. J. INT’L L. 35, 48–49 (2003) (“Free trade based on comparative

liberalization of capital flows allowed multinational companies from developed countries to move production to developing countries with lower environmental and labor standards, the non-economic fair trade argument raised concerns of a “race to the bottom” of such standards in developed countries.¹¹² To prevent such a race to the bottom, proponents of the argument called for the creation of an international “level playing field” and especially environmental and labor-rights trade measures.¹¹³ Just like their economic counterpart, these arguments were attacked by opponents as protectionism in disguise.¹¹⁴ Moreover, even if one views these arguments as not

advantage is agnostic about the production conditions in any particular jurisdiction, including its domestic regulatory standards. Fair trade theory, in contrast, is very much concerned with defining the background of those conditions under which international trade should occur. Production that violate these background conditions would constitute ‘unfair competition’”). For an overview of non-trade rationales for environmental and labor protection, see Howse & Trebilcock, *supra*, at 63–65.

¹¹² See Howse, *From Politics to Technocracy*, *supra* note 38, at 104 (“In the wake of the debt crisis, a range of developing countries ended up removing or modifying restrictions on foreign investment and various other domestic policies that were disincentives to the attraction of foreign capital This led to fears of ‘social dumping’ in the developed world that would eventually cause a race to the bottom: developed countries would not be able to sustain high environmental and labor standards, or rates of taxation needed to finance the redistributive policies of the welfare state, if they had to compete with these poorer countries for the location of capital investment.”).

¹¹³ Howse, *From Politics to Technocracy*, *supra* note 38, at 103; see, e.g., Howse & Trebilcock, *supra* note 111, at 78–79. For a literature overview on globalization and labor standards, see Eddy Lee, *Globalization and Labour Standards: A Review of Issues*, 136 INT’L LAB. REV. 173, 176–83 (1997). On the “race to the bottom” argument in relation to environmental standards, see ESTY, *supra* note 12, at 22–23.

¹¹⁴ See, e.g., BHAGWATI, IN DEFENSE OF GLOBALIZATION, *supra* note 111, at 123–31, 147–50 (arguing that the “race to the bottom” argument is not supported by empirical evidence; differences in environmental and labor standards are insignificant to affect the location of production; higher labor and environmental standards themselves can be a protectionist move; and finally, attributing such arguments to “rent seeking.”); see also OVERBEEK, *supra* note 34, at 557 (“At present [(1990s)], protectionists in wealthier countries, who are always on the look-out for new reasons for trade barriers, are using labor and environment related arguments to back up demands for additional trade impediments [T]his type of argument is extreme protectionism in its crudest possible disguise.”); Lee, *supra* note 89, at 177. But see Sean D. Ehrlich, *The Fair Trade Challenge to Em-*

protectionist in nature, addressing non-economic issues through trade measures was perceived as a second-best solution, because the first-best domestic measures are those not interfering with international trade.¹¹⁵

Although trade theorists advancing the idea of free trade were critical of the fair trade narrative, it would be inaccurate to say that this critique applied to *any* domestic interference with free trade.¹¹⁶ For example, Bhagwati acknowledged that objecting to any state intervention as a departure from fair trade was “a wrongheaded” approach.¹¹⁷ He also supported some of the “fair trade” arguments insofar as they were focused on the importance of creating intra-sectoral level playing fields—especially in the “context of the few technology-intensive industries in which there are significant scale economies relative to the size of the world market.”¹¹⁸ Along the same lines, he called for greater tolerance of “other countries’ social objectives”; regulation pursuing such objectives, he argued, should not be labelled as “unfair.”¹¹⁹

3. NEOLIBERAL DISCOURSE

As this Article has explicated above, redefining “protectionism” as “new protectionism” was framed as a necessary and logical step

bedded Liberalism, 54 INT’L STUD. Q. 1013, 1014, 1026, 1029–30 (2010) (providing empirical evidence of genuine nature of concerns with environmental and labor standards); Ronald B. Davies & Krishna Chaitanya Vadlamannati, *A Race to the Bottom in Labor Standards? An Empirical Investigation*, J. DEV. ECON., July 2013, at 1, 11–12 (providing empirical evidence of the race to the bottom in labor standards).

¹¹⁵ See Howse, *From Politics to Technocracy*, *supra* note 38, at 100 (“Thus, the notion that a more effective policy instrument than trade protection is always available to achieve *any* legitimate public end vastly oversimplifies the problem of politics.”). Bhagwati argued that using trade distorting measures to tackle unemployment is only a second-best measure, while purely domestic measures would be the first best solution. See Bhagwati, *Threats to the World Trading Regime*, *supra* note 37, at 238. On the theory of second best, see Jagdish N. Bhagwati, *The Generalized Theory of Distortions and Welfare*, in TRADE, BALANCE OF PAYMENTS AND GROWTH 69 (Jagdish N. Bhagwati et al. eds., 1971).

¹¹⁶ See, e.g., BHAGWATI, PROTECTIONISM, *supra* note 36, at 126–27.

¹¹⁷ *Id.* at 126.

¹¹⁸ *Id.* at 127.

¹¹⁹ *Id.*

in response to new forms of trade barriers. John Ruggie convincingly argues instead that the emergence of the new protectionism was not the cause but rather the effect of the neoliberal discourse, which redefined *social purposes* of the international trading system.¹²⁰ It was, thus, a new vision of the international trading system dictated by the neoliberal discourse, and not objective circumstances, which effectuated the transformation of the notion of protectionism.¹²¹

This evolution of the neoliberal discourse happened against the background of a shift in the economic theory of regulation.¹²² A neoliberal view that *any* regulation may constitute a potential barrier to trade relies to a large extent on the theory of regulatory capture that became “common language” in the circles of trade economists and international lawyers associated with the GATT.¹²³ These economic theories were later embraced in two official GATT reports.¹²⁴ In contrast to public interest theory (which advanced analytical arguments that regulation is adopted in the public interest, primarily to correct market failures and pursue non-economic and societal goals),¹²⁵ the “regulatory capture” theory (based on the empirical foundations of the public choice theory) argued that regulation is

¹²⁰ Ruggie, *supra* note 79, at 410–13. *See also* LANG, AFTER NEOLIBERALISM, *supra* note 39, at 169–70.

¹²¹ *See* Ruggie, *supra* note 79, at 410, 412–13.

¹²² *See generally* Zang, *Divided by Common Language*, *supra* note 23, at 432–57.

¹²³ *Id.* at 438 (“During the 1980s, Ordo-liberal and public-choice economics gained influence among trade economists and international lawyers associated with GATT, and ‘capture’ theory became the common language.”).

¹²⁴ *Id.*

¹²⁵ *See* ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, UNDERSTANDING REGULATION 39–43 (2nd ed., 1999); ANTHONY OGUS, REGULATION, LEGAL FORM AND ECONOMIC THEORY 58–71(1994). The private interest theory questioned one of the core assumptions of the public interest theory, the assumption of the “benevolent regulator,” in other words, that the political process creating regulation is efficient. *See, e.g.*, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) (“The second [alternative] view [of regulation] is essentially that the political process defies rational explanation: ‘politics’ is an imponderable, a constantly and unpredictably shifting mixture of forces of the most diverse nature, comprehending acts of great moral virtue (the emancipation of slaves) and of the most vulgar venality (the congressman feathering his own nest).”).

adopted and implemented primarily in the interest of organized interest groups,¹²⁶ and that regulatory capture is essentially unavoidable.¹²⁷ Captured regulation leads to a reduction of social welfare because it merely leads to the transfer of wealth from one industry to another and does not serve public interest any more.¹²⁸ This explains why, from the perspective of this theory, regulation should be reduced to a minimum.¹²⁹ This theory was also used as a justification of the aggressive pursuit of export interests on the international level to constrain domestic protectionist trade policy making.¹³⁰ Binding reciprocal trade rules were thus seen as a tool to contain domestic protectionism through what Richard Baldwin from the Graduate Institute of International Studies in Geneva calls a “juggernaut effect,”

¹²⁶ OGUS, *supra* note 125, 57–58 (1994). For an overview of “regulatory capture” theory, see BALDWIN, ET AL., *supra* note 98, at 43–49; OGUS, *supra* note 125, at 55–75; CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 69–71 (1993) [hereinafter SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*].

¹²⁷ Political economists developed sophisticated models based on empirical data that strongly suggested that not only elected political actors but also non-elected bureaucrats (especially in the case of the European Economic Community) were more prone to adopt protectionist regulation than to adhere to free market principles. See Patrick A. Messerlin, *The Political Economy of Protectionism: The Bureaucratic Case*, 117 *WELTWIRTSCHAFTLICHES ARCHIV*. 469, 469–71 (1981). But see Robert E. Baldwin, *The Political Economy of Trade Policy*, 3 *J. ECON. PERSP.* 119, 131 (1989) (“[T]he individual’s various social concerns can play an important role in shaping his or her decisions. To expand their already substantial contributions toward understanding the policymaking process, economists should integrate such social motivations into their microeconomic optimizing framework.”).

¹²⁸ See e.g., TUMLIR, *PROTECTIONISM*, *supra* note 57, at 4 (arguing that “[a]ll protection is a redistribution of income and wealth within the protecting country”); see also OVERBEEK, *supra* note 34, at 558 (discussing the policy of managed trade).

¹²⁹ See e.g., SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*, *supra* note 126, at 70 (criticizing the capture theory). Sunstein states that, “[T]he notion of rent-seeking rejects, as unproductive, nearly all of the basic workings of politics. It treats citizenship itself as an evil. Efforts to enact public aspirations, to counteract discrimination, to protect the environment—all these are seen as the diversion of productive energies into a wasteful place.” *Id.* at 71.

¹³⁰ LANG, *AFTER NEOLIBERALISM*, *supra* note 39, at 234 (“As regards the trade regime itself, public choice theory supported the view that aggressive championing of export interests through trade negotiations was generally beneficial, as it provided a counterweight to the inherent tendency of protectionist special interests to capture domestic trade policy-making processes.”).

which is using domestic export-oriented groups who profit from reduction of trade barriers to fight the domestic protectionist lobby.¹³¹

The new approach to domestic regulation was reinforced by a somewhat simplified version of trade economics that “professors dole out to journalists”¹³² (a “market fundamentalist ideology” rather than the true economic science).¹³³ Proponents of this ideology argued that trade leads to efficiency gains and enhances domestic welfare, while silencing the downsides, such as lack of consideration of social or distributional effects of free trade policy.¹³⁴ Relying on the assumption that any public policy objective can be more efficiently achieved by domestic regulation not interfering with international trade, this approach judged domestic trade restrictive

¹³¹ RICHARD BALDWIN, *THE GREAT CONVERGENCE. INFORMATION TECHNOLOGY AND THE NEW GLOBALIZATION* 70 (2016); *see also* Howse, *From Politics to Technocracy*, *supra* note 38, at 100–01.

¹³² *See* RODRIK, *supra* note 11, at 77 (“Free market economics was in the ascendancy, producing what has been variously called the Washington Consensus, market fundamentalism, or neoliberalism . . . This new vision elevated the simplistic case for trade—the one that economics professors dole out to journalists—over the appropriately qualified version. It regarded any obstacle to free trade as an abomination to be removed; caveats to be damned.”); *see also* Robert Driskill, *Deconstructing the Argument for Free Trade: A Case Study of the Role of Economists in Policy Debates*, 28 *ECON. & PHIL.*, 1, 2 (2012) (“[I]n light of the apparent settled nature of economists’ judgement on the issue of trade liberalization, the profession has stopped thinking critically about the question and, as a consequence, makes poor-quality arguments justifying their consensus.”).

¹³³ JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS REVISITED* xl (2018) [hereinafter STIGLITZ, *GLOBALIZATION*] (“Doubling down on the Washington Consensus was a policy inspired by the special interests that it served, but the belief in the efficacy of these policies was supported by ‘market fundamentalist’ ideologies—the notion that free, unregulated markets were the best way to organize a society.”) (emphasis added).

¹³⁴ *See* Howse, *From Politics to Technocracy*, *supra* note 38, at 99 (“Put in this crude way, the case for trade liberalization appeared to be totally indifferent to any notion of a just distribution of benefits and burdens from the removal of trade restrictions.”).

measures against the benchmark of an imaginary “toolbox of effective nontrade policy instruments.”¹³⁵ This perspective was also reinforced by the predisposition that protectionism explains domestic rules that deviate from this benchmark of efficient domestic rules.¹³⁶

Taking an opposite view, Joseph Stiglitz, the Nobel Prize winning economist, argued, “[t]he globalization which emerged at the end of the twentieth century and the beginning of the twenty-first was not based on ‘free trade,’ but managed trade—managed for special corporate interests in the United States and other advanced countries”¹³⁷ The “market fundamentalist” ideologies that created a presumption that “free, unregulated markets were the best way to organize a society” reinforced the myopic focus of political economy theory on the failures of domestic regulation.¹³⁸ Paradoxically, a policy of deregulation (or not adopting regulation in the first place) and of complete free trade *is* a type of domestic policy, which itself is prone to “capture” by domestic interest groups that benefit from such policies.¹³⁹ This led to questions about why international trade-law regulation would be immune to such capture.¹⁴⁰ To illustrate this line of reasoning, an argument can be made that some countries, such as the United States, set their data protection standards *strategically low* in order to increase their competitiveness on a global digital market.¹⁴¹

¹³⁵ *Id.* at 100 (“One simply *assumed* a certain toolbox of effective nontrade policy instruments, and the stability and viability of the social bargains within states as well, or at least the stability of institutions that construct and reconstruct such social bargains.”).

¹³⁶ *See id.* (“In its confidence in the prescription of free trade as a timeless truth, the network identified special interest groups as the evil force that explained all, or almost all, deviations from the clearly rational policy prescription to use nontrade instruments for achieving public policy goals.”).

¹³⁷ STIGLITZ, *GLOBALIZATION*, *supra* note 133, at 20.

¹³⁸ *See id.* at xl.

¹³⁹ *See* Howse, *From Politics to Technocracy*, *supra* note 38, at 100–01.

¹⁴⁰ *See id.*

¹⁴¹ *See, e.g.*, Graham Greenleaf, *The Influence of European Data Privacy Standards Outside Europe: Implications for Globalization of Convention 108*, 2 INT’L DATA PRIVACY L. 68, 72 (2012) (characterising the U.S. privacy standards as inherently or deliberately weak). “[A]ttempts by US companies and the US government to use their combined economic and political influence to limit the development of data privacy laws in other countries will continue to be important, but may now be on the wrong side of history.” *Id.*; *see also* Shamel Azmeh &

4. THE IMPACT OF NEOLIBERAL DISCOURSE ON FORMATION AND FUNCTIONING OF INTERNATIONAL TRADING SYSTEM

The neoliberal discourse had a profound impact on the further rounds of negotiations of the GATT, in particular, the Uruguay Round (1986-1994) that led to the creation, design and functioning of the WTO and the Execution of the WTO Agreement,¹⁴² and caused a considerable expansion of the scope of the multilateral trade system.¹⁴³ The WTO Agreement not only incorporated the GATT 1947,¹⁴⁴ but also introduced new international trade law disciplines on the international trade in services (General Agreement on Trade in Services (“GATS”)),¹⁴⁵ technical standards,¹⁴⁶ sanitary

Christopher Foster, *The TPP and the Digital Trade Agenda: Digital Industrial Policy and Silicon Valley’s Influence on New Trade Agreements*, 12 (London Sch. of Econ. and Pol. Sci., Working Paper No. 16-175, 2016) (“Over the last few years, the political role of ICT companies has increased substantially with some of these firms becoming key political lobbying forces.”).

¹⁴² Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

¹⁴³ Howse, *The World Trade Organization 20 Years On*, *supra* note 45, at 17, 53–54 (showing that the U.S. fair trade agenda became the core of the Uruguay Round, which lead to the adoption of trade disciplines implementing the rules dictated by “the predominant ideology represented by the Washington consensus”: extension of disciplines on domestic regulation beyond GATT non-discrimination obligations, greater market access, expansive intellectual property protection, de-monopolization and deregulation of telecommunications and finance, and “scaling down” governmental health, safety and environmental protection).

¹⁴⁴ General Agreement on Tariffs & Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994] (incorporating almost all of the provisions of GATT 1947).

¹⁴⁵ General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

¹⁴⁶ Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120.

and phytosanitary measures,¹⁴⁷ and intellectual property.¹⁴⁸ Another important outcome of the Uruguay Round was the creation of a binding dispute settlement mechanism.¹⁴⁹

During the Uruguay Round, “a specialized policy elite”—employees of GATT/WTO secretariat and a broad range of “experts”—took over the gradual development and administration of the multilateral trading system.¹⁵⁰ These elites were “insulated from, and not particularly interested in, the larger political and social conflicts of the age”¹⁵¹ and shared a common set of neoliberal normative values (ethos or ideology) on the nature and goals of international trade, the

¹⁴⁷ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493.

¹⁴⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; see also DANIEL J. GERVAIS, *THE TRIPS AGREEMENT* 3 (4th ed. 2010).

¹⁴⁹ Although there was a dispute settlement mechanism under the GATT 1947, the decision of the dispute settlement body (“Panel”) had to be adopted by a consensus, which, in practice, meant that a losing party could block the adoption of the decision against it. See JACKSON, *supra* note 69, at 68. Establishment of the Dispute Settlement System solved this problem. The Dispute Settlement System is embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S.; see JACKSON, *supra* note 69, at 72–73; see also Edwin Vermulst & Bart Driessen, *An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round Agreements*, 29 J. WORLD TRADE 131, 131 (1995) (providing an overview of the WTO dispute settlement system).

¹⁵⁰ Howse, *From Politics to Technocracy*, *supra* note 38, at 98 (“This group included some officials employed in the GATT/ WTO Secretariat . . . the larger group of ‘experts’: former or current governmental trade officials; GATT-friendly academics who often sat on GATT/WTO dispute settlement panels and were invited to various conferences and meetings of the GATT/WTO; international civil servants in other organizations (particularly the World Bank, the Organisation for Economic Co-operation and Development, and the International Monetary Fund) preoccupied with trade matters; and a few private attorneys, consultants, and former politicians.”).

¹⁵¹ *Id.* (“A sense of pride developed that an international regime was being evolved that stood above the ‘madhouse’ of politics (if one can borrow Pascal’s image), a regime grounded in the insights of economic ‘science,’ and not vulnerable to the open-ended normative controversies and conflicts that plagued most international institutions and regimes, most notably, for instance, the United Nations.”).

relationship between trade law, and politics and the boundaries of domestic regulatory autonomy.¹⁵² The main goal of the international trading system, as advanced by these policy elites, was no longer “embedded liberalism,” but the continued, gradual liberalization of trade.¹⁵³ International trade and globalization became an imperative for any trade policy measure, subordinated to the domestic economic, social, and political priorities, and an “end in itself.”¹⁵⁴ Under the influence of these policy elites, the WTO dispute settlement

¹⁵² See LANG, *AFTER NEOLIBERALISM*, *supra* note 39, at 181 (“[T]rade regime’s neoliberal turn was in significant part . . . a transformation of collective ideas about the nature and purpose of the trade regime, collective ideas about the function of law in trade politics, and collective principles and techniques for evaluating the legitimacy of governmental action . . . [and] this transformation of the GATT/WTO’s ‘legal imagination’ radically reshaped the form, structure, content, and interpretation of international trade law.”); see also Joseph H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 *J. WORLD TRADE* 191, 193 (2001) (“The diplomatic ethos which developed in the context of the old GATT dispute settlement tenaciously persists despite the much transformed juridified WTO.”).

¹⁵³ See RODRIK, *supra* note 11, at 76 (citing THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION* 61–65 (1999)) (“[T]he WTO marks the pursuit of a new kind of globalization . . . Domestic economic management was to become subservient to international trade and finance rather than the other way around. Economic globalization, the international integration of the markets for goods and capital (but not labor), became an end in itself, overshadowing domestic agendas. . . . Globalization became an imperative, apparently requiring all nations to pursue a common strategy of low corporate taxation, tight fiscal policy, deregulation, and reduction of the power of unions.”); see also Howse, *From Politics to Technocracy*, *supra* note 38, at 104 (“[Some insiders] moved from free trade as an economic ideology to free trade as embedded in a broader liberal economic ideology. Trade liberalization became part of a general set of prescriptions for growth and prosperity, at odds to a large extent with the progressive welfare state vision of the embedded liberalism bargain.”); Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 243, WTO Docs. WT/DS269/AB/R; WT/DS286/AB/R (adopted Sept. 12, 2005) (stating that security and predictability of “the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994”).

¹⁵⁴ See RODRIK, *supra* note 11, at 76.

system, which had exclusive competence to enforce WTO rules, became largely “self-referential” and gave little weight to other international rules, such as those governing human rights.¹⁵⁵

This shift in the dominant discourse affected the behavior of WTO members.¹⁵⁶ Compared to the previous system under GATT 1947, the WTO dispute settlement system challenged a broader range of domestic policy issues.¹⁵⁷ As a result, in addition to traditional trade-related questions such as tariffs and quotas, WTO dispute settlement bodies increasingly had to evaluate compliance with the new trade rules of domestic health and environment standards, cultural policies, and regulation protecting public morals.¹⁵⁸ In addition to domestic regulation discriminating based on origin (“*de jure* discrimination”),¹⁵⁹ which was a primary matter of concern in

¹⁵⁵ Weiler, *supra* note 152, at 194 (“A very dominant feature of the GATT was its self-referential and even communitarian ethos explicable in constructivist terms.”).

¹⁵⁶ See LANG, *AFTER NEOLIBERALISM*, *supra* note 39, at 223.

¹⁵⁷ See *id.* at 223–24 (“By the end of the 1990s, however, as informal norms limiting the scope of application of the GATT regulatory disciplines were gradually reconstituted, the range of measures subject to challenge under Articles I and III of the GATT had broadened considerably It was in part the result of a twofold imaginative change consisting of, first, a redefinition of the commonsense concept of ‘trade barrier,’ and second, a rethinking of the nature and purpose of the trade regime itself.”).

¹⁵⁸ See *e.g.* Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 1, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005) [hereinafter *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*]; Appellate Body Report, *European Communities—Measures Affecting the Prohibition of Asbestos and Asbestos Products*, ¶ 1, WTO Doc. NWI/DS135/AB/R (adopted Mar. 12, 2001); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 1, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998); Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 2, WTO Doc. WT/DS26/AB/R (adopted Jan. 16, 1998); Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, 1–2, WTO Doc. WT/DS31/AB/R (adopted June 30, 1997).

¹⁵⁹ Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an Aim and Effects Test*, 32 INT’L L. 619, 620 (1998) [hereinafter Hudec, *GATT/WTO Constraints on National Regulation*] (defining “*de jure* discrimination” as “regulatory measures that discriminate explicitly by providing different standards for domestic and foreign goods or services”); see also NICOLAS F. DIEBOLD, *NON-DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES*:

the GATT 1947, starting from late 1980s an increasing number of disputes focused on *de facto* discrimination, or domestic measures that did not specifically aim to discriminate foreign goods in favor of domestic ones based on their origin, but rather, on a domestic regulatory purpose (e.g. health or environmental protection).¹⁶⁰

The WTO caselaw that emerged from these disputes demonstrates a neoliberal shift in the trade adjudicators' interpretative techniques.¹⁶¹ The WTO adjudicating bodies increasingly refrained from considering the regulatory intent when assessing whether a particular domestic measure resulting in discrimination between domestic and foreign goods or services violates the relevant trade agreement and is, therefore, protectionist.¹⁶² Instead, the focus shifted towards the economic *impact* on the competitive opportuni-

'LIKENESS' IN WTO/GATS 35–37 (2010) [hereinafter DIEBOLD, NON-DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES].

¹⁶⁰ See Hudec, *GATT/WTO Constraints on National Regulation*, *supra* note 159, at 620 (defining “de facto discrimination” as “regulatory measures that make no explicit distinction between foreign and domestic goods (called ‘origin-neutral’), but which have a disproportionate impact on foreign goods or services that is for some reason viewed as wrong or illegitimate”). “Historically, GATT has been principally occupied with border measures and explicitly discriminatory measures, with de facto discrimination only becoming a major concern relatively recently.” *Id.* at 622. Hudec clarifies that “[o]f the first 207 legal complaints filed in GATT between 1948 and 1990, only a small handful involved claims of de facto discrimination by internal regulatory measures.” *Id.* 622 n.8; see also DIEBOLD, NON-DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES, *supra* note 159, at 37–45.

¹⁶¹ See LANG, AFTER NEOLIBERALISM, *supra* note 39, at 255.

¹⁶² See *id.* at 255, 257–65 (“Over the course of the 1990s, the clear trend was incrementally but decisively to eliminate virtually any explicit consideration of intent in the interpretation of GATT non-discrimination norms.”); see also DIEBOLD, NON-DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES, *supra* note 159, at 75–80; MICHAEL J. TREBILCOCK, ROBERT HOWSE & ANTONIA ELIASON, THE REGULATION OF INTERNATIONAL TRADE 138–45 (2013) (examining the Appellate Body’s interpretation of the National Obligation in the GATT and “rejection of an ‘aims and effects’ test to determine the validity of an internal tax measure.”); Lothar Ehring, *De Facto Discrimination in WTO Law: National and Most-Favored-Nation Treatment—or Equal Treatment?* 36 J. WORLD TRADE 921, 931–46 (2002); Hudec, *GATT/WTO Constraints on National Regulation*, *supra* note 159, at 629–33.

ties of foreign goods and the effects on competition between products or services.¹⁶³ These developments led to an equivalence between trade-distorting measures, discrimination, and protectionism.¹⁶⁴

At bottom, this equivalence between discrimination and protectionism had two practical implications. First, it altered the baseline between legitimate regulation and protectionism, thus making the term protectionism much more capacious. This, in turn, left a much narrower domestic regulatory space to protect non-economic values, such as the environment, labor rights, animal welfare, and human rights. Second, by refraining from any consideration of regulatory intent in the assessment of violations of international trade commitments, the WTO adjudicating bodies transferred the center of gravity in consideration of regulatory purposes towards the all-important general exceptions contained in GATT 1994 Article XX and GATS Article XIV.¹⁶⁵ This shift had an important consequence for the do-

¹⁶³ See, e.g., Panel Report, *Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, ¶ 11.182, WTO Doc. WT/DS155/R (adopted Feb. 16, 2001) (clarifying that “Article III:2, first sentence, is not concerned with taxes or changes as such or the policy purposes Members pursue with them, but with their economic *impact* on the competitive opportunities of imported and like domestic products”) (emphasis added); LANG, AFTER NEOLIBERALISM, *supra* note 39, at 262; Howse, *The World Trade Organization 20 Years On*, *supra* note 45, at 46 (“Consideration of regulatory intent or of evidence of purposeful discrimination plays no role in this analysis. The adjudicator makes a determination of whether the products are ‘like’ based upon objective criteria, such as physical characteristics and end uses, while consumer preferences can also be dispositive, and then undertakes a formalistic (not empirical) analysis of whether the regulatory intervention in question has detrimental impact on competitive opportunities for imported like products. In this disparate impact or de facto discrimination analysis, there is no apparent room for consideration of outside values or legitimate regulatory purposes.”).

¹⁶⁴ See LANG, AFTER NEOLIBERALISM, *supra* note 39, at 255 (“[A]n implicit association . . . began to be made between the notion of discrimination under Articles I and III and the notion of a ‘market distortion’ from economic analysis.”). “[T]he non-discrimination norm became a much more powerful tool to wield against domestic regulation, even that which was apparently ‘non-discriminatory’ in the sense that that term had been traditionally understood. ‘Discrimination’ began to look very much like ‘trade-distorting market intervention’.” *Id.* at 264.

¹⁶⁵ See Appellate Body Report, *Argentina—Measures Relating to Trade in Goods and Services*, ¶ 6.114, WTO Doc. WT/DS453/AB/R (adopted May 9,

mestic regulatory space: while the burden of proof of an alleged violation of a trade obligation is normally on the complaining party, the burden of proof that all the conditions of a “necessity” test have been met are on the party whose regulatory measure is contested.¹⁶⁶ This way, regulations in the public interest that interfered with international trade commitments were effectively put in a defensive position, facing the requirement of the necessity test and the requirements of the *chapeau* of the general exceptions.¹⁶⁷

Although the interpretation of the general exceptions has been, out of necessity, uneven throughout the years,¹⁶⁸ one thing has remained stable: it is a particularly difficult test to meet.¹⁶⁹ The interpretation of the general exceptions, which have become the core mechanism to distinguish between domestic measures that are legitimate and those that are protectionist,¹⁷⁰ has created a “protectionist

2016) (“[A] Member’s commitments under the GATS could in some cases serve to further its national policy objectives. Where measures are found to be inconsistent with a Member’s obligations or commitments under the GATS, the GATS provides for various mechanisms, such as Article XIV, which take account of policy objectives underlying such measures.”).

¹⁶⁶ See Donald H. Regan, *The Meaning of ‘Necessary’ in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing* 6 WORLD TRADE REV., 347, 364 (2007).

¹⁶⁷ See LANG, AFTER NEOLIBERALISM, *supra* note 39, at 265 (arguing that “[p]art of the purpose and the effect of the reinterpretation of Article III, in other words, was to shift the centre of gravity of the legal discipline of domestic regulation under the GATT from the non-discrimination test in Article III to the necessity test in Article XX”).

¹⁶⁸ For a comprehensive overview, see Gabrielle Marceau & Joel P. Trachtman, *A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade*, 48 J. WORLD TRADE 351, 368–77 (2014); Regan, *supra* note 166, at 347–66 (2007); Ingo Venzke, *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, 12 GERMAN L.J. 1111, 1116–35 (2011) (detailing how various GATT panels and Appellate Bodies have analyzed Article XX arguments).

¹⁶⁹ Panagiotis Delimatsis, *Protecting Public Morals in a Digital Age: Revisiting the WTO Rulings on US – Gambling and China – Publications and Audiovisual Products*, 14 J. INT’L ECON. L. 257, 266 (2011); Venzke, *supra* note 168, at 1118–19.

¹⁷⁰ See Panagiotis Delimatsis, *Who’s Afraid of Necessity? And Why it Matters?*, in WTO DOMESTIC REGULATION AND SERVICES TRADE 95 (Aik Hoe Lim & Bart De Meester eds., 2014) (“Since the inception of GATT, necessity tests

bias”; that is, an inclination to protect the interests of trade-oriented stakeholders that “may be inconsistent with the human rights interests of consumers in maximum equal liberty and open markets.”¹⁷¹ For example, in the interpretation of the “reasonably available” test—the benchmark for the assessment of whether a particular trade-inconsistent domestic measure meets the “necessity” requirement of the general exception¹⁷²—WTO adjudicating bodies assess whether an alternative measure that provides *the same level of protection* of the public interest or objective pursued by a trade-inconsistent measure without *prohibitive cost or substantial technical difficulties* is available.¹⁷³ Inconsistency in the interpretation of what “the same level of protection” and “prohibitive” costs entail, which in some cases amounted to the consideration of an actual level of protection achieved by a contested measure (rather than a desired level of protection subjectively determined by the state and not (yet) necessarily achieved), and disregard of high administrative and enforcement costs, has left WTO members a much narrower regulatory space than the wording of the test might otherwise suggest.¹⁷⁴ The

have formed part of the contract, providing flexibility and “breathing space” to regulators. Necessity has been traditionally considered as the prevailing proxy for the identification and the discipline of protectionist or unduly burdensome regulatory behaviour.”).

¹⁷¹ Ernst-Ulrich Petersmann, *Human Rights and International Economic Law in the 21st Century*, 4 J. INT’L ECON. L. 3, 27 (2001).

¹⁷² See, e.g. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WTO Docs. WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan. 10, 2001) [hereinafter Appellate Body Report, *Korea—Various Measures on Beef*]; Panel Report, *Argentina—Measures Relating to Trade in Goods and Services*, ¶ 7.729, WTO Doc. WT/DS453/R (adopted May 9, 2016); *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* note 158, ¶¶ 304–307; Appellate Body Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 5.169, 5.214, WTO Docs. WT/DS400/AB/R / WT/DS401/AB/R (adopted June 18, 2014).

¹⁷³ *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, *supra* note 158, ¶ 308.

¹⁷⁴ See Appellate Body Report, *Korea—Various Measures on Beef*, *supra* note 141, ¶ 178. Based on the actual application of the contested measure, the Appellate Body held the following:

We think it *unlikely that Korea intended to establish a level of protection that totally eliminates fraud* with respect to the origin

reality is that a less trade-restrictive measure is, in theory, almost always reasonably available in the imaginary “toolbox of effective nontrade policy instruments” mentioned above.¹⁷⁵

Recently, under sharp waves of critique and public discontent with the WTO’s practice of reframing regulatory approaches protecting non-economic values as barriers to trade, the WTO attempted to restore its legitimacy by trying to give more deference to the levels of protection of domestic societal interests.¹⁷⁶ It does not seem to be working. As Andrew Lang neatly put it,

In the lingua franca of trade professionals, ‘the toothpaste was out of the tube,’ and it was simply not possible to return to a trade regime which was narrowly focused on (say) border barriers, and only a small subset of domestic regulations which had direct and immediate impacts on trade flows.¹⁷⁷

After the Uruguay Round, WTO multilateral negotiations have not made any significant progress in further liberalization of international trade beyond what could be achieved through a neoliberal

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

Id. (emphasis added). The alternative measure, which the Appellate Body said was reasonably available to Korea, involved higher administrative and enforcement costs. Korea argued that it lacked the resources necessary for this alternative, but the Appellate Body still concluded that the contested measure did not pass the “necessity” assessment. *Id.*, ¶¶ 175, 180. *But see United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, *supra* note 158, ¶¶ 308, 317 (The Appellate Body dismissed the alternative measure proposed by a claiming party as ‘not an appropriate alternative’, and stated, “[A] ‘reasonably available’ alternative measure must be a measure that would preserve for the responding Member its right to achieve *its desired level of protection* with respect to the objective pursued under paragraph (a) of Article XIV.”) (emphasis added).

¹⁷⁵ Howse, *From Politics to Technocracy*, *supra* note 38, at 100.

¹⁷⁶ For a detailed account see Howse, *The World Trade Organization 20 Years On*, *supra* note 45, at 13, 45–75.

¹⁷⁷ LANG, AFTER NEOLIBERALISM, *supra* note 39, at 315.

interpretation of existing rules.¹⁷⁸ Instead, international trade law-making moved to bilateral and regional fora where multiple bilateral and plurilateral preferential trade and investment agreements have been concluded around the world (some 2300 bilateral investment treaties and 291 regional trade agreements are in force).¹⁷⁹ These agreements have structured and furthered the integration of national economies into a single world economic order.¹⁸⁰ As opposed to WTO negotiations, where consensus of all parties is required, bilateral and regional negotiations make it easier for certain states to advance a new form of the neoliberal discourse—that of global digital trade—to achieve an ever-deeper trade liberalization.¹⁸¹ Drawing a parallel with redefinition of protectionism as “new protectionism” in 1970s, the next Part discusses how the redefinition of protectionism as “digital protectionism” may have contributed to such transition.

II. DIGITAL PROTECTIONISM: THE LATEST WAVE OF TRADE CONSTRAINTS ON REGULATORY AUTONOMY

As noted at the end of the previous Part, the last decade has witnessed a trend to regulate electronic commerce and digital trade in

¹⁷⁸ MIRA BURRI, SHOULD THERE BE NEW MULTILATERAL RULES FOR DIGITAL TRADE? 3 (2013) (“As the Doha negotiations continue to make little progress, the multilateral venue of rule-making is being seriously undermined, and this triggers forum-shopping—bilaterally, regionally, and through new plurilateral initiatives within clubs of countries, unaffiliated to any international organization, such as the Anti-Counterfeiting Trade Agreement (ACTA).”).

¹⁷⁹ See *Regional Trade Agreements*, WTO, <https://www.wto.org/english/tratope/regione/regione.htm> (last visited Nov. 7, 2019); U.N. Conference on Trade and Development, *World Investment Report 2016: Investor, Nationality, Policy Challenges*, 101, U.N. Doc. UNCTAD/WIR/2016 (June 22, 2016). According to Wolfe, of the 275 regional/bilateral trade agreements (“RTAs”) that had been notified to the WTO by May 2017, seventy-five have e-commerce provisions, and such provisions are included in more than 60% of the RTAs that entered into force between 2014 and 2016. Robert Wolfe, *Learning About Digital Trade: Privacy and E-commerce in CETA and TPP*, 18 WORLD TRADE REV. 63 (2019).

¹⁸⁰ See Howse, *The World Trade Organization 20 Years On*, *supra* note 45, at 48.

¹⁸¹ See Joost Pauwelyn, *The WTO in Crisis: Five Fundamentals Reconsidered*, WTO https://www.wto.org/english/forums_e/public_forum12_e/art_pf12_e/art_9.htm (last visited Nov. 7, 2019).

bilateral and regional trade agreements.¹⁸² These changes have occurred against a background composed of the idea of globalization as a net positive, on the one hand, and the development of new information technologies that allowed for almost instant exchange of information, services, and capital, on the other hand. As (personal) data became an essential component of cross-border trade, ensuring its unrestricted cross-border flow became an important yet contentious point in the negotiations of “new generation” international trade agreements.¹⁸³ These negotiations coincided with the discourse of digital trade advanced by the United States, stressing the economic benefits of digital trade and exposing the downsides of restrictions on cross-border flows of personal data—which are also sometimes referred to as data localization requirements¹⁸⁴—labeling them as “*digital protectionism*.” This label, as the Article explains below, is in particular often attached to the E.U. restrictions on cross-border transfers of personal data by those criticizing the E.U. approach.¹⁸⁵ In spite, or perhaps because, of this, E.U. politicians also regularly express their disapproval of digital protectionism.¹⁸⁶ Although the E.U. and U.S. discourses on digital trade are ostensibly woven with similar terminological threads of digital protectionism, such discourses are inchoate and fundamentally diverge

¹⁸² See Wolfe, *supra* note 179, at s63.

¹⁸³ See *infra* Section II.B.

¹⁸⁴ It could be argued that “restrictions on cross-border data flows” and “data localization” mean different things, as data localization laws do not always restrict cross-border flows of data. See, e.g., Francesca Casalini & Javier López González, *Trade and Cross-Border Data Flows 5* (OECD Trade Policy Papers, No. 220), <http://dx.doi.org/10.1787/b2023a47-en>. Some authors view data localization as a form of restrictions on cross-border data flows. See, e.g., Susannah Hodson, *Applying WTO and FTA Disciplines to Data Localization Measures*, 18 WORLD TRADE REV. 2 (2019). Given that there is no consensus on the meaning of these terms, and drawing a clear line between them is not the purpose of this Article, I will use them interchangeably.

¹⁸⁵ MATTHIAS BAUER ET AL., EUROPEAN CENTRE FOR INTERNATIONAL POLITICAL ECONOMY (ECIPE), U.S. CHAMBER OF COMMERCE, THE ECONOMIC IMPORTANCE OF GETTING DATA PROTECTION RIGHT: PROTECTING PRIVACY, TRANSMITTING DATA, MOVING COMMERCE 11 (2013), https://www.uschamber.com/Sites/Default/Files/Documents/Files/020508_Economicimportance_Final_Revised_Lr.Pdf.

¹⁸⁶ Catherine Stupp, *Lawmakers Rebuke US ‘Digital Protectionism’ Charges*, EURACTIV (Sep. 25, 2015), <https://www.euractiv.com/section/digital/news/lawmakers-rebuke-us-digital-protectionism-charges/>.

on the views on the underlying values and policy objectives of digital trade.¹⁸⁷ Although in both cases powerful economic interests may have played a role in constructing the discourse, when it comes to the interplay between digital trade and the protection of personal data, unlike the United States, the European Union is bound by internal *constitutional* constraints.¹⁸⁸ The rights to privacy and the protection of personal data are fundamental rights in the E.U. Charter of Fundamental Rights (“E.U. Charter”), which took effect in 2009 and has the highest legal force in the E.U. legal system.¹⁸⁹ This Charter has been called the E.U. “Bill of Rights,” thus comparing it to the first ten Amendments of the U.S. Constitution.¹⁹⁰ It is this divergence that could explain why the attempt to redefine protectionism—and narrow domestic regulatory space to protect personal data—has ultimately been reflected in the U.S.-led, and not the E.U.-led, trade agreements.¹⁹¹ Before turning to the digital trade discourse and digital protectionism, let us first see what the E.U. restrictions on cross-border transfers of personal data, which are often the source of controversy between the European Union and its trading partners, entail.

A. The Source of Controversy: E.U. Restrictions on Cross-Border Transfers of Personal Data

This Section provides a high-level overview of the restrictions on cross-border transfers of personal data under E.U. law. Readers who are already familiar with this topic may skip to the following Section.

¹⁸⁷ Greenberg Ctr. for Geoeconomic Studies, *The Rise of Digital Protectionism*, COUNCIL ON FOREIGN REL. (Oct. 18, 2017), <https://www.cfr.org/report/rise-digital-protectionism>.

¹⁸⁸ Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1 [hereinafter Charter of Fundamental Rights of the EU].

¹⁸⁹ *Id.* arts. 7, 8.

¹⁹⁰ *Charteropedia*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS., <https://fra.europa.eu/en/charterpedia> (last visited Nov. 9, 2019) (“The Charter is the European Union’s ‘bill of rights.’”).

¹⁹¹ See RACHEL F. FEFER ET AL., CONG. RESEARCH SERV., R44565, DIGITAL TRADE AND U.S. TRADE POLICY 21–23 (2019), <https://fas.org/sgp/crs/misc/R44565.pdf>.

The E.U. legal framework for personal data protection includes two sets of rules: substantive rules regulating access to and processing of any personal data in the European Union, on the one hand, and the rules governing transfers of personal data *outside* the European Economic Area (“EEA”).¹⁹² Restrictions on transfers of personal data also apply to providing remote access to personal data from outside the EEA.¹⁹³ Unlike the E.U. “border control approach” to transfers of personal data, the United States maintains an “open skies” policy on this issue.¹⁹⁴ Regulation of cross-border data flows gives domestic privacy rules an international dimension.¹⁹⁵ It is that set of rules that is more often showcased as detrimental to international trade and described as protectionist.¹⁹⁶

¹⁹² Martina F. Ferracane & Erik van der Marel, *The Cost of Data Protectionism*, ECIPE (Oct. 2018), http://ecipe.org/blog/the-cost-of-data-protectionism/#_ftn5, [hereinafter Ferracane & van der Marel, *The Cost of Data Protectionism*] (“We identify two main categories of data policies. The first category covers those policies that impact the cross-border transfer of data whilst the second category covers policies that apply to the use of data domestically.”).

¹⁹³ EUR. DATA PROT. BD., GUIDELINES 2/2018 ON DEROGATIONS OF ARTICLE 49 UNDER REGULATION 2016/619, at 4 (2018), https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf. [hereinafter EUR. DATA PROT. BD.] (noting that “a transfer will for example generally be considered to be non-occasional or repetitive when the data importer is granted direct access to a database (e.g. via an interface to an IT-application) on a general basis.”). The European Data Protection Board is a consultative body comprising all E.U. data protection authorities. See *About EDPB*, EUR. DATA PROTECTION BOARD, https://edpb.europa.eu/about-edpb/about-edpb_en (last visited Nov. 9, 2019).

¹⁹⁴ Dan Jerker B. Svantesson, *The Regulation of Cross-Border Data Flows*, 1 INT’L DATA PRIVACY L. 180, 184 (2011), (“The relatively strict border control scheme introduced through this has had a significant impact in other countries striving towards meeting the privacy standard set by the EU”); see also François LeSieur, *Regulating Cross-Border Data Flows and Privacy in the Networked Digital Environment and Global Knowledge Economy*, 2 INT’L DATA PRIVACY L. 93, 101, 103–04 (2012).

¹⁹⁵ See LeSieur, *supra* note 194, at 93.

¹⁹⁶ See Avi Goldfarb & Daniel Trefler, *Artificial Intelligence and International Trade*, in THE ECONOMICS OF ARTIFICIAL INTELLIGENCE 463, 479–80 (Ajay Agrawal et al. eds., 2019) (viewing restrictions on personal data transfers as a form of data localization that could favor domestic firms and have negative effects on trade); see also Ferracane & van der Marel, *The Cost of Data Protectionism*, *supra* note 192 (“We find that restrictions on the cross-border movement of data, as opposed to restrictions on the domestic use of data, significantly reduce

The E.U. framework governing transfers of personal data outside the EEA is based on a “prohibition with derogations” principle.¹⁹⁷ Under the General Data Protection Regulation (“GDPR”),¹⁹⁸ which entered into force in May 2018, transfers of personal data to a country or territory outside the EEA or to an international organization (referred to jointly as “cross-border transfers of personal data”) may only occur if the conditions of Chapter V of the GDPR are met.¹⁹⁹ Let us see what this entails.

The European Data Protection Board (“EDPB”)²⁰⁰ advocates a layered approach to cross-border transfers of personal data outside the EEA.²⁰¹ Transfers of personal data can occur without restrictions only if the destination country, territory, or international organization ensures an “adequate” level of personal data protection.²⁰² “Adequate,” as interpreted by the Court of Justice of the European Union (“CJEU”), means “essentially equivalent” to the level of protection of fundamental rights and freedoms guaranteed by the E.U. Charter of Fundamental Rights.²⁰³ The European Commission (“Commission”) unilaterally evaluates adequacy of the data protection regime of a country, territory, or international organization on a case-by-case basis, taking into account its legal and administrative mechanisms of personal data protection.²⁰⁴ If the Commission’s assess-

imports of services.”); Avi Goldfarb & Catherine E. Tucker, *Privacy Regulation and Online Advertising*, 57 MGMT. SCI. 57, 69–70 (2011) (demonstrating that European strict e-privacy rules lead to an average reduction in effectiveness of 65% of banner ads, thus proving to be damaging for the European advertising industry).

¹⁹⁷ Svetlana Yakovleva, *Should Fundamental Rights to Privacy and Data Protection be a Part of the EU’s International Trade ‘Deals’?*, 17 WORLD TRADE REV. 477, 486 (2018).

¹⁹⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) [hereinafter GDPR].

¹⁹⁹ *Id.* art. 44.

²⁰⁰ See EUR. DATA PROT. BD., *supra* note 193, at 3.

²⁰¹ *Id.*

²⁰² GDPR, *supra* note 198, art. 45.

²⁰³ Case C-362/14, Schrems v. Data Prot. Comm’r, 2015 EUR-Lex 62014CJ0362 (Oct. 6, 2015).

²⁰⁴ For a list of criteria for assessment, see GDPR art. 45(2).

ment results in a positive finding, it issues a legally binding “adequacy decision.”²⁰⁵ Transfers of personal data to countries, territories, or international organizations that have not been granted an adequacy decision can lawfully occur only subject to “appropriate safeguards” put in place by the data controller or possessor (such as standard contractual clauses, binding corporate rules, certification, or codes of conduct).²⁰⁶ In exceptional circumstances, exporters of personal data may rely on limited derogations (such as unambiguous consent of the data subject or the performance or conclusion of a contract with or in the interest of the data subject).²⁰⁷ The derogations may only be used for non-repetitive and occasional transfers, however.²⁰⁸ The layered approach requires that before using these derogations, data exporters should first “endeavour possibilities to frame the transfer” with one of the adequate safeguards.²⁰⁹

The European Union’s restrictions on cross-border transfers of personal data undoubtedly impose limitations on international trade. The key question is whether such restrictions can appropriately be labelled as “protectionist,” and if so, what the consequences of using this label might be in future policy decisions. The Article addresses this question later in Part III.

B. *The Digital Trade Discourse(s)*

As shown above, showcasing the economic benefits of free cross-border data flows, the narrative of digital trade often presents domestic privacy and data protection regimes (as well as their inter-

²⁰⁵ “Adequacy decisions” are adopted as Commission implementing acts based on Article 288 of the Treaty on the Functioning of the European Union. Consolidated Version of the Treaty on the Functioning of the European Union art. 288, October 26, 2012 O.J. (C 326) 47–390. As of July 2019, the Commission has issued adequacy decisions for Andorra, Argentina, Canada, the Faroe Islands, Guernsey, the Isle of Man, Israel, Japan, Jersey, New Zealand, Switzerland, and Uruguay, and a special sectoral regime—the E.U.-U.S. “Privacy Shield”. See *Adequacy Decisions*, EUR. COMMISSION, https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en (last visited Nov. 4, 2019).

²⁰⁶ GDPR, *supra* note 198, arts. 46–47.

²⁰⁷ *Id.* art. 49.

²⁰⁸ EUR. DATA PROT. BD., *supra* note 193, at 4, 8.

²⁰⁹ *Id.* at 4.

national divergence) as (digital) trade barriers. A number of economic arguments, advanced primarily by the U.S. government, European and U.S. pro-trade think tanks (but also by several academics) are used to explain why restrictions on cross-border flows of personal data or data localization requirements hamper digital trade.

For instance, an influential McKinsey & Company report argued that in 2014 alone, cross-border data flows generated \$2.8 trillion in value.²¹⁰ An earlier study conducted for the U.S. Chamber of Commerce by the pro-trade think tank European Center for International Political Economy (“ECIPE”) warned of the negative welfare effects on the E.U. economy if cross-border data flows would be disrupted by the then-draft GDPR.²¹¹ A number of other ECIPE studies predict that removal of restrictions on cross-border flows of information would *increase* imports of services, on average by five percent.²¹² These studies feed into the lobbying activities of export-oriented service industries around the world.²¹³ In a similar vein, in a

²¹⁰ JAMES MANYIKA ET AL., MCKINSEY & CO., DIGITAL GLOBALIZATION: THE NEW ERA OF GLOBAL FLOWS 10 (2016), <https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Digital%20globalization%20The%20new%20era%20of%20global%20flows/MGI-Digital-globalization-Full-report.ashx>. See also U.S. CHAMBER OF COMMERCE & HUNTON & WILLIAMS LLP, BUSINESS WITHOUT BORDERS: THE IMPORTANCE OF CROSS-BORDER DATA TRANSFERS TO GLOBAL PROSPERITY 1–2 (2014), <https://www.huntonak.com/images/content/3/0/v3/3086/Business-without-Borders.pdf> [hereinafter BUSINESS WITHOUT BORDERS].

²¹¹ MATTHIAS BAUER ET AL., EUROPEAN CENTRE FOR INTERNATIONAL POLITICAL ECONOMY (ECIPE), U.S. CHAMBER OF COMMERCE, THE ECONOMIC IMPORTANCE OF GETTING DATA PROTECTION RIGHT: PROTECTING PRIVACY, TRANSMITTING DATA, MOVING COMMERCE 3 (2013) https://www.uschamber.com/sites/default/files/documents/files/020508_EconomicImportance_Final_Revised_lr.pdf.

²¹² See Ferracane & van der Marel, *The Cost of Data Protectionism*, *supra* note 192 (“Our analysis predicts that, if countries lifted their restrictions on the cross-border flow of data, the imports of services would rise on average by five percent across all countries, with obvious benefits for local companies and consumers who could access cheaper and better online services from abroad.”).

²¹³ See, e.g., Press Release, Glob. Serv. Coal., Statement on Digital Trade (Oct. 16, 2017), <http://www.esf.be/new/wp-content/uploads/2017/10/Global-Services-Coalition-Statement-on-Digital-Trade-Final-16-Oct-2017.pdf> (quoting Manyika, *supra* note 210, and several ECIPE studies and “calling[ing] for negotiators of ongoing or future negotiations related to data flow including FTAs/EPAs to make their utmost efforts to agree on strong and effective provisions which

taxonomy of trade restricting measures prepared by the United States International Trade Commission (“USITC”), the E.U. data protection framework, which unlike U.S. law requires a higher level of data protection complemented by restrictions on cross-border transfers of personal data, is mentioned as restricting international digital trade in several sectors.²¹⁴ The USITC and ECIPE stress that, generally speaking, restrictions on cross-border transfers, in addition to substantive rules restricting the use of personal data and data localization measures, increase the costs of conducting business for multinational companies.²¹⁵ More specifically, researchers associated with the ECIPE argue that restrictions on cross-border data flows reduce (or, in other words, restrict) imports of data-intensive services.²¹⁶

As any user of Facebook can attest, personal data, viewed as an economic asset, also constitutes an important ingredient of artificial intelligence-based systems and algorithms, an input in the production of many digital services, production processes, and logistics.²¹⁷

guarantee free flow of data, and prohibit forced data localization and requirements for provision of software source code, while applying appropriate and effective protection and security for personal data.”).

²¹⁴ DAVID COFFIN ET AL., U.S. INT’L TRADE COMM’N, GLOBAL DIGITAL TRADE 1: MARKET OPPORTUNITIES AND KEY FOREIGN TRADE RESTRICTIONS 273 (2017), <https://www.usitc.gov/publications/332/pub4716.pdf> (“According to input from industry representatives, regulatory and policy measures focused on data protection and privacy affect all kinds of industries. These measures can inhibit global digital trade by U.S. firms due to the increased administrative costs associated with complying with stricter privacy measures that differ from U.S. standards.”).

²¹⁵ *Id.*; Ferracane & van der Marel, *The Cost of Data Protectionism*, *supra* note 192.

²¹⁶ See Martina Francesca Ferracane & Erik van der Marel, *Do Data Policy Restrictions Inhibit Trade in Services?* 15 (Eur. Ctr. for Int’l Political Econ., Dig. Trade Estimates Working Paper No. 2, 2018), <https://ecipe.org/wp-content/uploads/2018/10/Do-Data-Policy-Restrictions-Inhibit-Trade-in-Services-final.pdf> (showing that “more restrictive data policies, in particular with respect to the cross-border movement of data, result in lower imports in data-intense services for countries imposing them.”).

²¹⁷ See JACQUES CRÉMER, YVES-ALEXANDRE DE MONTIOYE, & HEIKE SCHWEITZER, COMPETITION POLICY FOR THE DIGITAL ERA, FINAL REPORT TO THE EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR COMPETITION 73 (2019), <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> (“Data is

In other words, it is a *factor of production*.²¹⁸ Foreign providers of such services, including targeted marketing companies, are in a less favorable position than domestic providers that do not have to comply with the cross-border transfer restrictions to provide the same services domestically.²¹⁹ In addition, restrictions on flows of data are viewed not only as detrimental to ICT services, but also for trade in goods and services generally as they may result in companies choosing a less efficient mode of production (or supply) of services.²²⁰ Global information flows allow multinational companies to

a core input factor for production processes, logistics, targeted marketing, smart products and services, as well as Artificial Intelligence (AI).”).

²¹⁸ See Milton Mueller & Karl Grindal, *Data Flows and the Digital Economy: Information as a Mobile Factor of Production*, 21 DIGITAL POL’Y, REG. & GOVERNANCE 71, 80 (2019) (concluding that “information in the form of digital data flows can be considered a mobile factor of production”); see also Francisco Costa-Cabral & Orla Lynskey, *The Internal and External Constraints of Data Protection on Competition Law in the EU* 11 (London Sch. of Econ. Law, Soc’y & Econ., Working Paper No. 25, 2015), <http://ssrn.com/abstract=2703655> (“Without personal data as an input some goods and services are now ostensibly impossible to produce, leading to the growth of commodity markets for personal data. Thus, personal data is a full-fledged factor of production in a modern economy.”); see also Seda Gürses & Joris van Hoboken, *Privacy After the Agile Turn*, in THE CAMBRIDGE HANDBOOK OF CONSUMER PRIVACY 579, 595 (Evan Selinger et al. eds., 2018) (showing that users’ data has become an integral part of production and testing of digital services and software).

²¹⁹ Under the GDPR, in order to access EEA personal data from outside the EEA foreign companies not only have to comply with legal grounds for collecting personal data under Articles 5 and 6 of the GDPR (requirements that generally apply to European companies), but also with the limitations on cross-border transfers of personal data (Chapter V GDPR). EUR. DATA PROT. BD., *supra* note 193, at 3.

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

Id.; see also Bergkamp, *supra* note 8, at 39.

²²⁰ See Ferracane & van der Marel, *The Cost of Data Protectionism*, *supra* note 192 (citing Andrea Andrenelli et. al., *Multinational Production and Trade in*

operate globally with less of a physical presence.²²¹ Some academics also argue that restrictions on data flows may limit the possibilities of world-wide aggregation of personal data and are thus threatening technological advances in such areas as cloud computing and AI.²²² In a similar vein, the U.S. Chamber of Commerce and Hunton & Williams warned that such restrictions may turn the “Internet” into a “splinternet,” paving the way to economic stagnation.²²³

C. Framing Data Protection as “Digital Protectionism” in the Digital Trade Discourse

Discourse matters and the discourse is changing. Political, academic, and societal debates on cross-border data flows now revolve

Services, (OECD, Trade Policy Paper No. 212, 2018), <http://dx.doi.org/10.1787/16ec6b55-en> [hereinafter Andrenelli, *Multinational Production*] (“[A] range of data-intense services from computer services to retail and information services are increasingly being traded over the internet rather than by other means such as foreign establishments. Restricting data would, therefore, also inhibit companies from choosing the most efficient channel of trading many services.”).

²²¹ See U.N. Conference on Trade and Development, *World Investment Report: Investment and the Digital Economy*, at 167, UN Doc. UNCTAD/WIR/2017 (June 7, 2017) [hereinafter *World Investment Report 2017*].

²²² See Anupam Chander & Uyen P. Lê, *Data Nationalism*, 64 EMORY L.J. 677, 680 (2014) [hereinafter Chander & Lê, *Data Nationalism*] (Labelling E.U. restrictions on transfers of personal data as data localization measures and stating that “[b]y creating national barriers to data, data localization measures break up the World Wide Web, which was designed to share information across the globe Data localization would dramatically alter this fundamental architecture of the Internet.”); *id.* at 681 (arguing that data localization measures promote “data nationalism,” which “poses a mortal threat to the new kind of international trade made possible by the Internet—information services such as those supplied by Bangalore or Silicon Valley.”); see also Goldfarb & Trefler, *supra* note 196, at 29 (“Data localization is an issue for AI because AI requires data In other words, localization is a way to restrict the possible scale of any country in AI, but at the cost of lower quality overall.”). *But see* Christopher Kuner, *Data Nationalism and its Discontents*, 64 EMORY L.J. 2089, 2090 (2015) [hereinafter Kuner, *Data Nationalism*] (offering a powerful critique of these arguments).

²²³ BUSINESS WITHOUT BORDERS, *supra* note 210, at 2–3 (“Technological advances and an increasingly globalized economy have brought us to a policy crossroads: one path leads to a ‘splinternet’ of economic isolation, characterized by misguided attempts to safeguard data by building protectionist walls [T]his isolationist approach has repeatedly caused economic stagnation.”).

around terms such as “digital protectionism,” “data protectionism,” “data nationalism,” and “innovation mercantilism.”²²⁴

That said, the view that restrictions on cross-border flows of personal data could favor domestic industries is not new.²²⁵ As early as 1978, John Eger raised a concern that restrictions on cross-border flows of personal data adopted by some E.U. countries and envisaged to be introduced on E.U. level might, in practice, not only be used to protect privacy and national sovereignty, but also “to protect domestic economic interests” as indirect barriers to trade.²²⁶ It is only recently, however, that the term “digital protectionism” was coined to refer to such restrictions.²²⁷ For example, in a recent non-paper for the discussions on electronic commerce at the WTO, Japan stressed the necessity “to address emerging ‘digital protectionism’” as a pre-requisite for “open, secure, and reliable global e-commerce environment that will promote and facilitate cross-border digital trade.”²²⁸ Relying on the definition of barriers to digital trade by USITC, George Washington University Professor Susan Aaronson defined digital protectionism as “barriers or impediments to digital trade, including censorship, filtering, localization measures, and

²²⁴ See e.g. Chander & Lê, *Data Nationalism*, *supra* note 222, at 679, 739; Neha Mishra, *Data Localization Laws in a Digital World: Data Protection or Data Protectionism?* PUB. SPHERE, 206, at 137, 144 [hereinafter Mishra, *Data Localization Laws*] (“From a [international political economy] perspective, a dominant view is the emergence of ‘innovation mercantilism’ in digital trade today.”); Aaronson, *What We Are Talking About*, *supra* note 35, at 3; Andrew D. Mitchell & Neha Mishra, *Data at the Docks: Modernizing International Trade Law for the Digital Economy*, 20 VAND. J. ENT. & TECH. L. 1073, 1111–12 (2018) [hereinafter Mitchell & Mishra, *Data at the Docks*].

²²⁵ See John M. Eger, *Emerging Restrictions on Transnational Data Flows: Privacy Protection or Non-Tariff Trade Barriers*, 10 L. & POL’Y INT’L BUS. 1055, 1066 (1978).

²²⁶ See *id.* at 1066 (“Many countries in Europe may have no concern other than protecting the privacy of personal data, a concern which neither the American public nor any member of a democratic society can fault. But there is the danger, of course, that these new laws will be used not only to protect just privacy but also to protect domestic economic interests.”).

²²⁷ See Aaronson, *What Are We Talking About*, *supra* note 35, at 2, 8.

²²⁸ Work Programme on Electronic Commerce, *Non-Paper for the Discussions on Electronic Commerce / Digital Trade from Japan*, ¶ 2.2, WTO Doc. JOB/GC/100 (July 21, 2016).

regulations to protect privacy.”²²⁹ Other academics, most notably Anupam Chander and Uyen P. Lê, argued that “[w]e must insist on data protection without *data protectionism*. A better, safer Internet for everyone should not require breaking it apart.”²³⁰ Similarly, Mira Burri called upon international legal scholars to “stress the dangers of *data protectionism*, often under the guise of legitimate objectives, such as national security or privacy protection.”²³¹ At the same time, Burri points out that not only divergent approaches to data privacy and protection (which is arguably the crux of the cross-border data flow problem), but also standards of data protection that are *too low* could be viewed as barriers or obstacles to trade.²³² This is, in part, because consumer confidence and trust, she argues, are a precondition for well-functioning digital trade.²³³ This leads to a search for an optimal level (from a trade perspective) of protection rather than a complete absence of protection.²³⁴

The U.S. administration’s recent rhetoric centered on the notion of data protectionism seems to be based exactly on this logic. U.S. trade experts and the administration have used harsh language to characterize the European Union’s privacy and data protection

²²⁹ Susan Aaronson, *Why Trade Agreements Are Not Setting Information Free: The Lost History and Reinvigorated Debate over Cross-Border Data Flows, Human Rights, and National Security*, 14 *WORLD TRADE REV.* 671, 674 (2015) [hereinafter Aaronson, *Why Trade Agreements Are Not Setting Information Free*] (citing JAMES STAMPS ET AL., U.S. INT’ TRADE COMM’N, *DIGITAL TRADE IN THE U.S. AND GLOBAL ECONOMIES*, PART 1, at 5–1 to 5–2 (2013), <https://www.usitc.gov/publications/332/pub4415.pdf> [hereinafter Digital Trade, Part 1]); see also Aaronson, *What We Are Talking About*, *supra* note 35, at 17–22.

²³⁰ Chander & Lê, *Data Nationalism*, *supra* note 222, at 739 (emphasis added).

²³¹ Burri, *The Regulation of Data Flows*, *supra* note 9, at 448 (emphasis added).

²³² Mira Burri, *Current and Emerging Trends in Disruptive Technologies: Implications for the Present and Future of EU’s Trade Policy*, *PARL. EUR. DOC.* (EP/EXPO/B/INTA/2017/6) 13–14 (2017).

²³³ *Id.*; see also Neha Mishra, *Building Bridges: International Trade Law, Internet Governance, and the Regulation of Data Flows*, 52 *VAND. J. TRANSNAT’L L.* 463, 503 (2019) [hereinafter Mishra, *Building Bridges*] (“Implementing internet privacy is increasingly recognised as one of the fundamental requirements for digital trade.”).

²³⁴ *Id.*

framework.²³⁵ Work by Professor Aaronson demonstrates how the U.S. administration routinely uses the terms “protectionism” or “digital protectionism” to refer to E.U.-style privacy and personal data protection regimes.²³⁶ Yet, in parallel to attaching the (negative) label “protectionism” to—what it sees as too much—privacy protection, the U.S. government has also at times criticized situations with *too little* privacy protection on instrumental grounds, arguing that insufficient consumer privacy protection can stifle electronic commerce.²³⁷ It seems to agree that the protection of privacy and personal data are crucial to maintain consumer trust in digital technologies that in turn is indispensable for the strong and orderly development of electronic and digital commerce.²³⁸ As the Article argues in Part III, this is not a mere “inconsistency” of U.S. arguments on this issue,²³⁹ but indeed a fundamental question of a baseline—or optimal level of protection—that delineates “useful” (and possibly indispensable) protection from excessive protection (that one would then label “protectionist” to try to lower it). In Part III, the Article returns to the key role of *discourse* in drawing this baseline.

²³⁵ See, e.g., Digital Trade in the U.S. and Global Economies, Part 2, Inv. No. 332-540, USITC Pub. 4485, at 14 (Aug. 2014), <http://www.usitc.gov/publications/332/pub4485.pdf> [hereinafter Digital Trade, Part 2] (stating that E. U. data privacy and protection requirements are “obstacles to international digital trade,” among localization requirements, intellectual property rights infringement and customs measures.).

²³⁶ See, e.g., Aaronson, *What Are We Talking About*, *supra* note 35, at 8–10; see also Susan A. Aaronson, *Digital Protectionism? Or Label the U.S. Government Uses to Criticize Policy It Doesn’t Like?* COUNCIL ON FOREIGN RELATIONS (Mar. 3, 2016) <http://blogs.cfr.org/cyber/2016/03/03/digital-protectionism-or-label-the-u-s-government-uses-to-criticize-policy-it-doesnt-like/> [hereinafter Aaronson, *Digital Protectionism?*].

²³⁷ See Susan Ariel Aaronson, *Redefining Protectionism: The New Challenge in the Digital Age* 87 (The George Washington University, Institute for International Economic Policy Working Paper Series, Working Paper No. 30, 2016) [hereinafter Aaronson, *Redefining Protectionism*]; see also Aaronson, *What We Are Talking About*, *supra* note 35, at 21–22.

²³⁸ *Id.* at 19.

²³⁹ Aaronson, *Redefining Protectionism*, *supra* note 237, at 87 (“U.S. arguments against digital protectionism are often inconsistent.”); see also Aaronson, *What We Are Talking About*, *supra* note 35, at 21 (“[T]he United States has adopted an inconsistent approach to privacy as a barrier to trade . . .”).

Authors associated with ECIPE and Baker & McKenzie have characterized the E.U. data protection framework as “disproportionate and potentially protectionist.”²⁴⁰ This resonates with Alan Beattie’s article in *Financial Times* comparing the European Union’s approach to resistance to genetically modified organisms (“GMOs”) on public health grounds—a topic around which the battle between the European Union and United States lasted for at least two decades.²⁴¹ Even former U.S. President Barack Obama, reacting to the antitrust and data protection enforcement actions against U.S. tech giants Google and Facebook in the European Union, publicly insinuated the European Union was merely pursuing its “commercial interests.”²⁴²

As alluded to above, despite being criticized for pursuing potentially protectionist restrictions on transfers of personal data, the European Union itself is also actively seeking to remove measures it labels as digital protectionism.²⁴³ If one looks at the European Union

²⁴⁰ BAUER ET AL., *supra* note 185, at 4. (“The question of whether the European regulatory model on privacy is disproportionate and potentially protectionist has become one of the most controversial political debates within the EU at this time, and perhaps rightly so.”); *see also* Lothar Determann, *Adequacy of Data Protection in the USA: Myths and Facts*, 6 INT’L DATA PRIVACY L., 244, 247–48 (2016) (“The USA support free global trade and have so far not retaliated against the protectionist data transfer restrictions in ‘Fortress Europe.’”).

²⁴¹ Alan Beattie, *EU Trade Data Flows Are Becoming the New GMOs*, FIN. TIMES (Dec. 4, 2017), <https://www.ft.com/content/9da22968-d8ee-11e7-a039-c64b1c09b482> (arguing that the E.U. privacy and data protection framework is a localization requirement that acts as a form of protectionism in favour of (unnamed) interest groups, just as the E.U. prohibition on GMOs helped European farmers to protect themselves unfairly from U.S. competition.) Beattie contends that this regulatory framework will benefit European firms and, in the long term, the European Union’s “attitude to cross-border data flows . . . will retard European companies’ ability to maximise digital technology to full advantage.” *Id.*

²⁴² Murad Ahmed et. al., *Obama Attacks Europe Over Technology Protectionism*, FIN. TIMES (Feb. 16, 2015), <https://www.ft.com/content/41d968d6-b5d2-11e4-b58d-00144feab7de> (“We have owned the internet. Our companies have created it, expanded it, perfected it in ways that they can’t compete. And often-times what is portrayed as high-minded positions on issues sometimes is just designed to carve out some of their commercial interests.”).

²⁴³ Julia Fioretti, *EU Moves to Remove Barriers to Data Flows in Trade Deals*, REUTERS (Feb. 9, 2018), <https://www.reuters.com/article/us-eu-data-trade-idUSKBN1FT2DC>.

not as a homogenous institution but a composition of different sub-systems (primarily at the E.U. and Member States levels) with different goals and decision-making processes that determine the European Union's external (trade) and internal policies, then the situation is less clear.²⁴⁴ The issue becomes even more complicated if one also takes into account that, in the E.U. Commission, different departments (directorates general) are responsible for international trade (DG Trade)²⁴⁵ and fundamental rights (DG Just).²⁴⁶

After the 2008 worldwide financial crisis, the European Commission changed its discourse; in its new discourse, trade liberalization was “consistently presented . . . as a desirable and even *necessary* solution to the *crisis* and protectionism as a mistake from the past that has to be avoided.”²⁴⁷ This rhetoric targeted not only the European Union's trading partners, but also the traditionally more protectionist E.U. Member States that opposed to European Union's bilateral concessions that could harm their domestic industries.²⁴⁸

Faithful to its longstanding course towards further liberalization of trade and with an eye toward benefiting from globalization, in its

²⁴⁴ See ALASDAIR R. YOUNG & JOHN PETERSON, PAROCHIAL GLOBAL EUROPE: 21ST CENTURY TRADE POLITICS 23 (2014) (“Trade policy might be viewed as one of the most atomistic of all areas of public policy. Each policy decision—whether it is to negotiate a free trade agreement or impose anti-dumping duties on an imported product—involves different calculations, interests, and timeframes.”).

²⁴⁵ *Directorate-General: Trade*, EUR. COMM'N, https://ec.europa.eu/info/departments/trade_en (last visited Jan. 10, 2020).

²⁴⁶ *Directorate-General: Just*, EUR. COMM'N, https://ec.europa.eu/info/departments/justice-and-consumers_en (last visited Jan. 10, 2020).

²⁴⁷ Yelter Bollen, Ferdi De Ville & Jan Orbie, *EU Trade Policy: Persistent Liberalisation, Contentious Protectionism*, 38 J. EUR. INTEGRATION 279, 288 (2016) (emphasis added) [hereinafter Bollen et al., *EU Trade Policy*].

²⁴⁸ *Id.* (“This liberalisation-as-recovery-instrument discourse has been very powerful and difficult to contest by traditionally more protectionist Member States, uncompetitive industries or trade unions.”); see also Gabriel Siles-Brügge, *Resisting Protectionism After the Crisis: Strategic Economic Discourse and the EU–Korea Free Trade Agreement*, 16 NEW POLIT. ECON. 627, 643 (2011) (“How did DG Trade manage to convince the Member States to agree to the provisions of the FTA when it was facing the opposition of the powerful car industry . . . ? The answer is that, in a sense, it had already won the battle, by recasting liberalisation as *necessary* process, both in terms of the external constraint posed by globalisation but also, more specifically, the competitive pressure emanating from commercial rivals.”).

2015 Communication “Trade for All,” the European Commission contended that “the free flow of data across borders has become more *important for European competitiveness* in general.”²⁴⁹ In November 2016, the E.U. trade commissioner Cecilia Malström noted that “in the digital age, restrictions on cross-border data flows inhibit trade of all kinds, and may amount to ‘digital protectionism.’”²⁵⁰ She committed to using international trade deals as a means for setting the rules for digital trade. Where, then, one might ask, is the issue, if everyone agrees on the ills of digital protectionism? It follows from the fact that, when it comes to the rights to privacy and the protection of personal data, the European Union’s opposition to digital protectionism is now on a wholly different trajectory. The E.U. approach in this respect shifted in 2015 following push-back

²⁴⁹ EUR. COMM’N, TRADE FOR ALL: TOWARD A MORE RESPONSIBLE TRADE AND INVESTMENT POLICY 12 (2015), https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf (emphasis added).

²⁵⁰ Press Release, Eur. Comm’n, Commissioner Malmström on the Opportunities of Digital Trade (Nov. 17, 2016), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1580_

by the European Parliament,²⁵¹ E.U.-Member States,²⁵² academics,²⁵³ and civil society²⁵⁴ to the European Union's digital "free trade" policy, which made it apparent that such a policy "should not undermine European levels of protection and democratic policy-making."²⁵⁵ This shift is apparent, for example, in the 2017 Communication "Exchanging and Protecting Personal Data in a Globalised World," where the European Commission carefully carved out privacy protection from "protectionism" by highlighting that "European companies operating in some third countries are increasingly

²⁵¹ See Resolution of July 8, 2015 Containing the European Parliament's Recommendations for the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership (TTIP), EUR. PARL. DOC. P8_TA(2015)0252 9 (2015) ("[T]o ensure that the EU's Acquis on data privacy is not compromised through the liberalisation of data flows . . . while recognizing the relevance of data flows as a backbone of transatlantic trade and the digital economy . . ."); Resolution of Feb. 3, 2016 Containing the European Parliament's Recommendations to the Commission on the Negotiations for the Trade in Services Agreement (TiSA), EUR. PARL. DOC. P8_TA(2016)0041 (2016) ("[T]o acknowledge that data protection and the right to privacy are not a trade barrier, but fundamental rights, which are enshrined in Article 39 TEU and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union . . .").

²⁵² See Bollen et al., *EU Trade Policy*, *supra* note 247, at 284 ("In the states where TTIP has become most politicised, notably Germany, Austria and the United Kingdom, the openness-protectionism dichotomy is of minor importance. Instead, the debate is dominated by arguments about sovereignty, regulatory paradigms and food safety.").

²⁵³ See, e.g., KRISTINA IRION, SVETLANA YAKOVLEVA, & MARIJA BARTL, TRADE AND PRIVACY: COMPLICATED BEDFELLOWS? HOW TO ACHIEVE DATA PROTECTION-PROOF FREE TRADE AGREEMENTS 54 (2016) ("The risks for privacy and data protection stemming from the sphere of the EU are, broadly speaking, that EU international relations could place more emphasis on international trade in services relative to EU standards on privacy and data protection.").

²⁵⁴ See, e.g., Heini Järvinen, *BEUC and EDRI Urge the EU Commission Not to Undermine Citizens' Privacy in Trade Agreements*, EUR. DATA RTS. (June 13, 2016), <https://edri.org/beuc-edri-urge-eu-commission-not-undermine-citizens-privacy-trade-agreements/> ("Discussions on forced data localisation should take place outside trade agreements. Otherwise, our fundamental rights to privacy and data protection can be undermined or challenged as trade barriers.").

²⁵⁵ Bollen et al., *EU Trade Policy*, *supra* note 247, at 284.

faced with *protectionist restrictions that cannot be justified with legitimate privacy considerations.*²⁵⁶

In sum, while the European Union and United States frame their digital trade discourses in similar terms, they clearly do not agree on the right balance to be struck between the economic benefits of digital trade, on the one hand, and societal values, such as the protection of the rights to privacy and personal data, on the other.²⁵⁷ Both trading partners, however, do seem to agree that the term “protectionism” has a negative valence,²⁵⁸ which reinforces the importance of using the term only with full knowledge of its power to frame the debate and shape policy decisions and the outcome of international trade negotiators. In practice, however, the European Union and United States apply their own standards and values to measure what digital protectionism is *abroad* as a result of regulatory divergence on a number of domestic policies that affect digital trade, including privacy and data protection.²⁵⁹ While both the European Union and United States recognize, in theory, that privacy and data protection are important values, they diverge quite jarringly on what the ‘correct’ level of such protections should be.²⁶⁰ In other words, there is a deep disagreement on where to draw the line where protection becomes protectionism. This is the issue to which this Article returns below. We must first, however, add one more layer of bricks to the analytical edifice and turn to the business interests that underpin the shifts in the discourse.

²⁵⁶ Communication from the Commission to the European Parliament and the Council Exchanging and Protecting Personal Data in a Globalised World, COM (2017) 7 final, ¶ 3 (Jan. 10, 2017) (emphasis added).

²⁵⁷ Aaronson, *Why Trade Agreements Are Not Setting Information Free*, *supra* note 229, at 687 (“Unfortunately, despite their collaboration, the US and the EU do not completely agree on digital rights In addition, the US and the EU disagree on the role of the state and business in protecting privacy.”).

²⁵⁸ *See supra* Part I.

²⁵⁹ *See* Aaronson, *Why Trade Agreements Are Not Setting Information Free*, *supra* note 229, at 682 (“Under US law, online privacy is a consumer right, whereas in the EU (as well as in Australia and Canada), privacy is a human and consumer right that must be protected by governments.”).

²⁶⁰ *See id.* at 682–83 (“Under US law, online privacy is a consumer right, whereas in the EU . . . privacy is a human and consumer right that must be protected by governments The EU strategy seemed directly at odds with US voluntary, limited, and sectoral approach.”).

D. Business Interests Behind the “Digital Trade” Discourse

In Section I.D.3, this Article explained how a policy favoring liberalization of trade, just as a policy favoring domestic regulation limiting free trade (which is often presented by those favoring free trade as protectionist), can be captured. In following pages, this Article will demonstrate that not only the economic benefits of cross-border digital trade but also certain business interests profiting from the absence of restrictions on cross-border transfers are shaping the “digital trade” discourse.

The United States was one of the first WTO member states to adopt a so-called “digital trade” agenda back in 2002.²⁶¹ Historically, the United States has a “strong competitive advantage in the digital economy”²⁶² As Professor Aaronson has argued, by making the campaign against digital protectionism an essential element of its international trade policy as demanded by the global U.S.-based internet platforms, the United States is trying to promote a global internet, free of barriers to entry, while preserving its declining internet dominance.²⁶³ Some observers suspect that the United States applies the “digital protectionism” label to any domestic regulation that reduces its market share abroad in this space.²⁶⁴ This echoes the “diminished giant syndrome,” a term coined by

²⁶¹ See Mira Burri, *The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation*, 51 U.C. DAVIS L. REV., 65, 99, 129 (2017); Sacha Wunsch-Vincent, *The Digital Trade Agenda of the U.S.: Parallel Tracks of Bilateral, Regional and Multilateral Liberalization*, 58 AUSSENWIRTSCHAFT 7, 7 (2003).

²⁶² Azmeh & Foster, *supra* note 141, at 4–5 (“Such policies also represent a long term threat to the US economy which has a strong comparative advantage in the digital economy and related activities which gives it a strong advantage to lead the major technological shifts in the coming decades in different economic sectors.”); see also Aaronson, *What We Are Talking About*, *supra* note 35, at 8 (noting the particular importance of digital trade to the U.S. economy).

²⁶³ See Aaronson, *Digital Protectionism?*, *supra* note 236 (“The United States has conflicting objectives regarding the digital economy. On one hand, it wants to encourage a vibrant global Internet with few barriers to entry. On the other, the United States wants to preserve its Internet dominance, which is clearly declining as China, India, Indonesia and others develop their digital prowess and bring more people online.”).

²⁶⁴ *Id.* (“[T]o some observers, it seems like the United States defines [digital protectionism] as policies that with or without intent reduce U.S. market share in foreign markets.”).

Bhagwati to refer to the U.S. trade policy in the 1970s, which used new protectionism to reshape international trading order to its advantage.²⁶⁵ American tech companies view initiatives to control domestic data space in several countries, including through restrictions on data flows (e.g. those adopted in China, Australia, India, Russia, Thailand, Turkey, and the United Arab Emirates) as threats to their business model.²⁶⁶ As a result, executives of these companies, often relying on research of specialized think tanks, activated their lobbying activities with trade policy officials to “do a better job of limiting digital protectionism.”²⁶⁷

A 2016 study showed that tensions around cross-border data flows have intensified due to an increase in the use of the label “digital protectionism.”²⁶⁸ Based on the analysis of data on political spending (lobbying, campaign contributions, and other forms of political activism), the authors of the study were able to claim convincingly that powerful U.S. tech companies (including large corporations like Google, Facebook, Amazon, Microsoft, and Apple, as well as smaller firms such as LinkedIn, Airbnb, and Expedia) and industry associations (such as the Business Software Alliance (“BSA”), Information Technology Industry Council (“ITI”), and the Software & Information Industry Association (“SIIA”))²⁶⁹ played a crucial

²⁶⁵ See Bhagwati, *The Diminished Giant Syndrome*, *supra* note 97, at 22 (“The American mood parallels Great Britain’s at the end of the nineteenth century As was Great Britain at that time, America has been struck by a ‘diminished giant syndrome’—reinforced by the slippage in the growth of its living standards in the 1980s.”).

²⁶⁶ See, e.g., Aaronson, *Why Trade Agreements Are Not Setting Information Free*, *supra* note 229, at 684 (“[P]olicymakers from [China, Australia, India, Russia, Thailand, Turkey, and the United Arab Emirates] were increasingly determined to control the Internet within their borders and facilitate the rise of domestic Internet firms Many US based Internet companies saw in these actions a threat to their bottom lines.”).

²⁶⁷ *Id.* (“[E]xecutives demanded that officials do a better job of limiting digital protectionism For example, Google used the research of the Open Network Initiative (a Canadian think tank) to document how more than 40 governments instituted broad scale restrictions of information flows.”).

²⁶⁸ Azmeh & Foster, *supra* note 141, at 11 (“[T]ensions around cross-border data flows. Such tensions have been brought to the fore by the growing use of so-called ‘digital protectionism’ in a number of countries.”).

²⁶⁹ *Id.* at 12–14 (“In the US, political spending by these firms . . . have increased substantially over the last few years making internet and new ‘tech’ com-

role in the formation of the U.S. “digital trade agenda,” prioritization of cross-border data flows in international trade policy, and increase in pressure on domestic regulations restricting such flows.²⁷⁰ These political efforts, as well as fears concerning a diminishing technological advantage of the United States in the global digital economy, made the “digital trade agenda” “a key part of the U.S. trade policy in future multilateral and bilateral agreements.”²⁷¹

As far as the Author knows, no published similar research exists on the lobbying activities on digital trade at the E.U. level. The E.U. Transparency Register, which discloses information on interest groups affecting decision-making in the European Union, does not contain statistics on interest group spending in each particular area.²⁷² The available information, however, demonstrates that not only big U.S. tech companies, such as Google, Apple, Facebook,

panies one of the strongest lobbying sectors in Washington (table 1). This included major spending from large companies such as Google, Facebook, Amazon, Yahoo, Apple, EBay, Microsoft, and Apple, but also younger firms such as Snapchat, Rapidshare, LinkedIn, Dropbox, Twitter, Airbnb, Expedia, in addition to industry associations . . .”). *See also* U.N. Conference on Trade & Dev., Digital Economy Report 2019: Value Creation and Capture: Implications for Developing Countries, UNCTAD/DER/2019, at 88–89, https://unctad.org/en/PublicationsLibrary/der2019_en.pdf (“[Global digital platforms]” have an interest in lobbying for international rules and regulations that allow to enable them to leverage their business models. Indeed, in the past few years, technology companies have replaced the financial sector as the biggest lobbyists, and major platforms have spent considerable resources in key locations.”).

²⁷⁰ *See* Azmeh & Foster, *supra* note 141, at 19 (“Many of the policies demanded by the industry were reflected in the US trade policy and in the ‘digital dozen’ principles adopted by the USTR.[] Similarly, the trade promotion authority (TPA) . . . listed digital trade and cross-border data flows as principle negotiating objectives of the United States.”).

²⁷¹ *Id.* at 30; *see also* John Selby, *Data Localization Laws: Trade Barriers or Legitimate Responses to Cybersecurity Risks, or Both?* 25 INT’L J.L. & INFO. TECH. 213, 217 (2017) (“It is not surprising to see the US government push strongly in the next generation of international trade agreements to restrict efforts to implement data localization in other countries.”).

²⁷² *See* Homepage, EUROPA: TRANSPARENCY REGISTER, <http://ec.europa.eu/transparencyregister/public/homePage.do?redir=false&locale=en> (last updated Nov. 11, 2019).

Amazon, and Microsoft,²⁷³ but also large European industry associations, such as Business Europe and Digital Europe, annually spend several million Euros on lobbying activities at E.U. institutions involving digital trade, cross-border data flows, and personal data protection.²⁷⁴

²⁷³ See Azmeh & Foster, *supra* note 141, at 12–13, 12 n.5; *Registrant Profile: Google*, EUROPA: TRANSPARENCY REGISTER, <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=03181945560-59> (last updated Oct. 22, 2019, 17:22:31) (showing that Google spent more than eight million Euro on lobbying activities in the European Union in 2018); *Registrant Profile: Amazon Europe Core SARL*, EUROPA: TRANSPARENCY REGISTER, <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=366117914426-10&isListLobbyistView=true> (last updated Mar. 26, 2019, 01:43:22) (showing that Amazon spent more than 1.75 million Euro on lobbying activities in the European Union in 2018); *Registrant Profile: Microsoft Corporation*, EUROPA: TRANSPARENCY REG., <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=0801162959-21&isListLobbyistView=true> (last updated Oct. 9, 2019, 14:58:21) (showing that Microsoft spent more than five million Euro on lobbying activities in the European Union from July 2018 through June 2019); *Registrant Profile: Apple Inc.*, EUROPA: TRANSPARENCY REG., <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=588327811384-96> (last updated Sept. 19, 2019, 14:24:05) (showing that Apple spent more than two million Euro on lobbying activities in the European Union from October 2017 through September 2018); *Registrant Profile: Facebook Ireland Limited*, EUROPA: TRANSPARENCY REG., <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=28666427835-74&isListLobbyistView=true> (last updated Mar. 25, 2019, 15:19:33) (showing that Facebook spent more than 3.5 million Euro on lobbying activities in the European Union in 2018). Unfortunately, the E.U. Transparency Register does not break down these costs by topic.

²⁷⁴ See *Registrant Profile: BusinessEurope*, EUROPA: TRANSPARENCY REG., <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=3978240953-79> (last updated Mar. 7, 2019, 14:50:46) (showing that Business Europe spent more than four million Euro on lobbying activities in the European Union in 2018); *Registrant Profile: DigitalEurope*, EUROPA: TRANSPARENCY REG., <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=64270747023-20> (last updated Mar. 1, 2019, 9:15:48) (showing that Business Europe spent more than four million Euro on lobbying activities in the European Union in 2018); see also DIGITAL EUROPE, LIST OF DIGITAL EUROPE MEETINGS HELD WITH COMMISSIONERS MEMBERS OF THE OR DIRECTOR-GENERALS SINCE JANUARY DECEMBER 1, 2014, EUROPA: TRANSPARENCY REG. 1–8, <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=64270747023-20&pdf=true> (last updated Nov. 11, 2019) (showing that Digital Europe was active on the topics of trade, data flows, artificial intelligence, and GDPR).

E. *Measures Banning “Digital Protectionism” in Recent Trade Agreements*

Just like the neoliberal discourse of 1970s and 1980s, the modern digital trade discourse(s) are reflected in recent international trade agreements, which increasingly include dedicated chapters on electronic commerce and digital trade (“digital trade chapters”).²⁷⁵ Such chapters tackle a range of domestic policies affecting cross-border digital commerce²⁷⁶ (“digital trade provisions”), but this Article only focuses on those concerning cross-border data flows.

Countries have not yet achieved a multilateral consensus on the design and scope of digital trade provisions, which have thus far only appeared in bilateral and regional trade agreements, and have somewhat overshadowed the WTO’s multilateral efforts in this area.²⁷⁷ Although the proposals on electronic commerce in the WTO increasingly focus on barriers to digital trade and digital protectionism,²⁷⁸ the WTO has not yet made any progress on this issue. In early 2019, seventy-six WTO member states, including Canada, China, the European Union, and the United States,²⁷⁹ started a new round of negotiations on electronic commerce at the WTO in order to create rules governing e-commerce and cross-border data flows.²⁸⁰ It

²⁷⁵ See, e.g., Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 14, Mar. 8, 2018, <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/14.-Electronic-Commerce-Chapter.pdf> [hereinafter CPTPP] (governing electronic commerce in the Trans-Pacific Partnership).

²⁷⁶ See, e.g., *id.* art. 14.5 (outlining the endeavors each party to the agreement must make in maintaining a legal framework governing electronic transactions domestically).

²⁷⁷ See Burri, *The Regulation of Data Flows Through Trade Agreements*, *supra* note 9, at 417 (“As the Doha negotiations continue to make little progress, the multilateral venue of rule-making has been seriously undermined and this has triggered forum-shopping—bilaterally, regionally, or through plurilateral initiatives.”).

²⁷⁸ See Mitchell & Mishra, *Data at the Docks*, *supra* note 224, at 1111 (“The majority of the recent proposals on electronic commerce circulated by WTO Members in recent years tend to focus on regulatory barriers to digital trade. In particular, they emphasize digital protectionism.”).

²⁷⁹ Leika Kihara, *China and U.S. Among 76 WTO Members Pushing for New E-Commerce Rules*, REUTERS (Jan. 5, 2019, 8:58 PM), <https://www.reuters.com/article/us-davos-meeting-ecommerce/china-and-u-s-among-76-wto-members-pushing-for-new-e-commerce-rules-idUSKCN1PJ0UK>.

²⁸⁰ *76 WTO Partners Launch Talks on E-Commerce*, *supra* note 31.

remains to be seen how these negotiations will play out. Despite a seemingly firm consensus on the use of the terms “digital trade” and “digital protectionism”—the axes around which the discourses governing international negotiations revolve—the value structures underlying these discourses diverge, as the U.S. and the E.U. example above illustrates. This Section explicates how international trade provisions on cross-border data flows advanced by the United States and the European Union mirror this divergence.

In the spirit of its digital trade agenda, the United States has been a pioneer in including provisions on free cross-border data flows in international trade agreements.²⁸¹ Although the United States has advocated regulating information flows via international trade rules roughly since the 1980s,²⁸² the first time a non-actionable (or non-binding), horizontal provision on free cross-border data flows appeared in a trade agreement was in the electronic commerce chapter of the 2012 U.S.-Korea free trade agreement.²⁸³ The United States later proposed a *binding* horizontal provision—a demand of key

²⁸¹ Aaronson, *Redefining Protectionism*, *supra* note 237, at 59 (“The United States is the Paul Revere of digital protectionism, using naming and shaming to condemn such policies.”); *see also* Susan Ariel Aaronson, *Match Made in Heaven? The Wedding of Trade and Human Rights*, in 26 THE OXFORD HANDBOOK OF THE POLITICAL ECONOMY OF INTERNATIONAL TRADE 507 (Lisa L. Martin ed., 2015); *Cross-Border Data Flows: Could Foreign Protectionism Hurt U.S. Jobs?: Hearing Before the Subcomm. On Commerce, Manufacturing, and Trade of the Comm. on Energy and Commerce*, 113th Cong. 3 (2014) (statement of U.S. Chamber of Commerce); Michael Geist, *Data Rules in Modern Trade Agreements: Toward Reconciling an Open Internet with Privacy and Security Safeguards*, CTR. FOR INT’L GOVERNANCE INNOVATION (April 4, 2018), <https://www.cigionline.org/articles/data-rules-modern-trade-agreements-toward-reconciling-open-internet-privacy-and-security> (“The CPTPP also includes a specific exception for financial services, ironically at the insistence of the US Treasury, which wanted to retain the right to establish restrictions on financial data flows.”).

²⁸² *See* Aaronson, *Why Trade Agreements Are Not Setting Information Free*, *supra* note 229, at 672 (noting that the issue of free flow of information in trade agreements “is not new; in the 1980s, with the advent of faster computers, software, and satellites, officials from some states, including the US and Japan, wanted to include language governing the free flow of information in trade agreements.”). For a concise overview of earlier initiatives, *see id.* at 679–85.

²⁸³ *Id.* at 687 (“[T]his provision does not forbid the use of such barriers, nor does it define necessary or unnecessary barriers. In short, the language is not actionable.”).

U.S. lobbies as explained above—in the drafts of the currently stalled Trans-Atlantic Trade and Investment Partnership (“TTIP”) and Trade in Services Agreement (“TiSA”).²⁸⁴ The e-commerce chapter of Comprehensive and Progressive Trans-Pacific Partnership (“CPTPP”) similarly includes a legally binding horizontal obligation on the free cross-border data flow of information, including personal data, which states that “[e]ach Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.”²⁸⁵

This provision was included in CPTPP before the U.S. withdrawal from the agreement²⁸⁶ and remained unchanged in the final

²⁸⁴ See Gaël Le Roux, *TTIP Negotiations, Policy Convergence, and the Transatlantic Digital Economy*, 19 BUS. & POL. 709, 731 (2017) (“The USTR includes an essential element that is still not addressed by the European Commission in its initial proposal, which is cross-border data flows. The United States thus remains very offensive on the matter and reproduced what they have already pushed through in the KORUS and the TPP texts.”). A bracketed draft for Article 2 of the Annex on Electronic Commerce to TiSA included a prohibition to “prevent a service supplier of another Party from transferring, accessing processing or storing information, including personal information, within or outside the Party’s territory, where such activity is carried out in connection with the conduct of the service supplier’s business.” *Trade in Services Agreement (TiSA) Annex on Electronic Commerce*, WIKILEAKS, (2016), https://wikileaks.org/tisa/document/20151001_Annex-on-Electronic-Commerce/; COALITION FOR PRIVACY & FREE TRADE, COMMENTS OF THE COALITION FOR PRIVACY AND FREE TRADE TO THE TRADE POLICY STAFF COMMITTEE OF THE UNITED STATES TRADE REPRESENTATIVE 2–3 (2013), http://www.centerfordigitaldemocracy.org/sites/default/files/Coalition-for-Privacy-and-Free-Trade-Comments-to-USTR-May-9-2013_0.pdf (“The Obama Administration already has recognized the importance of interoperable privacy frameworks to global economic progress and prosperity: . . . *The United States is committed to engaging with its international partners to increase interoperability in privacy laws* by pursuing mutual recognition, the development of codes of conduct through multistakeholder processes, and enforcement cooperation.”) (emphasis added). *But see* James Fontanella-Khan, *Data Protection Ruled out of EU-US Trade Talks*, FIN. TIMES (Nov. 4, 2013), <https://www.ft.com/content/92a14dd2-44b9-11e3-a751-00144feabdc0> (noting E.U. officials’ fear that “finding a middle ground with the U.S. would only lower overall E.U. privacy standards.”).

²⁸⁵ CPTPP, *supra* note 275, art 14.11(2).

²⁸⁶ The version of the agreement with the United States as a party was known simply as the Transpacific Partnership (“TPP”). Removing the United States from this agreement was one of President Trump’s first decisions. *See* Letter from the

version of the agreement concluded without the United States.²⁸⁷ The United States Mexico Canada Agreement (“USMCA”)—a revision of the North American Free Trade Agreement (“NAFTA”)—includes a similar provision.²⁸⁸ Including such provisions in recent trade agreements is a U.S. priority.²⁸⁹ The U.S. proposal for the ongoing e-commerce talks at the WTO and the recent U.S.-Japan trade agreement replicate the “golden standard” provisions on digital trade.²⁹⁰ This move, against the background of trade restricting

Exec. Office of the President, Office of the U.S. Trade Representative, to TPP Depository (Jan. 30, 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/1-30-17%20USTR%20Letter%20to%20TPP%20Depository.pdf>.

²⁸⁷ See generally CPTPP, *supra* note 275.

²⁸⁸ Agreement Between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S. art. 19.11(1), Nov. 30, 2018, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf> [hereinafter USMCA] (“No Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means if this activity is for the conduct of the business of a covered person.”); see also Aaronson & Leblond, *supra* note 3, at 257 (noting that despite the fact that Trump withdrew from the TPP right after becoming President, “the Trump administration has built its proposals on those of the Obama administration (namely, the TPP).”).

²⁸⁹ See, e.g., RACHEL F. FEFER ET AL, *supra* note 191, at 1 (“To enable international data flows and trade, the United States has aimed to eliminate trade barriers and establish enforceable international rules and best practices that allow policymakers to achieve public policy objectives, including promoting online security and privacy.”); see also Press Release, Office of the U.S. Trade Representative, Summary of Objectives for the NAFTA Renegotiation, 8 (Nov. 17, 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf> (outlining specific negotiation objectives for the initiation of NAFTA negotiations as it related to digital trade in goods and services and cross-border data flows).

²⁹⁰ Inu Manak, *U.S. WTO E-Commerce Proposal Reads Like USMCA*, INT’L ECON. L. & POL’Y BLOG (May 8, 2019, 02:43 PM), <https://world-tradelaw.typepad.com/ielpblog/2019/05/us-wto-e-commerce-proposal-reads-like-usmca.html>; *President Donald J. Trump Has Secured a Tremendous Victory for American Farmers and Businesses with New Japan Trade Agreements*, WHITE HOUSE: BRIEFINGS & STATEMENTS (Oct. 7, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-secured-tremendous-victory-american-farmers-businesses-new-japan-trade-agreements/>; Agreement Between the United States of America and Japan Concerning Digital Trade art.11(1), Oct. 7, 2019, https://ustr.gov/sites/default/files/files/agreements/japan/Agreement_between_the_United_States_and_Japan_concerning_Digital_Trade.pdf (“Neither

measures in traditional trade sectors,²⁹¹ illustrates the strategic importance of digital trade for the U.S. economy.

As compared to prior U.S.-led free trade agreements, both the CPTPP and USMCA not only contain an exception from a free data flow provision for regulation pursuing important domestic public policy objectives, but also a dedicated article on the protection of personal information.²⁹² In both cases, the structure and text of the exception strongly resemble those of Article XIV(c)(ii) of GATS. For example, Article 19.11(2) of the USMCA, states the following:

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

(a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and

(b) does not impose restrictions on transfers of information greater than are *necessary* to achieve the objective.²⁹³

Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means, if this activity is for the conduct of the business of a covered person.”).

²⁹¹ See Daniel C.K. Chow, Ian M. Sheldon, & William McGuire, *The Revival of Economic Nationalism and the Global Trading System*, 40 *CARDOZO L. REV.* 2133, 2151 (2019) (“[T]he Trump Administration is following a path of economic nationalism and pushing back with threats of not playing by the accepted rules of international governance.”); see also Kyle Handley & Nuno Limão, *Trade Under T.R.U.M.P. Policies*, in *ECONOMICS AND POLICY IN THE AGE OF TRUMP*, 141, 141–43 (Chad P. Bown ed., 2017).

²⁹² Article 14.11(2) of the CPTPP and article 19.11(2) USMCA contain an exception for the free cross-border data flow provision; Article 14.8 of the CPTPP and Article 19.8 of the USMCA contain a provision on the protection of personal information. CPTPP, *supra* note 275, arts. 14.11(2), 14.8; USMCA, *supra* note 288, arts. 19.11(2), 19.8.

²⁹³ USMCA, *supra* note 288, art. 19.11(2) (emphasis added).

In both the USMCA and CPTPP, the exceptions do not specifically identify privacy and data protection by name, or any other particular policy objective.²⁹⁴ It can be reasonably argued that privacy and data protection would fall under such exceptions, as these policy interests are among the public policy goals that are most likely to be affected by the free cross-border data flow provision. The above-mentioned necessity test—the benchmark to evaluate the consistency of domestic regulation with the conditions of the exception—requires an objective assessment.²⁹⁵ The USMCA also clarifies that “[a] measure does not meet the conditions of this paragraph if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that *modifies the conditions of competition* to the detriment of service suppliers of another Party.”²⁹⁶ This ties in with the interpretation of the necessity test in the WTO general exceptions discussed *supra* in Section II.D.4 and does not recognize regulatory intent as a factor in the necessity test assessment.²⁹⁷

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

- (1) “[To] adopt or maintain a legal framework that provides for protection of personal data of users of digital trade,” featuring the [Asia-Pacific Economic Cooperation (“APEC”)] . . . Privacy Framework and the 2013 OECD Guidelines governing the Protection of Privacy and Transborder Flows of Personal data as examples of such frameworks;

²⁹⁴ See *id.*; CPTPP, *supra* note 275, art. 14.11.

²⁹⁵ Instead of the “necessity” requirement, the exception in Article 14.11(2) of the CPTPP provides that restrictions should not be “greater than are *required* to achieve the objective.” CPTPP, *supra* note 275, art. 14.11(3)(b) (emphasis added). This difference seems, however, purely semantic, and according to the WTO Secretariat, is yet another way to convey the concept of “necessity.” See WTO Secretariat, “*Necessity Tests*” in the WTO, ¶ 1.A.5, WTO Doc. 2/WPDR/W/27 (Dec. 2, 2003); CPTPP, *supra* note 275, at 6.

²⁹⁶ USMCA, *supra* note 288, art. 19.11(2)(b) n.5 (emphasis added).

²⁹⁷ *Id.* at 6.

- (2) To implement key data protection principles such as a limitation on the collection of data, data quality, purpose specification and a requirement that “any restrictions on cross-border flows of personal information are necessary and proportionate to the risks presented”;
- (3) A transparency requirement that parties publish information on how individuals can pursue a remedy in case of violation of personal information protections and on how companies can comply with the local personal information protection requirements; and
- (4) To cooperate with regulations towards developing mechanisms of compatibility between the parties’ data protection regimes and an endorsement of APEC Cross-Border Privacy Rules (“CBPR”) system as a “valid mechanism” to facilitate cross-border information flows while protecting personal data.²⁹⁸

At bottom, this provision transplants the U.S. approach to the protection of personal data as a consumer right. Explicit mention of the 2013 OECD Guidelines and the APEC CBPR reflects the economic approach to the protection of personal data as a precondition for digital trade.²⁹⁹ This way, privacy and personal data protection become normalized—or redefined—as tools of international trade and are viewed as trade values.³⁰⁰

The European Union’s digital trade discourse has also produced several “new generation” international trade agreements that contain, in addition to the usual chapters on trade liberalization, specific chapters on electronic commerce that included predominantly aspirational provisions.³⁰¹ However, so far, unlike the United States, the

²⁹⁸ *Id.* at 4–5.

²⁹⁹ *Id.*; see Yakovleva, *supra* note 197, at 484–85.

³⁰⁰ USMCA, *supra* note 288, art. 19.8; see Yakovleva, *supra* note 197, at 484–85.

³⁰¹ See Bollen et al., *EU Trade Policy*, *supra* note 247, at 282 (“[S]ince the 2006 Global Europe communication the EU has put bilateral trade deals explicitly

European Union has taken a more cautious approach to cross-border data flows in trying to defend its regulatory autonomy to protect the fundamental rights to privacy and personal data.³⁰² So far, none of the E.U. completed trade agreements include binding provisions on cross-border data flows.³⁰³ In the course of the TTIP and TiSA negotiations, such provisions, especially the exceptions from them for privacy and data protection, became a contentious (and a turning) point in the European Union's approach to regulating cross-border data flows in trade agreements, which has affected its trade negotiations with other trading partners.³⁰⁴ In the digital trade chapters of the E.U.-Japan Free Trade Agreement ("JEFTA") and (the revision of) the E.U.-Mexico Free Trade Agreements, the European Union explicitly refrained from including a free cross-border data flow provision; these agreements only contain a three-year review clause, which allows parties to reconsider this issue.³⁰⁵ Cross-border flows of personal data between the European Union and Japan were eventually routed through a mutual adequacy decision granted by both

at the service of its commercial and wider economic interests."); *id.* at 287 (stating that after the 2008 crisis the European Union significantly intensified "the (neo)liberal pattern in the bilateral dimension" by opening trade negotiations with the US, Canada, and Japan); *see also* Siles-Brügge, *Resisting Protectionism*, *supra* note 248, at 629; Jane Orbie & Ferdi De Ville, 'A Boost to Our Economies That Doesn't Cost a Cent': EU Trade Policy Discourse Since the Crisis, in *EU FOREIGN POLICY THROUGH THE LENS OF DISCOURSE ANALYSIS: MAKING SENSE OF DIVERSITY* 95, 95–110 (Caterina Carta & Jean- Frédéric Morin eds., 2014).

³⁰² *See* Aaronson, *Why Trade Agreements Are Not Setting Information Free*, *supra* note 229, at 685 ("The EU, in contrast, embraced a less combative and more internationalist strategy. The EU pushed for WTO wide data flow principles but did not name and shame other countries for digital protectionism (although it does list some countries' policies as barriers to trade).").

³⁰³ *See id.* at 685, 689–90.

³⁰⁴ *See* IRION ET AL., *supra* note 253, at 41; *see also* Fontanella-Khan, *supra* note 284.

³⁰⁵ European Union—Japan Economic Partnership Agreement, E.U.-Japan art 8.81, Feb. 1, 2019 [hereinafter JEFTA]; EUROPEAN COMM'N, MODERNISATION OF THE TRADE PART OF THE EU-MEXICO GLOBAL AGREEMENT WITHOUT PREJUDICE 5–6 (2018), http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156811.pdf; *see also* Brett Fortnam, *EU Punts on Data Flow Language in Japan Deal, Leaving Position Unresolved*, *INSIDE US TRADE* (July 6, 2017, 4:03 PM), <https://daytona.law.miami.edu:2742/inside-us-trade/eu-punts-data-flow-language-japan-deal-leaving-position-unresolved>.

parties to each other (the European Union—in accordance with the GDPR) a week before JEFTA took effect.³⁰⁶

In 2018, the European Union agreed on model provisions on free cross-border data flows and respective exceptions for privacy and data protection.³⁰⁷ The European Union has already included these clauses in its proposals for currently negotiated trade agreements with New Zealand, Australia, Chile, Indonesia, and Tunisia, and in its proposal for the recent WTO negotiations on electronic commerce.³⁰⁸ Unlike an open provision on cross-border data flows in Articles 14.11(2) of the CPTPP and 19.11(1) of the USMCA,³⁰⁹ Ar-

³⁰⁶ European Commission Press Release IP/19/421, European Commission Adopts Adequacy Decision on Japan, Creating the World's Largest Area of Safe Data Flows (Jan. 23, 2019).

³⁰⁷ EUROPEAN COMM'N, HORIZONTAL PROVISIONS FOR CROSS-BORDER DATA FLOWS AND FOR PERSONAL DATA PROTECTION, *in* EU TRADE AND INVESTMENT AGREEMENTS 1–2 (2018), http://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf [hereinafter HORIZONTAL PROVISIONS FOR CROSS-BORDER DATA FLOWS AND FOR PERSONAL DATA PROTECTION].

³⁰⁸ See European Union, *Joint Statement on Election Commerce: EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce*, at 4, WTO Doc. INF/ECOM/22 (Apr. 26, 2019); European Union, *EU-New Zealand Free Trade Agreement Proposal on Digital Trade*, at 4–5 (Sept. 25, 2018), http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157581.pdf; European Union, *EU-Australia Free Trade Agreement Proposal on Digital Trade*, at 4–5 (Oct. 10, 2018), http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157581.pdf; European Union, *EU-Tunisia Free Trade Agreement Proposal on Digital Trade*, at 4–5 (Nov. 9, 2018), https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157660.%20ALECA%202019%20-%20texte%20commerce%20numerique.pdf. Digital Trade Proposals for E.U.-Chile and E.U.-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. European Union, *EU-Chile Modernised Association Agreement Proposal for Digital Trade*, at 7 (Feb. 5, 2018), https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156582.pdf (containing a placeholder for provisions on data flows); European Union, *EU-Indonesia Free Trade Agreement Proposal for Digital Trade*, at 7 (Jul 27, 2017), https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156106.pdf. The European Union tabled its model clauses at a later stage in negotiations with these two countries. See, e.g., European Union, *Report of the 5th Round of Negotiations for a Free Trade Agreement Between the European Union and Indonesia*, at 1, 3 (July 2018), http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157137.pdf.

³⁰⁹ CPTPP, *supra* note 275, art. 14.11(2); USMCA, *supra* note 288, art. 19.11(1).

article A of the European Union's proposal only outlaws an enumerated list of restrictions on cross-border data flows: the requirement to use local computing facilities or network elements (both as such and as a precondition for data transfers), the requirements for data localization, and the requirement on storing or processing information abroad.³¹⁰ This article is formulated in a way that makes the European Union's own restrictions on cross-border transfers of personal data *a priori* not subject to the prohibition to restrict cross-border data flows. Furthermore, Article B of the European Union's proposal embodies the recognition that "the protection of personal data and privacy is a *fundamental right* and that high standards in this regard contribute to trust in the digital economy and to the development of trade."³¹¹ In addition, it provides for a broad national-security-type exception for domestic privacy and data protection rules:

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.³¹²

This exception is fundamentally different from those included in the CPTPP and the USMCA in at least three ways. First, it integrates into a trade agreement a different normative approach to protecting the rights to privacy and data protection—that of fundamental rights protection as compared to the instrumental approach embedded in the CPTPP and the USMCA.³¹³ Second, it recognizes rules on cross-

³¹⁰ HORIZONTAL PROVISIONS FOR CROSS-BORDER DATA FLOWS AND FOR PERSONAL DATA PROTECTION, *supra* note 307, at 1.

³¹¹ *Id.* at 2.

³¹² *Id.* (emphasis added).

³¹³ Compare CPTPP, *supra* note 275, art. 14.11(3) in conjunction with art. 14.8(1), and USMCA, *supra* note 288, art. 19.8(1), with European Union, *Joint Statement on Election Commerce: EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce*, at 4, WTO Doc. INF/ECOM/22 (Apr. 26, 2019).

border data flows as a valid regulatory tool to protect the rights to privacy and personal data.³¹⁴ Third, it incorporates a *subjective* necessity test—as opposed to the *objective* necessity test in the CPTPP and the USMCA—similar to that employed in national security exceptions in WTO agreements.³¹⁵

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

F. *The “Digital Protectionism” Label as a Trigger to Redefine “Barriers to Trade”*

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

³¹⁴ Compare CPTPP, *supra* note 275, art. 14.11(3), in conjunction with art. 14.8(1), and USMCA, *supra* note 288, art. 19.11(3), in conjunction with art. 19.8(1), with European Union, *Joint Statement on Election Commerce: EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce*, at 4, WTO Doc. INF/ECOM/22 (Apr. 26, 2019).

³¹⁵ Compare CPTPP, *supra* note 275, art. 14.11(3), and USMCA, *supra* note 288, art. 19.11(2), with European Union, *Joint Statement on Election Commerce: EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce*, at 4, WTO Doc. INF/ECOM/22 (Apr. 26, 2019); see, e.g., GATS, *supra* note 145, pt. II, art. XIV.bis.

At the dawn of the multilateral trading system governed by the discourse of embedded liberalism, the term protectionism was meant to target measures *intended* to protect domestic industry (as applied by the GATT for two decades or more).³¹⁶ Within the discourse of neoliberalism, the term “new protectionism” led to a removal of the intent component of the test as a relevant factor in defining a protectionism measure.³¹⁷ The increasingly frequent use of the term “digital protectionism” seems to be heading in the direction of questioning any form of regulation altogether.³¹⁸ Despite the notable differences in the scope and types of domestic policies outlawed by digital trade provisions in the E.U.- and U.S.-led trade agreements discussed in the previous Section, they have one trait in common: they are *not* formulated as non-discrimination provisions.³¹⁹ While a challenge of restrictions on cross-border data flows or data localization measures would require the contesting party to prove discrimination if such measures were challenged under most-favored-nation (“MFN”) treatment obligations under the GATS, or services chapters of post-GATS Free Trade Agreements (“FTAs”),³²⁰ this Article argues that such a challenge under the digital trade provisions would not impose such a requirement because the measures prohibit restrictions on cross-border data flows or data localization measures irrespective of their discriminatory character.³²¹ This means that a complainant need not establish discrimination. Put simply, new digital trade provisions make it easier to challenge domestic regulation that interferes with digital trade, and make the rate of successful challenges much more probable compared to challenges under non-discrimination provisions.

Professor Aaronson puts forward several theoretical arguments about why digital protectionism is unlike other form of protection-

³¹⁶ See *supra* notes 87 & 88 and accompanying text.

³¹⁷ Aaronson, *What We Are Talking About*, *supra* note 35, at 6–7.

³¹⁸ *Id.* at 6, 8, 17.

³¹⁹ CPTPP, *supra* note 275, art. 14.11; USMCA, *supra* note 288, art. 19.11.

³²⁰ See Marceau & Trachtman, *supra* note 168, at 358–60.

³²¹ See CPTPP, *supra* note 275, art. 14.11; see also USMCA, *supra* note 288, art. 19.11.

ism and calls on the United States to lead in (re)defining “protectionism” for the digital age.³²² Her arguments are based on the premise that information is different from the objects of trade that the “old protectionism” is concerned with.³²³ The discussion above, however, shows that this redefinition has already taken place. While it seems hard to disagree with the proposition that information is different in nature from goods and services, does that difference imply *ipso facto* that there is a sufficient reason to redefine protectionism? This implication is not obvious, as the characteristics that delineate protectionism from protection—the discriminatory intent or effect of domestic regulation—are not related to the objects of regulation. Therefore, the rhetoric presenting the redefinition of “protectionism” as “digital protectionism” as a logical, necessary step to respond to changing circumstances could be self-serving. Put differently, it could be, just as in the case of “new protectionism,” that the emergence of “digital protectionism” is a product of a new digital trade discourse—and not the consequence of digital transformation of trade—that serves particular business interests and not the broader public interest.

All that said, digital protectionism has already been incorporated in several trade agreements—it is here to stay.³²⁴ Given that a different conceptualization of digital protectionism has already led to diverging and potentially mutually inconsistent digital trade provisions, a consensus on what digital protectionism means is necessary.

“Digital protectionism” is defined and interpreted within a particular discourse. It follows that, to be able to reach a consensus on the meaning of “digital protectionism,” *countries must agree on the discourse in the first place*. As things stand now, though there is an agreement on the use of the terms “digital trade” and “digital protectionism,” the value structures underlying the discourse are vastly different. Using the example of privacy and data protection, Part III

³²² Aaronson, *Redefining Protectionism*, *supra* note 237, at 58, 87 (“Scholars and policymakers alike need to rethink how we define and measure [digital protectionism] as well as reconsider the appropriate strategies to address it Given the stakes, the United States should take a leading role in defining protectionism at the World Trade Organization.”).

³²³ Aaronson, *What We Are Talking About*, *supra* note 35, at 6–8.

³²⁴ See, e.g., CPTPP, *supra* note 275, art. 14.11; USMCA, *supra* note 288, art. 19.11; see also HORIZONTAL PROVISIONS FOR CROSS-BORDER DATA FLOWS AND FOR PERSONAL DATA PROTECTION, *supra* note 307, at 1–2.

will illustrate how fundamental values on which a discourse is based affect the baseline between protection and protectionism.

III. THE BASELINE BETWEEN PRIVACY PROTECTION AND PROTECTIONISM: THE ROLE OF DISCOURSE

One variant of the digital trade discourse, advanced in particular by the United States and demonstrated in Parts II.B and C above, tends to equate strict privacy and data protection measures such as restrictions on cross-border data flows with a non-tariff trade barrier and, potentially, digital protectionism.³²⁵ However, even when some degree of privacy and data protection *are* factored into this discourse of digital trade, the protection of these interests is often presented as an *economic* necessity, a precondition for free trade rather than a fundamental right and societal value beyond its economic utility.³²⁶ It is likely presented as such because the use of the digital protectionism label features trade values as natural and obvious and forces policy makers to defend the measure against a baseline of free trade as non-protectionist. Regulatory conversations on privacy and data protection within the economic digital trade discourse about the term “digital protectionism” thus implicitly bring in the normative goal of maximization of wealth rather than a set of goals interacting with and counterbalancing each other.³²⁷

³²⁵ It is, however, often recognized that other legitimate concerns could also play a role. *See, e.g.*, Mishra, *Data Localization Laws*, *supra* note 224, at 150–52 (“The contentious issues with respect to data localization extend well beyond free trade versus protectionism into some delicate, complex and legitimate political concerns, such as technology transfer and IP rights, privacy, human rights, and national security, which is currently missing (and expectedly so) on most trade agendas.”). Mitchell and Hepburn similarly concede that there might be privacy and security concerns behind restrictions on cross-border data flows, but add that “digital protectionism may also be at play . . .” Andrew D. Mitchell & Jarrod Hepburn, *Don’t Fence Me In: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer*, 19 *YALE J.L. & TECH.* 182, 186 (2017).

³²⁶ USMCA, *supra* note 288, art. 19.8; Yakovleva, *supra* note 197, at 484–85.

³²⁷ *See* Driskill, *supra* note 132, at 2–3 (“[T]he standard argument made by economists in favour of free trade . . . implicitly imposes philosophical value judgements about what is good for a nation or society, or it makes leaps of empirical faith about how the world works.”).

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

A. Normative Approaches to Privacy and Data Protection

There are at least two policy approaches to the protection of privacy and personal data: (1) an economic approach in which personal data is viewed as an economic asset and its protection is a precondition of data-intensive trade; and (2) a moral value approach in which personal data is a materialized form of human behavior and its protection is directed not to data, but to an *individual's constitutional rights*.³²⁸ While in the first case the normative goal of protection is to generate more trade in data, as individuals tend to share more data when they believe it is protected,³²⁹ in the second case the aim is the protection of human dignity, autonomy, and privacy as valuable themselves.³³⁰

From an economic perspective, protection of privacy and personal data has several justifications, of which the creation and maintenance of consumers' trust is most prominently featured in the

³²⁸ See Sarah Spiekermann et al., *The Challenges of Personal Data Markets and Privacy*, 25 ELECTRONIC MKTS. 161, 164 (2015) ("Interpreting personal data as a tradable good raises ethical concerns about whether people's lives, materialized in their data traces, should be property at all, or whether in fact personal data should be considered inalienable from data subjects.").

³²⁹ See, e.g., Alessandro Acquisti et al., *Privacy and Human Behavior in the Age of Information*, 374 SCI. 509, 512–13 (2015) [hereinafter Acquisti et al., *Privacy and Human Behavior*] (showing that providing users with explicit control mechanisms over their personal data may lead to sharing more sensitive data by users).

³³⁰ See *infra* note 334 (collecting sources on the goals of the moral approach from a broad societal perspective).

economic discourse on digital trade.³³¹ This justification is explicitly included in the text of several E.U.- and U.S.-led FTAs.³³² This economic approach serves as a normative rationale for the protection of personal data as a commercial consumer right in the United States.³³³

³³¹ See *supra* Section II.C. Looking at the digital economy as a whole, trust meets all the criteria of a public good: it is neither rivalrous nor excludable. Without regulation, the market will not produce an optimal amount of trust necessary for the digital economy to flourish. On trust as a public good, see generally HANS-BERND SCHÄFER & CLAUS OTT, *THE ECONOMIC ANALYSIS OF CIVIL LAW* 359–60 (2004); George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941, 976 (1992) (“Economists too have recognized that trust is an extremely valuable and vulnerable resource, which the market alone cannot be counted on to supply.”). For a discussion on the how privacy protection contributes to building trust, see Neil M. Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 435 (2016); Neil Richards & Woodrow Hartzog, *Privacy’s Trust Gap: A Review*, 126 YALE L. J. 1180, 1185–86 (2017) (reviewing FINN BRUNTON & HELEN NISSENBAUM, *OBfuscation: A USER’S GUIDE FOR PRIVACY AND PROTEST* (2015)); Adam N. Joinson et al., *Privacy, Trust, and Self-Disclosure Online*, 25 HUM.–COMPUTER INTERACTION 1, 4 (2010). For an overview of other economic justifications of privacy protection, see, e.g., Ian Brown, *The Economics of Privacy, Data Protection and Surveillance*, in 12 HANDBOOK ON THE ECONOMICS OF THE INTERNET 247, 248–56 (Michael Latzer & Johannes M. Bauer, eds., 2016).

³³² See, e.g., USMCA, *supra* note 288, art. 19.8(1) (“Personal Information Protection— The Parties recognize the economic and social benefits of protecting the personal information of users of digital trade and the contribution that this makes to enhancing consumer confidence in digital trade.”); see also CPTPP, *supra* note 275, art. 14.8(1) (a similar provision stating “The Parties recognise the economic and social benefits of protecting the personal information of users of electronic commerce and the contribution that this makes to enhancing consumer confidence in electronic commerce.”); Free Trade Agreement Between the European Union and the Republic of Singapore, E.U.-Sing. art. 8.57(4), Oct. 19, 2018, 7972/1/18 REV 1; Comprehensive Economic and Trade Agreement, Can.-E.U., art. 16.4, Oct. 30, 2016, 2017 O.J. (L 11) 23 (entitled “Trust and confidence in electronic commerce,” which requires that parties “should adopt or maintain laws, regulations or administrative measures for the protection of personal information of users engaged in electronic commerce . . .”).

³³³ See WHITE HOUSE, *CONSUMER DATA PRIVACY IN A NETWORKED WORLD: FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL DIGITAL ECONOMY* 6 (2012), <https://www.hsdl.org/?view&did=700959> (“Preserving trust in the Internet economy protects and enhances substantial economic activity. Online retail sales in the United States total \$145 billion annually To preserve these economic benefits, consumers must continue to trust networked technologies. Strengthening consumer data privacy protections will

By contrast, the moral value approach views the protection of personal data rights from a broad societal perspective as contributing to the preservation of a free and democratic society, social equality, individual autonomy, integrity, and self-determination.³³⁴ In addition, preventing and correcting discriminatory harms caused by inappropriate use of personal data can (and should) be seen as a matter of social justice.³³⁵

Importantly, these two approaches are not mutually exclusive, as economically motivated protection contributes to the protection of a fundamental right, and fundamental right protection may have positive effects on digital commerce. The European Union is a good illustration of how these two approaches can coexist, as it simultaneously advances both models in the domestic and international arenas.³³⁶ In the European Union, a strong economic discourse—in which personal data and its protection are presented as enablers of the digital single market—is counterbalanced by a fundamental

help to achieve this goal.”). For a comparison of E.U. and U.S. data protection regimes, see Paul M. Schwartz, *The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures*, 126 HARV. L. REV. 1966, 1966–67 (2013) [hereinafter Schwartz, *The EU-U.S. Privacy Collision*]; Paul M. Schwartz & Daniel J. Solove, *Reconciling Personal Information in the United States and European Union*, 102 CALIF. L. REV. 877, 877 (2014) [hereinafter Schwartz, *Reconciling Personal Information*].

³³⁴ See Cécile de Terwangne, *Is a Global Data Protection Regulatory Model Possible?*, in 10 REINVENTING DATA PROTECTION? 175, 180, 185–88 (Serge Gutwirth et al. eds., 2009); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1423–28 (2000); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1658–66 (1999); Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056, 2087 (2004); Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, 30 J. INFO. TECH. 75, 85–86 (2015); LeSieur, *supra* note 194, at 94–95, 98.

³³⁵ See KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 153 (2017) (arguing that “denying privacy is a mechanism for social control.”); Linnet Taylor, *What Is Data Justice: The Case for Connecting Digital Rights and Freedoms Globally*, 4 BIG DATA & SOC. 1, 4–8 (2017) (Showing, based on examples of big data-driven discrimination, that “a specific articulation of social justice is now required with regard to contemporary data technologies.”).

³³⁶ HORIZONTAL PROVISIONS FOR CROSS-BORDER DATA FLOWS AND FOR PERSONAL DATA PROTECTION, *supra* note 307, art. B(1).

rights discourse.³³⁷ It is for that reason Professors Radim Polčák and Dan Jerker B. Svantesson label the intertwined nature of economic and fundamental rights considerations in data privacy a “Gordian knot.”³³⁸

In the European Union, privacy and data protection are protected as binding fundamental rights.³³⁹ The E.U. privacy and data protection framework, arguably one of the strictest in the world,³⁴⁰ is deeply rooted in a European cultural preference for strong privacy protection and is viewed as an integral part and key instance of the protection of human dignity.³⁴¹ However, the history of the E.U. data protection regime shows that the first E.U. legislative instrument on data protection—the 1995 Data Protection Directive—was also undergirded by the goal of establishing a functioning internal market, of which the protection of the fundamental rights of individuals to privacy and data protection was a necessary ingredient.³⁴² Similarly, Article 1 of the GDPR proclaims the protection of personal data is a fundamental right but also prohibits restrictions on

³³⁷ EUROPEAN DATA PROTECTION SUPERVISOR, OPINION 4/2015, TOWARDS A NEW DIGITAL ETHICS DATA, DIGNITY AND TECHNOLOGY 4, 9–10 (Sept. 2015), https://edps.europa.eu/sites/edp/files/publication/15-09-11_data_ethics_en.pdf.

³³⁸ RADIM POLČÁK & DAN JERKER B. SVANTESSON, INFORMATION SOVEREIGNTY: DATA PRIVACY, SOVEREIGN POWERS AND THE RULE OF LAW 208 (2017) (“[D]ata privacy involves multiple fundamental human rights – the right of privacy and the freedom of expression at a minimum – and significant commercial values. Indeed, maybe we are here dealing with a Gordian knot.”).

³³⁹ See *supra* Part II.

³⁴⁰ See Mishra, *Data Localization Laws*, *supra* note 224, at 140 (“The EU is considered to be one of the strictest regimes in the world for data privacy.”).

³⁴¹ See Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303) 17, 17; EUROPEAN DATA PROTECTION SUPERVISOR, *supra* note 337, at 12; Stefano Rodotà, *Data Protection as a Fundamental Right*, in 3 REINVENTING DATA PROTECTION? 77, 80 (Serge Gutwirth et al. eds., 2009); Chris Jay Hoofnagle et al., *The European Union General Data Protection Regulation: What It Is and What It Means*, 28 INFO. & COMM. TECH. L. 65, 69–72 (2019).

³⁴² Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 OJ (L 281) 31, 31–32, 38 [hereinafter *Data Protection Directive*]. For a discussion, see GLORIA GONZÁLEZ FUSTER, THE EMERGENCE OF PERSONAL DATA PROTECTION AS A FUNDAMENTAL RIGHT OF THE EU 198 (2014); Joris van Hoboken, *The European Approach to Privacy* 5 (Aug. 28, 2014) (unpublished 2014 TPRC Conference Paper), <https://ssrn.com/abstract=2418636>.

the free movement of data within the European Union.³⁴³ Recital 4 of the GDPR reconciles the economic and fundamental rights objectives of data protection, stating that, “[t]he processing of personal data should be designed to serve mankind.”³⁴⁴ That is, the fundamental right to data protection should be balanced with other fundamental rights, including the right to conduct a business enshrined in Article 16 of the E.U. Charter.³⁴⁵

E.U. data protection reforms that led to the adoption of the GDPR were one of the pillars of the Digital Single Market project, presented by the European Commission as the key for making the European Union thrive in the emerging global data economy.³⁴⁶ It is crucial, the Commission noted, to “enable the free flow of personal data within the Union, from which the critical mass of data essential for a strong data economy can be generated.”³⁴⁷ This rhetoric is clearly linked to the neoliberal internal and external policy discourse of the European Commission discussed above.³⁴⁸ At the same time, the Commission acknowledged the following:

[r]espect for private life and the protection of personal data are *fundamental rights* in the EU Strong data protection, confidentiality of communications and data security are crucial to dispel individuals’ doubts about misuse of their data and to create trust. Without this *trust*, the potential of a thriving data economy will not be met.³⁴⁹

³⁴³ GDPR, *supra* note 198, art. 1.

³⁴⁴ *Id.* recital 4.

³⁴⁵ *Id.*; Charter of Fundamental Rights of the EU, *supra* note 188, art. 16.

³⁴⁶ *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Completing a Trusted Digital Single Market for All*, at 2–3, COM (2018) 320 final (May 15, 2018) [hereinafter *Communication on Completing a Trusted Digital Single Market*].

³⁴⁷ *Id.* at 4.

³⁴⁸ *See supra* Section II.B.

³⁴⁹ *Communication on Completing a Trusted Digital Single Market*, *supra* note 346, at 2–3 (emphasis added). Similarly, in the explanatory memorandum to the proposal for the GDPR, the European Commission notes, on the one hand, that building a stronger and more coherent data protection framework in the European Union is essential for building the pan-European digital economy, and, on the other hand, emphasizes the protection of the right to protection of personal

In a similar vein, the European Union's most recent standard clause on cross-border data flows discussed above provides 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."³⁵⁰ This illustrates that the Commission does not separate the economic and moral approaches to privacy and data protection and seems to assign equal importance to each.

In contrast to the European Commission, the CJEU has grounded the E.U. restrictions on cross-border transfers of personal data in the international context solely on a fundamental rights basis.³⁵¹ This notwithstanding the fact that Chapter V of the GDPR, which regulates such transfers—as well as previously the same rules in the Data Protection Directive—are, in theory, guided by the exact same economic and non-economic rationales envisaged in Article 1 of the GDPR.³⁵² As the CJEU explained in the 2015 *Schrems* ruling, which invalidated the E.U.-U.S. Safe Harbor framework for commercial personal data transfers,³⁵³ limitations on transfers of personal data outside the EEA constitute a part of the European Union's "constitutional" data protection framework and are necessary to

data as a fundamental right. *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, at 2, COM (2012) 11 final (Jan. 25, 2012).

³⁵⁰ See HORIZONTAL PROVISIONS FOR CROSS-BORDER DATA FLOWS AND FOR PERSONAL DATA PROTECTION, *supra* note 307, art. B (emphasis added).

³⁵¹ Case C-362/14, *Schrems v. Data Prot. Comm'r*, 2015 EUR-Lex 62014CJ0362, ¶¶ 38–39, 42 (Oct. 6, 2015).

³⁵² See GDPR, *supra* note 198, art. 1 & ch. V; Data Protection Directive, *supra* note 342, at 33–34, 36–37.

³⁵³ The EU-U.S. Safe Harbor was the European Commission's decision recognizing the "adequacy" of the U.S. data protection in the meaning of the EU Data Protection Directive. See Commission Decision of 26 July 2000 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the Safe Harbour Privacy Principles and Related Frequently Asked Questions Issued by the US Department of Commerce art. 2, 2000 O.J. (L 215), 7, 9. After its invalidation, the framework was replaced by the "EU-U.S. Privacy Shield." See Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the EU-U.S. Privacy Shield, 2016 O.J. (L 207) 1, 3.

avoid circumvention of the E.U. data protection framework.³⁵⁴ This ruling, adopted in the aftermath of the famous Snowden revelations, embodied the European discontent with U.S. foreign surveillance practices.³⁵⁵

Although the European Union embraces both economic and moral value approaches to the protection of privacy and personal data, the latter will always prevail because the European Union may neither conclude nor implement through an E.U. legislative act an international agreement or decision of an international adjudicating body if it does not comply with the E.U. Charter.³⁵⁶ This matters because, although the economic and moral value rationales are complementary, the crucial difference between them is, as the next Section elaborates, that economic justification warrants a lower level of protection than the moral value one.

³⁵⁴ In the *Schrems* ruling, the CJEU stated that “[the adequacy requirement] implements the express obligation laid down in Article 8(1) of the Charter to protect personal data and . . . is intended to ensure that the high level of that protection continues where personal data is transferred to a third country.” *Schrems*, 2015 EUR-Lex 62014CJ0362, at ¶ 72 (referring to Article 25(6) of the Data Protection Directive). However, this does not affect the analysis because Article 45 of the GDPR preserved the essential features of the adequacy approach. See GDPR, *supra* note 198, art. 45; see also LEE A. BYGRAVE, DATA PROTECTION LAW: APPROACHING ITS RATIONALE, LOGIC AND LIMITS 79–80 (2002) (“The chief aim of these rules is to hinder data controllers from avoiding the requirements of data protection laws by shifting their data-processing operations to countries with more lenient requirements (so-called ‘data havens’).”). This approach is now explicitly incorporated in Article 44 of the GDPR, which requires that the limitations on transfers of personal data outside the EEA “shall be applied in order to ensure that the level of protection of natural persons guaranteed by [the GDPR] is not undermined.” GDPR, *supra* note 198, art. 44.

³⁵⁵ See Kuner, *Data Nationalism*, *supra* note 222, at 2092 (“The transfer of national borders to the online space reflects society’s ambivalence about the benefits and drawbacks of globalization: on the one hand we have grown accustomed to the global availability of goods and services, but on the other hand we are unsettled by the breakdown of barriers that seems to threaten our national and regional identities. The Snowden revelations and other recent developments have increased the pace and intensity of these anxieties, but the deep-seated nature of these concerns shows the importance of developing an underlying normative framework to address them.”).

³⁵⁶ Arianna Vidaschi, *Privacy and Data Protection Versus National Security in Transnational Flights: The EU-Canada PNR Agreement*, 8 INT’L DATA PRIVACY L. 124, 138–39 (2018).

B. *Limitations of the Economic Approach to Privacy and Data Protection*

There are at least two problems with fitting privacy and data protection's non-economic value (as opposed to the economic value of ensuring consumers' trust in digital trade) into the economic digital trade discourse.

First, non-economic interests in general are difficult to quantify for use in the wealth maximization calculus; it is not always possible to find convincing proof justifying the economic necessity of ensuring a certain level of privacy and data protection.³⁵⁷ Although some empirical research exists examining the costs of insufficient privacy protection,³⁵⁸ the aspects of privacy protection contributing to consumers' trust in digital ecosystems,³⁵⁹ and the value (or price) of privacy,³⁶⁰ such research has an inherent limitation: privacy and per-

³⁵⁷ See IRWIN, *supra* note 50, at 221 (showing that empirical evidence “either played virtually no role” or “played a small and unproductive role . . . in evaluating the substance of an economic argument for protection” and that, rather, the debate about these issues was a “conceptual debate over economic logic . . .”).

³⁵⁸ For empirical research attempting to quantify the chilling effects of governmental surveillance see, e.g., PEN AM. CTR., CHILLING EFFECTS: NSA SURVEILLANCE DRIVES U.S. WRITERS TO SELF-CENSOR 3 (2013); Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 117, 145–61 (2016); Alex Marthews & Catherine Tucker, *Government Surveillance and Internet Search Behavior 2–3* (Mar. 15, 2017) (unpublished paper) (<https://ssrn.com/abstract=2412564>).

³⁵⁹ See, e.g., WORLD ECON. FORUM, RETHINKING PERSONAL DATA: A NEW LENS FOR STRENGTHENING TRUST 21 (2014), http://www3.weforum.org/docs/WEF_RethinkingPersonalData_ANewLens_Report_2014.pdf.

³⁶⁰ See, e.g., NICOLA JENTZSCH ET AL., EUROPEAN NETWORK & INFO. SEC. AGENCY, STUDY ON MONETISING PRIVACY: AN ECONOMIC MODEL FOR PRICING PERSONAL INFORMATION 1 (2012); Alessandro Acquisti et al., *What Is Privacy Worth?* 42 J. LEGAL STUD. 249, 250 (2013); Dan Cvrcek et al., *A Study on the Value of Location Privacy*, in PROCEEDINGS OF THE 5TH ACM WORKSHOP ON PRIVACY IN ELECTRONIC SOCIETY 109, 110 (2006), <https://dl.acm.org/citation.cfm?id=1179621>; Bernardo A. Huberman et al., *Valuating Privacy: The Value of Privacy*, IEEE SECURITY & PRIVACY, Sept.–Oct. 2005, at 22, 22; Tamara Dinev & Paul Hart, *An Extended Privacy Calculus Model for E-Commerce Transactions*, 17 INFO. SYS. RES. 61, 61 (2006); Luc Wathieu & Allan Friedman, *An Empirical Approach to Understanding Privacy Valuation 1–2* (Harvard Bus. Sch., Working Paper No. 07-075, 2007).

sonal data protection cannot be precisely estimated because consumers' valuation of privacy is highly context-dependent and prone to behavioral biases.³⁶¹

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

From an economic perspective, the line between data protection as a precondition of trade and as a trade barrier should be drawn based on the considerations of efficiency—arguably the key benchmark for evaluating any policy measure.³⁶² Efficiency is defined as the maximization of social welfare,³⁶³ where social welfare is the aggregated welfare of individual members of society.³⁶⁴ There is no consensus on how to define welfare; money or utility are the most

³⁶¹ See Acquisti et al., *What Is Privacy Worth?*, *supra* note 360, at 252 (challenging the premise that privacy valuations can be precisely estimated based on theories from behavioural economics and decision research); *id.* at 257 (“The dichotomy between [willingness to pay] and [willingness to accept payment] . . . suggests that ordinary studies investigating privacy valuations may not tell us much about whether, or how much, consumers will actually pay to protect their data.”); see also Acquisti et al., *Privacy and Human Behavior*, *supra* note 329, at 505–10; Maria C. Wasastjerna, *The Role of Big Data and Digital Privacy in Merger Review*, 14 EUR. COMPETITION J. 417, 436 (2018) (stating that privacy lacks quantifiable metrics due to the subjectivity of consumer preferences about privacy).

³⁶² See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 2 (2004) [hereinafter SHAVELL, FOUNDATIONS]; SCHÄFER & OTT, *supra* note 331, at 46–47; Francesco Parisi, *Positive, Normative and Functional Schools in Law and Economics*, 18 EUR. J.L. & ECON. 259, 262 (2004). Empirical research shows that people are more willing to share their information and participate in digital transactions if they trust the provider. See, e.g., Janice Y. Tsai et al., *The Effect of Online Privacy Information on Purchasing Behavior: An Experimental Study*, 22 INFO. SYS. RES. 254, 266 (2011); see also Joinson et al., *supra* note 331, at 4–5, 17 (2010).

³⁶³ See SCHÄFER & OTT, *supra* note 331, at 8; see also RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 14–15 (9th ed. 2014).

³⁶⁴ See SCHÄFER & OTT, *supra* note 331, at 8.

widely-used proxies to evaluate welfare and suggest the most optimal regulatory option.³⁶⁵ In their well-known *Harvard Law Review* article *Fairness Versus Welfare*, Louis Kaplow and Steven Shavell introduce one of the most comprehensive definitions of “welfare” that incorporates “in a positive way everything that an individual might value,” including a taste for fairness, and in a negative way anything that the “individual might find distasteful.”³⁶⁶ However, even this inclusive understanding of welfare does not (and should not, according to Kaplow and Shavell) include the notion of fairness *as a value in itself*.³⁶⁷ Kaplow and Shavell emphasize that welfare, defined in this way, should be the sole concern of legal policy makers; they criticize the legal method, which views fairness as an *independent evaluative principle* that should be upheld even at the expense of individuals’ well-being, because it can sometimes lead to a decrease of social welfare and make society worse-off.³⁶⁸ Similarly,

³⁶⁵ See Marco Fabbri & Diogo G.C. Britto, *Distributive Justice, Public Policies and the Comparison of Legal Rules: Quantify the “Price of Equity”*, 14 REV. L. & ECON. 1, 8 (2018) (noting that welfare economics theory traditionally maximizes utility, while law and economics tends to prefer using wealth as the object of maximization.”); Heico Kerkmeester, *Methodology: General*, in 0400 ENCYCLOPEDIA OF LAW AND ECONOMICS VOLUME I: THE HISTORY AND METHODOLOGY OF LAW AND ECONOMICS 386–87 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POL’Y 85, 86–87 (1985).

³⁶⁶ Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 980–82 (2001) (“The notion of well-being . . . incorporates in a positive way everything that an individual might value—goods and services that the individual can consume, social and environmental amenities, personally held notions of fulfillment, sympathetic feelings for others, and so forth. Similarly, an individual’s well-being reflects in a negative way harms to his or her person and property, costs and inconveniences, and anything else that the individual might find distasteful. Well-being is not restricted to hedonistic and materialistic enjoyment or to any other named class of pleasures and pains. The only limit on what is included in well-being is to be found in the minds of individuals themselves, not in the minds of analysts We further note a particular source of well-being . . . , namely, the possibility that individuals have a taste for a notion of fairness, just as they may have a taste for art, nature, or fine wine.”).

³⁶⁷ *Id.* at 1011–17. Kaplow and Shavell succinctly summarize the argument: “whenever a notion of fairness leads one to choose a different rule from that favored under welfare economics, everyone is necessarily worse off as a result.” *Id.* at 1012.

³⁶⁸ *Id.* at 967 (stating, as their central claim, that “the welfare-based normative approach should be exclusively employed in the evaluating legal rules. That is,

the economic approach is unable to fully capture the moral value of personal data protection as a fundamental right.³⁶⁹

A data protection policy designed with both economic and non-economic considerations in mind arguably should ensure a higher level of personal data protection than one designed with only economic efficiency considerations in mind.³⁷⁰ Put differently, the goal of privacy and personal data protection predetermines, in part, both the desired optimal level of protection and the design of the regulatory framework.³⁷¹ If the goal is economic and instrumental, then it is justified *only to the extent necessary* to generate and preserve consumers' trust ("bottom-up regulation design").³⁷² Driven by their bottom lines, companies will only invest in privacy and data protection up to the point where marginal costs of generating more trust will equal marginal benefits.³⁷³ The problem is that trust is a subjective notion: the subjective level of consumer trust that is sufficient for consumers to enter into digital transactions does not always accurately reflect the actual trustworthiness of digital businesses, as consumers may not have full information or understanding on how well their personal data is actually protected by the company.³⁷⁴ This

legal rules should be selected entirely with respect to their effects on the well-being of individuals in society.”).

³⁶⁹ See Wolfgang Kerber, *Digital Markets, Data, and Privacy: Competition Law, Consumer Law and Data Protection*, 11 J. INTELL. PROP. L. & PRAC. 856, 857 (2016) (“[E]conomic analysis usually focusses on welfare effects alone, which might not always grasp sufficiently the normative dimension of privacy as a fundamental right.”); see also Alessandro Acquisti, *The Economics of Personal Data and the Economics of Privacy, Background Paper #3*, at 4, in JOINT WPISP-WPIE ROUNDTABLE, THE ECONOMICS OF PERSONAL DATA AND PRIVACY: 30 YEARS AFTER THE OECD PRIVACY GUIDELINES (2010), <https://www.oecd.org/sti/ieconomy/46968784.pdf> (arguing that not all externalities caused by the use of personal data can be captured in economic terms); Acquisti et al., *Privacy and Human Behavior*, *supra* note 329, at 509.

³⁷⁰ See Acquisti et al., *Privacy and Human Behavior*, *supra* note 329, at 509.

³⁷¹ See Kerber, *supra* note 369, at 863–64.

³⁷² Sandra J. Milberg et al., *Information Privacy: Corporate Management and National Regulation*, 11 ORG. SCI., 35, 49 (2000); Yakovleva, *supra* note 197, at 483.

³⁷³ See Kerber, *supra* note 369, at 865.

³⁷⁴ See Acquisti et al., *Privacy and Human Behavior*, *supra* note 329, at 512–13 (showing that the perceived and the actual levels of privacy may not coincide, and that providing users with explicit control mechanisms over their personal data

means that by pursuing their strategic self-interest, companies may not necessarily improve the actual trustworthiness of their digital goods or services.³⁷⁵ In contrast, if the protection is granted *for its own sake* as independent normative significance (“top-down regulatory design”), the level of protection will tend to be higher than the level that is necessary to advance social welfare from the welfare economics perspective.³⁷⁶

In sum, the protection of personal data as a fundamental right is a type of protection that is not necessarily efficiency-enhancing in an economic sense, but it can create both economic and non-economic effects beneficial for society at large. Setting economic theory and models as the *proper realm* of the discourse (and thus economic efficiency as the proper benchmark) skews the outcome.³⁷⁷ An emphasis on efficiency brands a broader range of domestic policies as protectionist.

When it comes to cross-border transfers of personal data, economic efficiency (or maximization gains from international digital trade) is not the only goal of protection or restrictions.³⁷⁸ Even if limitations on personal data transfers, such as those imposed by the European Union, do factually restrict trade, a country may well be willing to sacrifice some of the gains to protect its constitutional, cultural, or societal values.³⁷⁹ As Bhagwati rightly acknowledged,

may lead to sharing more sensitive data by users); *see also* Joinson et al., *supra* note 331, at 16–17.

³⁷⁵ *See* RODRIK, *supra* note 11, at 227 (“Corporations, after all, are motivated by the bottom line. They may be willing to invest in social and environmental projects if doing so buys them customers’ goodwill. Yet we shouldn’t assume their motives align closely with those of society at large, nor exaggerate their willingness to advance societal agendas. The most fundamental objection to labelling and other market-based approaches is that they overlook the *social* dimension of standard-setting.”).

³⁷⁶ SHAVELL, FOUNDATIONS, *supra* note 362, at 610. Shavell illustrates the point by the following example: “[I]f promise-keeping is granted independent significance, more promises will be kept than would be best if the goal were to keep promises only to advance individuals’ utilities, and whatever utility-based measure of social welfare one endorses will likely be lower than it could be.” *Id.*; Yakovleva, *supra* note 197, at 483.

³⁷⁷ *See* Acquisti et al., *Privacy and Human Behavior*, *supra* note 329, at 509.

³⁷⁸ *See* Kuner, *Data Nationalism*, *supra* note 222, at 2097.

³⁷⁹ Kuner makes a similar point. *See id.* at 2096 (arguing that the central question that the criticism of the economic effects of data nationalism asks is: “[W]hat

when non-economic objectives, such as valuation in themselves of specific policy objectives, enter the scene, “free trade will generally cease to be the optimal solution.”³⁸⁰ Moreover, a country’s international trade policy cannot be viewed in clinical isolation from other domestic policies and objectives. Just like all other policies, it is (or at least should be) guided by a common set of normative values of governmental policy in general, normative goals that are typically safeguarded by domestic constitutions.³⁸¹ For the European Union, these principles are those contained in Article 3(5) and Article 21 of the Treaty on European Union and include the universality and indivisibility of human rights and fundamental freedoms and the contribution to their protection, as well as respect for human dignity and for principles of the United Nations and international law.³⁸² It is beyond cavil that societies and governments have goals other than welfare.³⁸³ Susan Strange argued that efficiency is only one of the four basic values pursued by a politically organized society—wealth, order, justice and freedom—and in all politically organized societies these values will be combined differently and lead to different outcomes.³⁸⁴

if a country has decided that it wants to sacrifice a certain amount of economic efficiency in exchange for promoting other legitimate values that it believes are furthered by data nationalism?”).

³⁸⁰ Bhagwati, *Fair Trade*, *supra* note 97, at 19 (arguing that “[w]hen ‘non-economic’ objectives (such as the *valuation in themselves* of specific outputs such as manufactures or high-tech industry so that a dollar worth of output is valued at four, for instance) are admitted into the analysis, free trade will generally cease to be the optimal solution.”) (emphasis added).

³⁸¹ See Kuner, *Data Nationalism*, *supra* note 222, at 2097.

³⁸² Consolidated Version of the Treaty on European Union arts. 3.5, 21, Oct. 26, 2012, 2012 O.J. (C 326) [hereinafter TEU].

³⁸³ Strange, *supra* note 28, at 236 (“The basic premise that state policy should, or even can, be based on the single criterion of maximizing efficiency in the production of goods and services for the market is demonstrably false.”).

³⁸⁴ *Id.* at 237 (“Efficiency, in short, is only one of four basic values that any politically organized society seeks to achieve for its members. Wealth, order, justice, and freedom; these are the basic elements of political compounds just as hydrogen, oxygen, and carbon are the essential elements of some chemical compounds. And just as chemical elements can be combined differently to produce oil, wood, or potatoes, so basic values will be combined differently in all politically organized societies to produce, for example, fast-growing authoritarian states or slow-growing democracies, or conversely, fast-growing democracies or slow-growing police states.”); see also POLČÁK & SVANTESSON, *supra* note 338,

The E.U. data protection framework—a result of a difficult political compromise of, at that time, twenty eight-member states with distinct cultures and values—may not be the best regulation, but regulation can never be perfect.³⁸⁵ In a narrow effects-based definition of “protectionism” generated by neoliberal discourse, the E.U. framework indeed may be viewed as protectionist due to its restrictive effects on international trade.³⁸⁶ However, because of the limitations of the economic discourse, this framework is not appropriate when fundamental rights are at stake.³⁸⁷ A neoliberal conception of protectionism that once drove the world trading system towards globalization has reached a turning point where it has become a victim of its own success.³⁸⁸ A new multidisciplinary discourse is necessary in order to allow each trading party to strike the right balance between globalization (economic gains from digital trade and the right to conduct business), democratic politics, and domestic autonomy to pursue domestic values such as fundamental rights to privacy and data protection.³⁸⁹

Yet, European integration and the resulting economic power of the European Union is not only an inward-looking effort, but to a large extent also an outward-looking strategy: while it improves internal trade within the European Union, it also improves European Union’s negotiating positions in external economic relations and negotiations of international treaties.³⁹⁰ It also contributes to the expansion of European standards and values around the world, a phenomenon labelled by Anu Bradford as the “Brussels Effect.”³⁹¹ The

at 209 (“While the Internet is often seen as borderless in nature and global in scope, the physical work and the people that inhabit that world are still divided by fundamentally different cultures and values; and even where common values are found, those values are weighted in different ways.”).

³⁸⁵ See Mira Burri & Rachel Schär, *The Reform of the EU Data Protection Framework: Outlining Key Changes and Assessing Their Fitness for a Data-Driven Economy*, 6 J. INFO. POL’Y 479, 488–89 (2016).

³⁸⁶ GLOBAL DIGITAL TRADE 1, *supra* note 214, at 276.

³⁸⁷ Burri & Schär, *supra* note 385, at 500.

³⁸⁸ RODRIK, *supra* note 11, at xvii–xviii.

³⁸⁹ *Id.* at 200 (pointing at a “fundamental political trilemma of the world economy,” meaning that it is impossible to simultaneously pursue democracy, national self-determination, and hyper-globalization).

³⁹⁰ See Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 47–48 (2012).

³⁹¹ See *id.*

European privacy and data protection framework was not only driven by the constitutional concerns of ensuring a high degree of protection of personal data, but also by a desire to strengthen the European single market.³⁹² The presence of an economic rationale for unification of data protection rules in the European Union, however, does not diminish the fact that the level of data protection guaranteed by the unified rules is a projection of Europeans' vision of governance and cultural values.³⁹³

Although U.S. law does recognize, to some extent, the value of protecting privacy, such protection tends to be anchored in the commercial sphere (aimed at protecting consumer welfare) rather than constitutional rights;³⁹⁴ the legal weight of such protection is thus lower than, say, that of the constitutional right to freedom of expression.³⁹⁵ Recall, in addition, that a more liberal approach to data protection in the United States not only echoes U.S. cultural values, but

³⁹² See *id.* at 44–46.

³⁹³ See Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 STAN. L. REV. 1315, 1319–20 (2000) [hereinafter Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*] (“[S]pecific privacy rules in any particular country have a governance function reflecting the country’s choices regarding the roles of the state, market, and individual in the country’s democratic structure. Under this governance theory of privacy, national differences derive from distinct visions of governance, and privacy rules strive to protect a state’s norm of governance, whether it be a liberal market norm or a socially-protective, citizen’s rights norm.”); see also Milberg et al., *supra* note 372, at 47 (based on the empirical study of samples from nineteen different countries, the authors concluded that “[a] country’s cultural values are associated strongly with the privacy concerns that are exhibited by its populace (Hypothesis 1) and are associated marginally with its regulatory approach (Hypothesis 2).”).

³⁹⁴ See Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, *supra* note 393, at 1318.

³⁹⁵ Schwartz & Solove, *supra* note 333, at 880–81 (stating that the right to privacy in the United States “may even be secondary to other concerns, such as freedom of speech.”); see also Schwartz, *The EU-U.S. Privacy Collision*, *supra* note 333, at 1976–77 (“The First Amendment’s protections for freedom of expression . . . help define the U.S. orientation to privacy regulation.”). Although in some cases the First Amendment can “bolster privacy,” most of the time it is used to limit privacy: “statutes that limit information sharing on privacy grounds are subject to constitutional scrutiny of their impact on the speech of the data processor.” *Id.* (emphasis omitted).

also factors in the U.S. strategy of preserving global dominance in the information technology industry.³⁹⁶

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

CONCLUDING REMARKS: TOWARDS A NEW DIGITAL TRADE REGIME

This Article has argued that the choice of the right discourse for policy conversations on domestic privacy and the protection of personal data in the context of international trade negotiations is crucial. The discourse and value structures coming with it will ultimately predetermine where the line will be drawn between legitimate privacy and personal data protection and illegitimate protectionism, both in the relevant provisions of international trade agreements and in the interpretation of such provisions by trade adjudicating bodies.

Deliberations on the distinction between protection and protectionism show that it is not clear-cut: drawing a line beyond which protection *should* be viewed as protectionism is ultimately a judgment call.³⁹⁷ On a spectrum between the two extremes, there is a

³⁹⁶ See *supra* Section II.D.

³⁹⁷ Cf. Marceau & Trachtman, *supra* note 168, at 352 (“The distinction between a protectionist measure—condemned for imposing discriminatory or unjustifiable costs—and a non-protectionist measure restricting trade incidentally (and thus imposing some costs) is sometimes difficult to make.”); see Sykes, *supra* note 50, at 33 (“[I]t is exceedingly difficult to devise a workable and palatable legal rule to condemn regulatory measures that are necessary to nonprotectionist regulatory goals but that are nevertheless undesirable because of their trade impact. As a result, this task is left to case-by-case bargaining.”); see also Robert Howse, *Regulatory Measures*, in *THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION* 441–43 (Martin Daunton et al., eds., 2012) (“Regulations

gray area that includes domestic measures with an element of uncertainty as to what type of regulatory goal is at stake: protectionism in disguise or genuine protection, which only incidentally benefits domestic industries.³⁹⁸ Whether measures in this gray area should fall under the label of “protection” or “protectionism”—in other words, whether trade adjudicating bodies should err on the side of protection or protectionism—essentially depends on the discourse. Within an economic discourse, where free trade alone is high on the values scale, such regulation should be excluded as protectionist. In contrast, in a multidisciplinary discourse where equal values are assigned to free trade and protection of fundamental rights, letting some disguised protectionist measures sift through in order to safeguard domestic autonomy to adopt socially beneficial regulation may be a preferred approach.

This Article contends that the distinction between privacy and personal data protection and protectionism is in part a *moral* question, that is, not just a question of economic efficiency. Therefore, when a policy conversation, such as the one on cross-border flows of personal data, involves non-economic spill-over effects to individual rights, such conversation should not be confined within the straightjacket of trade economics, but rather placed in a broader normative perspective. The economic digital trade discourse, advanced by some states, most notably the United States, and reflected in the recently concluded CPTPP and USMCA, as this Article claims, subordinates non-economic values, such as the protection of privacy and personal data as moral values, to efficiency and sometimes to fuzzy welfare enhancement goals.³⁹⁹ As a result, only an economically justified—and lower—level of privacy and data protection, as

serve diverse objectives and reflect compromises between different groups. In such circumstances, it is not simple to draw a line between internal policies that are legitimate exercises of domestic regulatory autonomy (even if they have some trade-restrictive effects) and those that can be considered a form of protectionism or ‘cheating’ on the WTO bargain, in that they undermine the market access reasonably expected from commitments on liberalization of border measures in the multilateral trading system.”); Howse, *From Politics to Technocracy*, *supra* note 38, at 96.

³⁹⁸ Marceau & Trachtman, *supra* note 168, at 352.

³⁹⁹ Additionally, these goals often do not reflect negative externalities of economic growth (e.g., environmental degradation) and thus take a narrow view of “welfare.”

compared to that warranted by a multidisciplinary discourse, is able to qualify as not protectionist.⁴⁰⁰ In the Author's opinion, the political economy arguments against privacy and data protection beyond economic necessity should be taken with a grain of salt, precisely because those who are putting them forward may themselves be suffering from capture by those profiting from unrestricted cross-border data flows.

In a global perspective, the inchoate use of the terms "protectionism" and "digital protectionism" in different discourses by the European Union and the United States exposes a deeper challenge of the present day multilateral trade negotiations.⁴⁰¹ Having chosen digital protectionism as the main stumbling stone on the path of digital trade, trading partners focus more on the labels and their definition, while shying away from more fundamental questions about the goals and values of future (digital) trade.⁴⁰² The Author believes that this path is misguided: there exist as many definitions of (digital) protectionism as there are discourses, which the E.U. and U.S. examples clearly demonstrate. Using the same terminology, these trading partners advance utterly different discourses built upon different views on where the balance between trade and privacy should be struck. Against this backdrop, the Article contends that countries should rethink the goals of international trade for the twenty-first century.⁴⁰³ Such goals should determine and define the discourse, not the other way around. A consensus on the discourse and underlying values is essential for the ongoing multilateral negotiations on digital trade to succeed. *The discussion should be not about what protectionism means but rather about how far domestic regimes are willing to let trade rules interfere in their autonomy to protect their societal, cultural, and political values.* Protectionism should be defined based on the outcome of this discussion.

On the subject of restrictions on cross-border flows of personal data, the Author is of the opinion that such restrictions are, and will remain, necessary. Unless approaches to data protection and privacy are harmonized, which is not the road to take because of differences and lack of (political) basis for such harmonization (plus risks of

⁴⁰⁰ See *supra* Section II.E.

⁴⁰¹ See *supra* Part II.

⁴⁰² See *supra* Part II.

⁴⁰³ See LANG, AFTER NEOLIBERALISM, *supra* note 39, at 353.

becoming the lowest common denominator), countries need more regulatory space to determine the design of domestic data protection regimes. It is precisely because data protection standards in other countries are low (perhaps, strategically low) that countries with higher standards need to impose restrictions on data transfers.⁴⁰⁴ When it comes to the consequences of removing restrictions on cross-border flows of personal data on domestic privacy and data protection regimes and the ways to avert them, one could draw a parallel with restrictions on financial data flows, which are essential to ensure financial stability in a country. Harvard's Dani Rodrik has eloquently argued the following:

Financial globalization in effect neutralizes differences in national regulations. This is what is known in the trade as “regulatory arbitrage,” a race to the bottom in finance. For this reason, a commitment to regulatory diversity has a very important corollary: the need for restrictions on global finance . . . Governments should be able to keep banks and financial flows out—not for financial protectionism but to prevent the erosion of national regulations . . . Hence a new global financial order must be constructed on the back of a minimal set of international guidelines and with limited international coordination . . . Most important, the rules would explicitly recognize governments’ right to limit cross-border financial transactions, insofar as the intent and effect are to prevent

⁴⁰⁴ On the prospects of harmonizing data protection regimes, see, e.g., Milberg et al., *supra* note 372, at 53 (“What will or will not meet ‘societal expectations’ is highly contingent on a society itself . . . Thus, a universal regulatory approach to information privacy seems unlikely and would ignore cultural and societal differences.”); see also Christopher Kuner, *Regulation of Transborder Data Flows Under Data Protection and Privacy Law: Past, Present, and Future*, in OECD DIGITAL ECONOMY PAPERS NO. 187, at 8 (2011); PERRY KELLER, EUROPEAN AND INTERNATIONAL MEDIA LAW: LIBERAL DEMOCRACY, TRADE, AND THE NEW MEDIA 348–51 (2011). *But see* Aaditya Mattoo & Joshua P. Meltzer, *International Data Flows and Privacy: The Conflict and Its Resolution*, 21 J. INT’L ECON. L. 769, 769 (2018) (arguing that a common privacy framework could be based on the OECD and APEC data protection frameworks).

foreign competition from less strict jurisdictions from undermining domestic regulatory standards.⁴⁰⁵

This line of reasoning, in the Author's view, applies equally to restrictions on cross-border transfers of personal data. Deep harmonization of domestic privacy and data protection standards would also require a more extensive form of global governance. Whether this is the path to take is a separate question, far beyond the issue of cross-border data flows and beyond the scope of this Article.

⁴⁰⁵ See RODRIK, *supra* note 11, at 263–65.