PERSONAL DATA PRIVACY AND THE WTO

*Diane A. MacDonald and Christine M. Streatfeild**

* Diane MacDonald is a Senior Associate in Baker & McKenzie's International-Commercial practice group, where she focuses her practice on international trade compliance and litigation, with specific emphasis on U.S. customs counseling and enforcement proceedings, export control matters, and trade remedy proceedings. Ms. MacDonald represents clients before administrative agencies, the U.S. Court of International Trade, and the U.S. Court of Appeals for the Federal Circuit.

Christine Streatfeild is an Associate in Baker & McKenzie's Intellectual Property practice group. Ms. Streatfeild focuses her practice on international trade and patent litigation, where she represents multinational companies before the U.S. International Trade Commission, the Court of International Trade, the Court of Appeals for the Federal Circuit, and various U.S. agencies.

Personal data has been labeled the "currency" of the digital economy[1]—unsurprisingly, since many large and small companies rely heavily on the harvesting of Internet-based personal data. While "personal data" takes many forms, it is generally recognized to consist of information that could potentially identify an individual, regardless of whether the individual willingly sends the information to a provider of services (such as a bank or a social media site) or unknowingly supplies it to a third party collector (just by visiting a website). In a virtual market with capacities unknown to many regulators and which, by virtue of the Internet, transcends geographic boundaries, companies buy, sell, process, and store volumes of personal data that may help them identify consumer preferences, medical histories, and financial profiles. As countries rush to address the competing interests between the invaluable free-flow of information and consumers' "right to be forgotten" on the Internet, the data privacy issue sits on a collision course with international trade rules now more than it ever has in the past.[2]

If personal data is the currency of the digital economy, then "big data" is its jackpot.[3] The claims for big data—"mass repositories of data that can be collected across multiple platforms, in multiple jurisdictions, and in multiple

1. *See* Ben Rooney, *Reding Details Sweeping Changes to EU Data Laws*, WALL ST. J. TECH EUR. BLOG (Jan. 23, 2012, 1:37 AM), http://blogs.wsj.com/tech-europe/2012/01/23/reding-details-sweeping-changes-to-e-u-data-laws ("Personal data is the currency of today's digital market, . . . [a]nd like any currency, it needs stability and trust. Only if consumers can 'trust' that their data is well protected, will they continue to entrust businesses and authorities with it, buy online, and accept new services."); *Private Data, Public Rules: The World's Biggest Internet Markets Are Planning Laws to Protect Personal Data. But Their Approaches Differ Wildly*, ECONOMIST, Jan. 28, 2012, at 59 [hereinafter *Private Data, Public Rules*].

2. *See generally Private Data, Public Rules*, *supra* note 1, at 59–60 (discussing various consumer-privacy laws at different stages of development within the EU, United States, China, and India, including the new EU law that will allow consumers to force businesses to delete information on file).

3. *See* JAMES MANYIKA ET AL., MCKINSEY GLOBAL INST., BIG DATA: THE NEXT FRONTIER FOR INNOVATION, COMPETITION, AND PRODUCTIVITY 1 (2011) ("'Big data' refers to datasets whose size is beyond the ability of typical database software tools to capture, store, manage, and analyze.").

languages"[4]—are that it fosters transformative innovation,[5] stimulates economic growth,[6] enhances the development of new medicines,[7] drives productivity, efficiency, and growth,[8] and combats terrorism,[9] to name a few. Yet, the collection of big data brings concomitant and complex privacy concerns that span national borders and regulatory regimes.

Much has been written about the (in)adequacy of World Trade Organization (WTO) disciplines to address the burgeoning issues associated with Internet-based personal data trade.[10] Meanwhile, companies are racing to enter new markets and to provide cross-border data services because no one can afford to sit on the sidelines.[11] In addition, countries are moving

4. Richard Graham, *Big Data and Financial Services: Are European Privacy and Information Security Hindering Innovation?*, INT'L L. NEWS, Fall 2012, at 22.

5. SOFTWARE & INFO. INDUS. ASS'N., DATA-DRIVEN INNOVATION, A GUIDE FOR POLICYMAKERS: UNDERSTANDING AND ENABLING THE ECONOMIC AND SOCIAL VALUE OF DATA 2 (2013).

6. *Id. But see* James Glanz, *Is Big Data an Economic Big Dud?*, N.Y. TIMES, Aug. 18, 2013, at SR5 (debating the utility of big data as a driver of economic activity).

7. Graham, *supra* note 4, at 22.

8. Omer Tene & Jules Polonetsky, *Privacy in the Age of Big Data: A Time for Big Decisions*, 64 STAN. L. REV. ONLINE 63, 63 (2012).

9. Gerry Smith & Ben Hallman, *NSA Spying Controversy Highlights Embrace of Big Data*, HUFFINGTON POST (June 12, 2013, 4:30 PM), http://www.huffingtonpost.com/2013/06/12/nsa-big-data_n_3423482.html. That the drive to mine big data is pervasive was recently demonstrated by the U.S. National Security Administration's announcement that it has been analyzing huge amounts of internet, phone, and financial data in an effort to combat terrorism. *Id.*

10. *See, e.g.*, PETER P. SWIRE & ROBERT E. LITAN, NONE OF YOUR BUSINESS: WORLD DATA FLOWS, ELECTRONIC COMMERCE, AND THE EUROPEAN PRIVACY DIRECTIVE 196 (1998) (arguing the WTO is an inappropriate forum for data privacy issues "that are only modestly related to free trade and protectionism"). *But see* Carla L. Reyes, *WTO-Compliant Protection of Fundamental Rights: Lessons from the EU Privacy Directive,* 12 MELB. J. INT'L L. 141, 163–66 (2011) (discussing regulatory restraints on privacy protection under the WTO); *see also* Maria Veronica Perez Asinari, *Is There Any Room for Privacy and Data Protection within the WTO Rules?*, 9 ELEC. COMM'N L. REV. 249, 278–80 (2002) (acknowledging the obstacles to effective WTO regulation of e-commerce, including the inability to force Member states to forego independent data privacy regulation).

11. John Furrier, *Big Data is Big Market & Big Business*, FORBES (Feb. 17, 2012, 1:26 PM), http://www.forbes.com/sites/siliconangle/2012/02/17/big-data-is-big-market-big-business (describing the increasing value of the big data market, which is expected to hit $50 billion by 2017).

full-speed ahead on new privacy regulations with or without the WTO's blessing, demanding their regulatory sovereignty regarding the protection of their citizens' data.[12] The European Union formally led the charge on January 25, 2012, by releasing the draft of a sweeping new general data protection regulation.[13] The United States quickly followed with the White House's framework for protecting privacy in the digital economy in February 2012,[14] and the Federal Trade Commission's privacy framework final report and recommended best practices in March 2012.[15] Additionally, the United States has begun drafting new consumer privacy legislation, which could address some of the concerns that the European Union, among others, have with the perceived lack of data privacy controls in the United States.[16] China and India are also critical players in the

12. *See, e.g.*, Press Release, European Commission, Commission Proposes a Comprehensive Reform of Data Protection Rules to Increase Users' Control of Their Data and to Cut Costs for Businesses (Jan. 25, 2012), *available at* http://www.europa.eu/rapid/press-release_IP-12-46_en.htm?locale=en; EXEC. OFFICE OF THE PRESIDENT, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL DIGITAL ECONOMY (2012), *available at* http://www.whitehouse.gov/sites/default/files/privacy-final.pdf; Solveig Singleton, *Privacy as a Trade Issue: Guidelines for U.S. Trade Negotiators*, HERITAGE FOUND. (Mar. 18, 2002), http://www.heritage.org/research/reports/2002/03/privacy-as-a-trade-issue. For a summary of the EU's 1995 directive and the corresponding "safe harbour" that it established, see AARON LUCAS, CATO INST., SAFE HARBOR OR STORMY WATERS? LIVING WITH THE EU DATA PROTECTION DIRECTIVE 1–2 (2001).

13. Press Release, *supra* note 12.

14. EXEC. OFFICE OF THE PRESIDENT, *supra* note 12.

15. FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS (2012), *available at* http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

16. *See Commerce Push to Draft Privacy Law Could Smooth EU Tension: Kerry*, INSIDE U.S. TRADE, Sept. 6, 2013 (noting the EU believes "the United States' data privacy regime is weak because it lacks a single legislative framework"). As the U.S. International Trade Commission noted in a recently released report on digital trade, "[t]he United States generally uses the term 'data privacy' on the assumption that only private information can be protected. By contrast, Europe refers to the broader term 'data protection,' which may extend to information that is in the public domain." Digital Trade in the U.S. and Global Economies, Part I, Inv. No. 332-531, USITC Pub. 4415 (July 2013) at 5–8 n.41.

data privacy space.[17] Not only do both countries have draft guidelines or rules circulating to crack down on the use of personal data on the web, the countries will also soon have more people online than the United States and Europe have citizens.[18]

How can WTO Members regulate the collection, storage, and use of personal data without running afoul of their trade commitments? Put another way, do WTO disciplines provide any measurable limits on a Member's ability to regulate the use of data collected within one Member's borders by a company whose home base is in another Member? Given these fast-moving developments, this paper examines whether the WTO's General Agreement on Trade in Services (GATS) can provide relief for cross-border services companies facing a dizzying array of country-specific privacy laws.

I. MAY A WTO MEMBER PROHIBIT THE TRANSFER OF PERSONAL DATA FROM ITS TERRITORY?

Personal data privacy can become a trade issue in a number of ways, ranging from the fairly simple (a multinational super store opens a local branch in Vietnam, where it will maintain a server that collects buying histories of its Vietnamese customers) to the more complex (a healthcare management company uses a "cloud" based server sited in India to store X-rays and medical records of U.S. citizens).[19] In particular, the

17. On June 7, 2012, the State Council Information Office of the People's Republic of China issued a revised draft "Measures on the Management of Internet Information Services." Wendy Zeldin, *China: Draft Measures on Internet Information Services Management*, GLOBAL LEGAL MONITOR (Jun. 19, 2012), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403202_text.

18. *See India is Now World's Third Largest Internet User After U.S., China*, HINDU (Aug. 24, 2013, 12:10 AM), http://www.thehindu.com/sci-tech/technology/internet/india-is-now-worlds-third-largest-internet-user-after-us-china/article5053115.ece (discussing a recent report that pegged the number of internet users in India at 74 million, and comparing that number to alternative estimates from March 31, 2013, which were as high as 164.81 million); *see also* Michael Kan, *China's Internet Users Cross 500 Million*, PCWORLD.IN, http://www.pcworld.in/news/chinas-internet-users-cross-500-million-61392012 (last visited Jan. 21, 2014) (noting that there were 513 million Internet users in China as of December 2011).

19. For a review of Target Corporation's current practice in the United States relating to collection of such data, see Charles Duhigg, *How Companies Learn Your*

issue of cross-border transfers of personal data has arisen in the recent free trade agreement between the United States and South Korea.[20]

The financial services chapter of the United States-Korea Free Trade Agreement (KORUS FTA) provides that "[e]ach Party shall allow a financial institution of the other Party to transfer information in electronic or other form, into and out of its territory, for data processing where such processing is required in the institution's ordinary course of business."[21] While the United States already allows this, Korea's current data privacy rules require financial services firms to locate their data servers in Korea and prevent data from being transferred outside of the country for processing.[22] However, Korea pledged to effect its KORUS FTA commitment to allow the offshoring of data processing within two years of the date KORUS FTA entered into force, or March 15, 2014.[23]

In response to this commitment, Korea has issued a draft regulation that "would allow financial services firms to transfer data outside of Korea, subject to several limitations."[24] The draft regulation allows the offshoring of data, but it retains the requirement mandated by Korean law to obtain consent from the consumer, for each transaction, before doing so.[25] Additionally, according to sources, the draft law only allows the transfer of data to the headquarters or to a direct affiliate of the financial services company and prevents offshoring if the

---

Secrets, N.Y. TIMES (Feb. 16, 2012), http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html.

20. Free Trade Agreement between the United States and the Republic of Korea, U.S.-S. Kor., art. 13, June 30, 2007 [hereinafter KORUS FTA], *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text.

21. *Id.* at Annex 13-B, sec. A.

22. *U.S., EU Engaged with Korea on Implementation of Data-Flow Obligation*, INSIDE U.S. TRADE, June 7, 2013 [hereinafter *Data-Flow Obligation*].

23. *Id.* Just a few months earlier, Korea had entered into an identical commitment in the European Union-Korea Free Trade Agreement. EUR. COMM'N, EU-KOREA FREE TRADE AGREEMENT: 10 KEY BENEFITS FOR THE EUROPEAN UNION, MEMO/10/423 (Sept. 17, 2010), *available at* http://europa.eu/rapid/press-release_MEMO-10-423_en.htm. Pursuant to that agreement, Korea pledged to allow these transfers by July 1, 2013. *See Data-Flow Obligation*, *supra* note 22.

24. *Data-Flow Obligation*, *supra* note 22.

25. *Id.*

financial services company has been sanctioned by any regulatory body within the past three years.[26] Furthermore, the draft regulation requires financial service firms to receive prior approval from the Korean Financial Services Commission for data offshoring.[27] However, there is no timeline for this approval and it must be based on a "necessity" test.[28]

U.S. companies have made it known that they believe the draft regulation does not meet the commitments of the KORUS FTA.[29] In particular, companies object based on the difficulties of doing business in the face of the consent requirements; the prohibition against using third-party processors; and the requirement of prior approval and proving the necessity of the transfer.[30] All of these measures would seriously curtail the use of data in a manner comparable to that of U.S. consumers' data—whether in the cloud, by third-party processors, or by moving data cross-border to the most appropriate servers—and hinder the agglomeration and processing of big-data treasure-troves.[31]

The U.S. Trade Representative has called the financial services chapter of KORUS FTA a "groundbreaking" agreement that provides more extensive provisions related to financial services, including increased market access and the data-transfer provision, than any previous free trade

---

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* As of March 21, 2014, U.S. officials state that Korea has put in place the necessary regulations and guidelines for implementing the data transfer provision. However, how these rules will work in practice remains a question. *Official: U.S. Hopes To Consult Further With Korea On TPP Within Weeks*, INSIDE U.S. TRADE, Mar. 20, 2014, *available at* http://insidetrade.com/201403172464544/WTO-Daily-News/Daily-News/official-us-hopes-to-consult-further-with-korea-on-tpp-within-weeks/menu-id-948.html.

31. U.S.-KOR. FTA BUS. COAL., FINANCIAL SERVICES AND THE U.S.-KOREA FTA, *available at* http://www.uskoreacouncil.org/sites/default/files/files/Financial-Services-KORUS.pdf (last visited Jan. 21, 2014) ("The KORUS FTA contains critical new language allowing for cross-border data flow. This commitment is ground breaking in Asia, and essential to the operations of U.S. world-wide financial services firms. Among other things, it allows for U.S.-based, "back-office" support to the Korean operations of U.S. firms.").

agreement.[32] KORUS FTA has also been referred to as a "gold standard" agreement,[33] and one that will be a model for future U.S. free trade agreements, precisely because of the importance of the data-transfer provision to financial services companies.[34] While the issue, therefore, is just being framed, it is one that has significant future effect.

Given that U.S. financial services companies have established, and are going to continue to establish, footholds in Korea regardless of the status of negotiations over this issue,[35] what options are available to a U.S. company trying to navigate market access in Korea?

Using Korea's restriction on the offshoring of data as an example, we consider how that measure would fare if the provision remained unchanged and if the United States instituted dispute settlement procedures at the WTO. While this analysis involves a provision in the KORUS FTA (and one that may be resolved by negotiation or through dispute settlement provisions within that agreement), it serves as a useful example of an issue that may arise with any number of other countries that may or may not have entered into a free trade agreement with the United States or that may be party to an agreement that does not contain the advanced financial services provisions of the KORUS FTA. In fact, cross-border U.S. services trade has grown rapidly since 1986 (45% for export services; 30% for import services),[36] and promises to continue to do so. And, the

---

32. *KORUS FTA Facts: New Opportunities for Financial Services*, OFFICE OF THE U.S. TRADE REP. (Oct. 2008), http://www.ustr.gov/archive/assets/Document_Library/Fact_Sheets/2008/asset_upload_file972_15191.pdf.

33. Tami Overby, *Opening the Floodgates of Trade with Korea*, FREE ENTERPRISE, (Mar. 15, 2012), http://www.freeenterprise.com/international/opening-floodgates-trade-korea.

34. Predictably, the chapter generated a lot of comment. *See, e.g.*, Todd Tucker, *Google It—Under Korea FTA, China Holds Your Data Privacy Future*, EYES ON TRADE: PUBLIC CITIZEN'S BLOG ON GLOBALIZATION & TRADE (Jan. 15, 2010, 11:50 AM), http://citizen.typepad.com/eyesontrade/2010/01/google-it-under-korea-fta-china-holds-your-data-privacy-future.html (arguing the data transfer provisions "[go] clearly counter to the demands in the TRADE Act to fix our own offshore privacy laws").

35. The United States and Korea continue discussions on implementation of Korea's data-transfer commitment. *See Data-Flow Obligation*, *supra* note 22.

36. *U.S. Trade in Services: Cross-Border Services Trade and Services Supplied Through Affiliates,* INT'L TRADE ADMIN. (Nov. 16, 2010), http://www.trade.gov/mas/ian/

Internet has transformed front- and back-end operations everywhere, particularly for U.S. providers in the financial services, professional services, healthcare, and education services fields.[37] Cross-border service disputes and data privacy issues are therefore international trade's new frontier.

II. THE WTO'S TRADE IN SERVICES FRAMEWORK

GATS is the first multinational agreement governing cross-border trade in services. It applies to "measures by Members affecting trade in services,"[38] where "measure" is defined as a "law, regulation, rule, procedure, decision, administrative action, or any other form . . . ."[39] This article presumes, without concluding, that the Korean regulations restricting U.S. cross-border financial services companies from processing data outside of Korea constitutes a measure that affects the trade in services, and thus should be considered under the GATS framework.[40]

A. General and Specific Obligations

GATS is a list-based, "positive" agreement: a Member agrees to open its market to services and service providers of other Members in only those service sectors listed in the Member's Schedule of Specific Commitments (Schedule), and as limited by any terms and conditions specified in that Schedule.[41]

---

build/groups/public/@tg_ian/documents/webcontent/tg_ian_003459.pdf.

37. Digital Trade in the U.S. and Global Economies, *supra* note 16, at 3–7.

38. General Agreement on Trade in Services art. I, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 283 [hereinafter GATS].

39. *Id*. art. XXVIII(a).

40. The fact that this measure can be considered a *service*—as opposed to a *good*—under WTO disciplines is not a foregone conclusion and is a topic worthy of its own paper. In 1998, a report entitled *Electronic Commerce and the Role of the WTO* noted that "[e]lectronic commerce could be characterized as trade in goods, trade in services, or as something different from either of these." WORLD TRADE ORGANIZATION, ELECTRONIC COMMERCE AND THE ROLE OF THE WTO 50 (1998), *available at* http://www.wto.org/english/res_e/booksp_e/special_study_2_e.pdf. To the extent that personal data is a product that is simply stored in electronic format, a product-based analysis (under GATT, the General Agreement on Tariffs and Trade) may be equally appropriate and, at a minimum, raises a host of interesting issues regarding the distinction between goods and services in the digital context. *Id*. at 51.

41. GATS art. XX.

Conversely, if a service sector is not listed in a Member's Schedule, the Member has not agreed to allow other Members access to its market in that service sector.

Members' obligations under GATS may be divided into two broad groups: general obligations, which apply automatically to all members and all service sectors; and specific obligations, which concern market access and national treatment and that apply only in the service sectors designated by each member in its Schedule.[42] The specific obligations are negotiated by each Member in individual market sectors and by "modes of supply": (1) cross-border (*i.e.*, from one Member's territory into another Member's territory); (2) consumption abroad (*i.e.*, in one Member's territory to a consumer of another Member); (3) commercial presence (*i.e.*, by one Member's service provider through the commercial presence of another Member's territory); and (4) presence of natural persons (*i.e.*, by one Member's service supplier through the presence of natural persons in the territory of another Member).[43]

The most significant general obligation, GATS Article II, requires a Member to extend unconditionally, to services and services suppliers of any other Member, "treatment no less favourable" than that it accords to like services and service suppliers of any other Member.[44] This "most favored nation" clause prevents preferential arrangements among groups of Members or between Members, with limited exceptions.[45]

The specific obligation of market access, per Article XVI, requires that each Member that grants access to its markets in a specific services sector accord the services and service suppliers of other Members treatment no less favorable than that set out in its services Schedule.[46] Market access may thus be limited access, subject to all of the terms and conditions set out by the Member in its Schedule. The commitment a Member makes

---

42. *Id.*

43. *Id.* art. I. We assume, without assumptions related to any other mode, that the first mode of service supply is relevant here.

44. *Id.* art. II.

45. *Id.* One exception is regional trade agreements, found in GATS Article V. *Id.* art. V.

46. *Id.* art. XVI.

within each services sector and each mode of supply is therefore a specific set of market access rules that is generally based on each Member's own policy objectives.

GATS Article XVI(2) provides an exhaustive list of the kinds of limitations that a Member may maintain, without violating its GATS obligations, if the restrictions are specified in a Member's Schedule.[47] Thus, if specific market access commitments are undertaken in a specific services sector, a Member may maintain any of the following limitations, essentially in the form of quotas or corporate requirements, if set out in its Schedule:

> a) limitations on the number of service suppliers;
>
> b) limitations on the total value of service transactions;
>
> c) limitations on the total number of service operations or on the total quantity of service output;
>
> d) limitations on the total number of natural persons that may be employed in a particular service sector;
>
> e) measures that restrict or require specific kinds of legal entities; and
>
> f) limitations on the participation of foreign capital.[48]

The specific obligation of "national treatment," per Article XVII, is a pledge not to discriminate in favor of domestic services or service suppliers over foreign services or service suppliers. National treatment is also only applicable to services sectors and modes listed in a Member's Schedule.[49] That is, if a service sector is not inscribed in a Member's Schedule, that Member may impose measures that discriminate against services and service suppliers of other Members without violating its GATS obligations. Similar to market access, national treatment, when granted, may be limited, but unlike market access, national

---

47. *Id.* art. XVI(2); *see also* Wei Wang, *On the Relationship Between Market Access and National Treatment Under the GATS*, 46 INT'L LAW 1045, 1053 (2012).

48. GATS art. XVI.

49. *Id.* art. XVII.

treatment may be limited by "any conditions and qualifications" set out in the Member's Schedule.[50] This limitation is broader than the six limitations on market access.

Thus, under Article XVII(1), a Member shall accord to services and service suppliers of any other Member, "treatment no less favourable than that it accords to its own like services and service suppliers."[51] A Member may meet this commitment, according to Article XVII(2), by granting "either formally identical treatment or formally different treatment" to that it accords its own service suppliers.[52]

The notion of possibly discriminatory treatment in favor of domestic parties is somewhat clarified in Article XVII(2), which specifies that "[f]ormally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member."[53] The WTO will consider whether the discriminatory treatment is *de jure,* because it is apparent from the face of the measure, or *de facto*,[54] because it fails to "guarantee equality of competitive opportunities."[55]

Furthermore, while set out in separate columns of a Member's services schedule, the concepts of market access and national treatment are, in fact, linked by paragraph 2 of Article XX of the GATS, which provides that: "[m]easures inconsistent with both Articles XVI [market access] and XVII [national treatment] shall be inscribed in the column relating to Article XVI. In this case, the inscription will be considered to provide a condition or qualification to Article XVII as well."[56] Therefore, at least some of the six market access limitations are also national treatment limitations; that is, Article XVI(2) extends to

50. *Id.*

51. *Id.* art. XVII(1).

52. *Id.* art. XVII(2).

53. *Id.* art. XVII(3).

54. UN Conference on Trade and Development, *Dispute Settlement: 3.13*, at 29, UNCTAD/EDM/Misc.232/Add.31 (2003), *available at* http://www.unctad.org/en/docs/edmmisc232add31_en.pdf.

55. Wang, *supra* note 47, at 1049.

56. GATS art. XX(2).

measures with discriminatory, *i.e.,* favoring domestic over foreign, aspects.[57] Thus, the six allowable limitations in Article XVI(2) may be regarded as national treatment limitation measures if they are discriminatory.[58] As the WTO has stated, "a single measure can contain or give rise to two simultaneous inconsistencies: one with respect to a market access obligation, the other with respect to a national treatment obligation."[59]

If, however, a Member does not wish to make any market access or national treatment commitments in a specific sector, it may do so by inscribing "Unbound" (it is not bound by any commitments) in the relevant columns of its Schedule.[60]

The multinational agreement governing trade in services is therefore a conditional and complex document whose effects are Member-specific. First, it must be determined if a Member has agreed to open its market in a specific service sector and in a specific mode of supply.[61] Once it has been established that a Member has committed to market access, one Member complaining that another Member's law or regulation favors domestic service suppliers over foreign service suppliers must explain how the challenged law constitutes impermissible discrimination given the other Member's specific national treatment commitments.[62]

B. General Exception for Data Privacy

Overarching market access and national treatment commitments is GATS Article XIV, which provides a list of general exceptions to a Member's GATS commitments.[63] These general exceptions are designed to allow Members to adopt measures, which may otherwise violate a Member's commitments, to protect public morals, public order, or other

---

57. *Id.* art. XVI; *see* Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, ¶ 7.654, WT/DS413/R (July 16, 2012) [hereinafter *China – EP*].

58. Wang, *supra* note 47, at 1055.

59. *China – EP, supra* note 57, ¶ 7.658.

60. *Id.* ¶ 7.660.

61. *See* GATS art. XX ("Each member shall set out in a schedule the specific commitments it undertakes . . . .").

62. *Id.* art. XIV.

63. *Id.*

important societal interests, so long as those measures are not disguised restrictions on trade in services.[64] Relevant here is the general exception found in Article XIV(c)(ii), which provides that GATS does not prevent a Member from adopting a measure to protect the privacy of personal data.[65] Thus, a Member may adopt a measure:

> necessary to secure compliance with laws or regulations which are not inconsistent with the provision of this Agreement including those relating to:
>
> * * *
>
> (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts . . . .[66]

The Member invoking this exception must show that the measure meets the terms of the exception and that the measure meets the requirements of the chapeau of Article XIV, which provides that any measures "necessary" to the relevant public policy goals must not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail . . . ."[67]

The GATS exception for the protection of the privacy of personal data has neither been tested by a dispute resolution panel nor attracted much interest in the otherwise lively GATS negotiations.[68] However, there have been several cases that have examined Article XX of the WTO's General Agreement on Tariffs and Trade (GATT), which is applicable to the trade in goods and which provides for general exceptions that are

---

64. Indeed, "a responding party must make a *prima facie* case that its challenged measure is 'necessary.'" Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* ¶ 323, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *U.S. – Gambling*].

65. GATS art. XIV(c)(ii).

66. *Id.*

67. *Id.*

68. On April 21, 2011, the Chairman of the Council for Trade in Services submitted a report detailing the achievements of, and gaps in, the services negotiations; the scope of Article XIV(c)(ii) was not mentioned. *See* Council for Trade in Services Special Session, *Report by the Chairman, Ambassador Fernando de Mateo, to the Trade Negotiations Committee*, TN/S/36 (Apr. 21, 2011).

"necessary" to protect public-policy goals that are similar to those found in GATS Article XIV.[69] GATT Article XX jurisprudence has developed a "weighing and balancing" test that has been, by analogy, applied to exceptions under GATS Article XIV.[70]

Thus, the WTO Appellate Body has applied a two-tier test when the general exception provisions are invoked, whether under GATT Article XX or GATS Article XIV.[71] First, it considers whether the measure falls within the scope of one of the listed objectives in the exception.[72] Second, the measure must address the relevant public interest at issue, with a sufficient nexus between the measure and the objective pursued.[73] The Appellate Body has described the test, in relation to GATT Article XX(d), as referring to a:

> range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken

69. *See, e.g.*, *U.S. – Gambling*, *supra* note 64, ¶ 291 (comparing exemptions set forth in Article XIV of GATS to those noted in Article XX of the 1994 GATT); *see also* Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, at n.452, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter *China – AV*] (noting that the Court's interpretation of the exemptions set forth in Article XIV of GATS and in Article XX of the 1994 GATT was based upon the *U.S. – Gambling* precedent.). *See generally* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT].

70. *See U.S. – Gambling*, *supra* note 64, ¶ 78 (discussing the "weighing and balancing" test); *China – AV*, *supra* note 69, ¶ 239 (further discussing the "weighing and balancing" test). Similar to Article XIV of GATS, Article XX of GATT provides for general exceptions to the rules of the GATT when necessary to protest public morals, human, animal, or plant life, and similar reasons. *See, e.g.*, *id.* ¶ 291 (confirming that it may be possible for Members to pursue one of the objectives set forth in the general exceptions of GATT Article XX or GATS Article XIV, even if pursuit of that objective means the Member acts inconsistently with its other obligations under the WTO Agreements).

71. *U.S. – Gambling*, *supra* note 64, ¶ 292; *see also* Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶¶ 119–24, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter *Brazil – Tyres*] (illustrating an example of the two-tier balancing system at work, wherein the Appellate Body weighed a health-related import ban of retreaded tires against the economic need to encourage free trade).

72. *U.S. – Gambling*, *supra* note 64, ¶ 292.

73. *Id.*

> to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to."[74]

And, the more vital or important the interest that the measure is designed to protect, the easier it is to accept as "necessary" a measure designed to protect that interest.[75] However, the Appellate Body has also noted that certain exceptions under GATT Article XX discuss measures "relating to" a goal (similar to the GATS data privacy exception), and has suggested that the "relating to" requirement is "more flexible textually" than a strict "necessity" requirement and that "relating to" may simply require a "substantial" relationship or a "reasonable" relationship of the measure to the goal.[76]

The Appellate Body has also stated that the "weighing and balancing" of factors should also include a comparison of the challenged measure and its possible alternatives.[77] Thus, even if a measure is "necessary" under the appropriate exception, a Member may not apply it in an arbitrary and discriminatory manner.[78]

III. WILL ONLINE DATA PRIVACY PROTECTION PROVE TO BE AN EXCEPTIONAL EXCEPTION UNDER GATS?

With that background in mind, this article now considers how the current restriction in Korean law, preventing financial services firms from transferring financial data outside of Korea, might fare if a dispute over the measure were before the WTO.

We assume that the particular scenario involves a U.S. credit card issuer that wishes to offer its cards to Korean

---

74. Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter *Korea – Beef*].

75. *Id.* ¶ 162.

76. *Id.* at 49 n.104 (citing Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, at 19, WT/DS2/AB/R (Apr. 29, 1996) and Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* ¶ 141, WT/DS58/AB/R (Oct. 12, 1998)).

77. *China – AV*, *supra* note 69, ¶ 242.

78. That is, the measure must satisfy the requirements of the chapeau of Article XIV. *See U.S. – Gambling*, *supra* note 64, ¶ 292.

citizens via the cross-border mode of supply, mode 1. That is, the U.S. company would not establish a presence in Korea; it would offer its cards through its offices in the United States. The U.S. company does wish to consolidate the information of its Korean cardholders on its servers located in the United States, for reasons of business efficiency and marketing analysis.

A. Specific Commitments

A complaining Member, in this case, the United States, would begin the challenge by reviewing Korea's Schedule. The United States must establish a *prima facie* case that a prohibition on data transfers is inconsistent with a specific commitment undertaken by Korea; however, Korea may then rebut that case.[79]

Reviewing Korea's Schedule, in category 7.B., "Banking and Other Financial Services," Korea has made market access commitments in subcategory (2), "Credit Card Businesses, Credit Card Services."[80] In mode of supply 1, Korea has inscribed "Unbound" in the "Limitations on Market Access" column and "Unbound" in the "Limitations on National Treatment" column.[81]

The first inquiry would be to determine whether the credit card services that the U.S. company wishes to supply fall within this services sector. We assume here that the services are covered by this commitment, but the necessary inquiry would be fact-specific and assess both the scope of subcategory (2) and the services supplied by the U.S. company.

Next, as noted above, Korea's inscription in the limitation on market access column of its Schedule for mode 1 is "Unbound," with no qualifications.[82] This inscription means that Korea is

---

79. *U.S. – Gambling*, *supra* note 64, ¶¶ 138–39.

80. *Republic of Korea: Schedule of Specific Commitments, Supplement 3 Revision*, WORLD TRADE ORG. (Nov. 18, 1999), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=32669,9813,35922,3820,46784,17953&CurrentCatalogueIdIndex=0&FullTextSearch=.

81. *Id.* For the sake of simplicity, we analyze this issue based on a single commitment and a single mode of supply, which is not to imply that other commitments or modes of supply are not likely to be involved.

82. *Id.*

under no obligation to grant market access within the terms of Article XVI(2). Moreover, Korea's inscription in the limitations on national treatment column for mode 1 in this sector are also "Unbound," suggesting that Korea may introduce measures inconsistent with the principle of national treatment. [83]

Given that Korea's commitments for both market access and national treatment in the credit card services sector are Unbound, it is likely that a WTO dispute resolution panel would find that the prohibition against offshore processing of credit card transaction data does not violate Articles XVI and XVII of GATS. This conclusion demonstrates the flexibility of GATS and the ways in which it differs from GATT, the agreement covering cross-border trade in goods. On its face, GATS appears to be more comprehensive than GATT because GATS covers not only the cross-border exchange of services, but also in-country investments, and labor and consumer movements (as implied by the four modes of supply). But, because GATS obligations are subject to the trade policies of each Member, as set out in each Member's Schedule, GATS does not apply to all cross-border services trade.[84] GATT, however, applies to all trade in goods and most-favored-nation and national treatment are general obligations of all members—requiring all like products, regardless of their origin and regardless of whether they are foreign or domestic, to be treated similarly.[85] As such, GATS coverage is more comprehensive than that of GATT only if a Member agrees to comprehensive coverage.

As described above, GATS also contains most-favored-nation and national treatment obligations that are overlapping and linked by various provisions. In many cases, a Member's Schedule will contain potentially contradictory or overlapping market access commitments ("Unbound" and "None," respectively, for example, for a mode of supply) that raise very complicated questions about the ability of a Member to maintain

---

83. *See China – EP*, *supra* note 57, ¶¶ 7.651–.652 (interpreting the term "unbound" as the equivalent of a listing of all of the six restrictions found in Article XVI(2)). Some of these measures may, in their effects, discriminate in favor of domestic concerns.

84. *See* GATS art. XVI (discussing the circumstances under which GATS applies to cross-border trade).

85. GATT arts. I, II.

prohibitions on trade in services such as the restriction on the offshore processing of credit card data. We assume, for purposes of the next section, that a dispute resolution panel found that the offshoring prohibition was contrary to a Member's obligations under either Articles XVI or XVII. In that case, may that Member then invoke the General Exception under Article XIV(c) to justify the prohibition as "necessary" to laws "relating to" the protection of the privacy of individuals in relation to the processing of personal data?

B. The "Necessity" Exception—Article XIV(c)

A first step in analyzing the general exception for data privacy would be an examination of the terms in the exception: what, exactly, is meant by "the protection of privacy of individuals in relation to the processing and dissemination of personal data"?[86] Does the prohibition on the transfer of credit card data fall within the terms of the exception?

Second, the WTO would apply the "weighing and balancing" test, developed in other analyses of the "necessity" exemptions, to determine if the prohibition on offshoring was necessary for the protection of personal data privacy. The WTO Appellate Body has considered, based on GATT cases, three primary factors that should be assessed in carrying out this test:

i. the relative importance of the objective;

ii. the contribution of the measure to the realization of the objective; and

iii. the restrictive impact of the measure on international commerce.[87]

The burden of demonstrating that the measure is "necessary" falls on the Member that enacted the measure at issue.[88]

Finally, even if the measure may be found "necessary" for the protection of the privacy of individuals in relation to the

86. GATS art. XIV(c).

87. *China – AV*, *supra* note 69, ¶¶ 239–42 (citing *Brazil – Tyres*, *supra* note 71, ¶¶ 156, 178; *Korea – Beef*, *supra* note 74, ¶ 153; *U.S. – Gambling*, *supra* note 64, ¶¶ 291, 306–08).

88. *U.S. – Gambling*, *supra* note 64, ¶ 309.

processing and dissemination of personal data, the chapeau of Article XIV must be satisfied.[89]

1. The Terms of the Exception

For the General Exception to apply, the credit card transaction data of Korean consumers, for example, must meet the terms of the exception for the protection of "personal data." But, is the processing of credit card transaction data regarded as "the processing and dissemination of personal data"? Is "personal data" equivalent to financial data or data that simply records a credit card transaction? What if the data has been disaggregated, such that it is stripped of markers that would allow the identification of a particular individual? How can disaggregated data still be regarded as "personal data" or "confidential data"? What are "processing" and "dissemination" for purposes of this exception? Does offshore processing for back-office purposes by a company with strict electronic security controls fall within these terms? What if the processing were to create targeted advertising? As noted, this exception has not been tested and the terms such as "protection of the privacy," "personal data," and "confidentiality of individual records and accounts" remain undefined.

2. The "Necessity" of the Measure Restricting Offshoring of Data

It is well established that different countries have developed different approaches toward the dissemination, use, and protection of personal data.[90] In many countries or markets, rights surrounding the collection and dissemination of personal data are more tightly regulated than in the United States.[91] The tighter regulation reflects different attitudes about the importance of privacy as a fundamental right and the use of such data for the "protection" of consumers. Yet, is individual

89. *Id.* ¶ 338.

90. For instance, the EU is said to have strict data controls because census data was used to target various groups during the Holocaust. Singleton, *supra* note 12.

91. *See* Graham, *supra* note 4, at 23 (noting the European Union's emphasis on protecting the security of personal data).

data better "protected" by the freer flow of truthful information (albeit with appropriate electronic security controls) and, therefore, the enhanced ability to ferret out and eliminate or correct bad data? Or, is the data better protected by stricter control, perhaps by the individual data "owner"?[92] In situations involving the provision of cross-border services, the different approaches become international trade issues: whose data privacy rules prevail?

Without resort to any sort of legislative history or other background documentation, it is presumed that Korea, for example, adopted its restriction on cross-border data transfers for several reasons: (1) its recognition of personal data privacy as a fundamental right of individuals; (2) a policy decision to ensure that data about its citizens is handled only by Korean companies, who may be sensitized to the privacy preferences of Korean citizens; (3) its perceived need to create uniform and technical commercial standards to allow credit card transactions to function smoothly within Korea; or (4) a desire to have the personal data of its citizens controlled by Korean laws at all points in the chain of commerce, including by companies subject to the laws and jurisdiction of Korea.

Assuming that protecting the privacy of its residents is of paramount importance to Korea, does this privacy mandate outweigh the importance many others, such as the United States, put on the free flow of information across the Internet?[93]

a. What is the relative importance of the prohibition on the offshore processing of personal data?

Given the importance Korea assumedly places on the protection of personal data, does the prohibition on offshoring contribute to Korea's realization of its personal data privacy goal? What if the offshoring for processing purposes was allowed, but the U.S. company had to obtain permission from

92. *See generally* Singleton, *supra* note 12 (discussing differing views on the protection of data regulation, and the benefits and drawbacks to these views).

93. Indeed, much of the daily compilation and storage of personal information in the United States is currently illegal in Europe. 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, 2 (2000).

each customer prior to each data transfer? Would this protect the privacy of the data or would state intervention be necessary to overrule consumer choice? Because the "product," that is, the data, is always transmitted electronically, does a national border make any sense as a means of protecting the data? Does keeping the data within Korea contribute to the goal of protecting personal data privacy? If the database were to be hacked, for example, could a hacker reach the data on a servicer inside Korea just as easily as on a server outside Korea?

Would the transfer of Korean citizens' financial data to a country, such as the United States, with laxer restrictions on the handling of personal financial data, so reduce the primacy of the goal of protecting the privacy of Korean residents as to render it meaningless? Is the prohibition of offshoring the only method for realizing the objective of protecting data privacy? Would standards for electronic security better contribute to the goal of protecting personal data than the location of the server? Can the paramount goal of data privacy be respected if the data is de-personalized, and stripped of any association with a particular person?

b. Does the measure contribute to the realization of the protection of data privacy?

While the objective of the offshoring prohibition may be legitimate, that does not mean that the measure itself is a WTO-consistent means of realizing that objective. The "necessity test" has evolved to a test that permits measures that are not "indispensable" or "of absolute necessity" to still be regarded as "necessary" within the meaning of Article XX of GATT.[94] Here, the Appellate Body determined the measure "must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT . . . ."[95] Is, then, the restriction on the removal of credit card data for processing outside of Korea designed to secure compliance with the goal of protecting data privacy? What if a U.S. credit card issuer is able to ensure that its electronic data

94. *Korea – Beef*, *supra* note 74.

95. *Id.* ¶ 157.

protection systems are state-of-the-art and among the most advanced in the world? What if the U.S. credit card issuer is able to demonstrate that its data protection software is better that that of the largest Korean card issuer? Does the restriction prevent any threats to data privacy that could not be prevented by a U.S. issuer of cards? Is the measure more "indispensable" to protecting data privacy than merely "contributing to" data privacy? Is the Korean interest in personal data privacy so vital or important, perhaps because of a history of misuse of similar data, that the prohibition becomes "necessary" to the national interest in data privacy?

The data protection exception is phrased in terms of measures necessary to ensure compliance with laws and regulations "relating to" the privacy of personal data.[96] Because the WTO has suggested the "relating to" requirement is "more flexible textually" than a strict "necessity" requirement and that "relating to" may simply require a "substantial" or a "reasonable" relationship of the measure to the goal,[97] the test may be tempered: is it reasonable to implement a law protecting data privacy by prohibiting the transfer of personal data outside of Korea?

c. Does the measure arbitrarily restrict international commerce?

Even if there are necessary, substantial, or reasonable grounds that a prohibition on offshore processing of a Korean citizen's personal data contributes to the objective of protecting personal data privacy, the measure must not be applied so as to constitute "arbitrary or unjustifiable" discrimination between countries where like conditions prevail, per the chapeau of Article XIV.[98] On its face, the prohibition on offshore processing of personal data does not necessarily constitute discrimination between like service providers: a Korean company may transfer data to a third-party processor within Korea, just as an American company may transfer data to a processor within Korea. Neither company, however, may use offshore

96. GATS art. XIV.

97. *Korea – Beef*, *supra* note 74, at 49 n.104.

98. GATS art. XIV.

processors.[99] But, a U.S. company, providing credit card services through mode 1, could not transfer the data to its home office in the United States and thereby agglomerate the data with that of its other customers to take advantage of the benefits of big data. A Korean credit service provider, however, could consolidate the data in its home office in Korea with the data of its other customers (even if that data came from customers in another country) for analysis. Does this impose a negligible or meaningful restriction on international commerce? Is a measure discriminatory if, in application, it prevents a multinational services firm from pursuing the business advantages gained by the consolidation and mining of multinational data?

Thus, even if the measure is discriminatory, the analysis must determine if that discrimination is "arbitrary" or "unjustifiable" or a disguised restriction on trade in services. At least one WTO case has held that a measure, distinct from the challenged measures, provided an exemption to the challenged measures for domestic companies, but not foreign companies.[100] The challenged measures were, therefore, arbitrarily or unjustifiably discriminatory.[101] Is there, then, the possibility of another Korean statute that permits Korean companies to disseminate medical data, for example, to foreign x-ray technicians for processing or reviewing? Could this processing be equated to the processing of financial data? Are there differences between the offshore processing of medical data by a state-run medical institution where the citizen has no choice but to use that institution (and, therefore, no choice in the processing services) and a financial services company that a citizen chooses to patronize?

Moreover, is choosing to upload personal shopping preferences, visible anywhere in the world, on, for example, Facebook, which then analyzes the shopping preferences of its

---

99. *See* Young-Hee Jo, Soo-Hyun Lee & Young-Min Kil, *Proposed Regulations on Delegation of Information Processing and IT Facilities of Financial Companies*, LEXOLOGY (Apr. 24, 2013), http://www.lexology.com/library/detail.aspx?g=7ad5a4c8-5347-4eaa-bf65-43c5e6cab81e (discussing the restrictions on delegation of processing information to an offshore third party).

100. *U.S. – Gambling*, *supra* note 64, ¶ 369.

101. *Id.* ¶¶ 369–70.

billions of users on servers located in the United States, different than choosing to use the credit card services of a company for which the customer has no choice (or even information) about the location of its processing servers? Does the offshoring prohibition have an unjustifiable impact on U.S. companies wishing to offer its services to Korean citizens, but also wishing to process the resulting data outside of Korea so as to maximize business efficiencies? Given the desire for big data and the data mining opportunities it provides, would a provision restricting the international compilation of this data be a disguised restriction on trade?

Finally, it is important to consider the "prudential" carve-out of the GATS Annex on Financial Services. The Annex, by its own terms, applies to "measures affecting the supply of financial services."[102] And, for purposes of the Annex, a "financial service" includes "[l]ending of all types, including consumer credit."[103] Paragraph 2(a) of the Annex provides that, notwithstanding any other provisions of GATS, a Member "shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system."[104] It further provides that, where such measures do not conform to the GATS, "they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement."[105]

This provision appears to allow Members to maintain measures to protect consumers to ensure the "integrity and stability" of the financial system. On one hand, the first sentence of the provision allows a Member, for "prudential

102. GATS at Annex on Financial Services, ¶ 1.

103. *Id.* ¶ 5(a)(vi).

104. *Id.* ¶ 2(a).

105. *Id.* Article 13.10 of the KORUS FTA has a similar prudential carve-out, written in very similar language, with the exception of the addition of a footnote defining "prudential reasons" to include "the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions or cross-border financial service suppliers" KORUS FTA, *supra* note 20, art. 13.10.

reasons," to maintain measures for certain listed purposes.[106] This language is similar to "anti-abuse" in application language found in GATS Article XIV or GATT Article XX.[107] On the other hand, the last sentence of the provision states that, if such measures do not conform to the provisions of the GATS, they "shall not" be used as a means of avoiding GATS obligations.[108] This, then, provides a possible means of negating the ability to maintain measures for prudential reasons. "Prudential reasons" are not defined except in the non-exhaustive listing in the "including" clause of the provision.[109] Therefore, "prudential reasons" other than those listed may qualify and, since the provision has not yet been analyzed by a dispute panel, it remains to be seen whether the protection of data privacy in connection with the provision of a financial service would qualify. Additionally, the relationship of the prudential carve-out and the general exceptions under Article XIV has not been analyzed.

IV. CONCLUSION

The value of personal data gathered through Internet use is well-documented.[110] The value of massive agglomerations of personal data, and the cross-border use of this data, is just being tested. A tension exists between businesses that rely on that information for efficient (and often appreciated) advertising, and business processes and consumers who are increasingly demanding enhanced Internet privacy.

Yet, even this simplified review of a prohibition on offshore processing of personal financial data demonstrates not only the

106. *Id.*

107. *Compare id.*, *with* GATS art. XIV, *and* GATT art. XX.

108. KORUS FTA, *supra* note 20, art. 13.10.

109. *See id.* (listing the prudential reasons considered by the KORUS FTA).

110. *See, e.g.*, Alessandro Acquisti, *The Economics of Personal Data and the Economics of Privacy* (Org. for Econ. Co-operation & Dev., Background Paper #3, 2010), *available at* http://www.oecd.org/sti/ieconomy/46968784.pdf; *see also* WORLD ECON. FORUM, THE EMERGENCE OF A NEW ASSET CLASS 5 (2011) ("The types, quantity and value of personal data being collected are vast."); Julia Angwin, *The Web's New Gold Mine: Your Secrets*, WALL ST. J., July 31, 2010, at W1 (discussing how a Wall Street Journal investigation found that one of the fastest-growing businesses on the internet is the business of spying on users).

complexity of any inquiry into data privacy and cross-border trade in services, but also how inextricably linked the issues are to questions of sovereignty and to the "separation of powers between national law and international law[.]"[111] Increasingly, too, and with heightened significance as the race to mine, and profit from, big data archives heats up on an international scale, the questions highlight the importance of trade in digital services. The questions gain urgency as countries negotiate multilateral trade agreements such as the Trans-Pacific Partnership,[112] and as the Doha Round talks continue to languish.[113] Would a WTO panel, like the Appellate Body in *U.S. – Gambling*, find that the prohibition on offshoring personal financial data serves to protect "very important societal interests that can be characterized as 'vital and important in the highest degree[?]'"[114] Is the collection of personal financial data, and the ability to extrapolate from this data for purposes that may then be applied to the individuals whose profiles created the data (perhaps resulting in monetary savings for those individuals), an activity that is integral to international commerce? Is the data, similar to personal Internet browsing histories, among the most confidential individual data, precisely because it potentially reveals the most intimate details of an individual's life?

At the same time, the limitations of the current multilateral agreement covering trade in services are being discovered. In January 2013, the U.S. Trade Representative announced that

---

111. *See* Wang, *supra* note 47, at 1065 ("The complicated relationship between market access and national treatment under the GATS is a reflection of the complicated issue of the separation of powers between Members and the WTO, and . . . between national law and international law.").

112. The Trans-Pacific Partnership talks are aimed at enhancing trade and investment among the partner countries; promoting innovation, economic growth and development; and supporting the creation and retention of jobs. *The U.S. in the Trans-Pacific Partnership,* OFFICE OF THE U.S. TRADE REP. (Nov. 2011), http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership.

113. The Doha Round commenced in November 2001 and its objective is to lower trade barriers around the world in order to facilitate increased global trade. *The Doha Round*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Jan. 21, 2014).

114. *U.S. – Gambling, supra* note 64, ¶ 301.

the Obama Administration intended to enter negotiations for a new trade agreement aimed at promoting the international trade in services.[115] The initial negotiating group comprises 20 trading partners including Australia, Canada, Chinese Taipei, European Union, Hong Kong China, Israel, Japan, Korea, Mexico, and Turkey.[116] In his announcement, the Trade Representative noted that, at present, business services are five times less likely to be exported than manufactured goods.[117] The Administration hopes that a new, ambitious, and "high-standard" agreement covering the international trade in services will significantly increase the export of these services.[118] Clearly, the Administration is cognizant of the enormous potential for services exports and, at the same time, of the limitations of GATS. While the Administration is not prepared to wait for a revision of GATS by the WTO, the principles and lessons of GATS will surely inform the new services negotiations.

Technological advancements and the explosion of cross-border data transmissions have placed the personal data issue on a collision course with international trade disciplines. While the result of this debate under trade rules remains unknown, countries (and companies) are not without options for effectively regulating the protection of personal data. Whether existing, formal international trade rules and organizations, such as the WTO or new bi- or multi-lateral free trade agreements, will provide solutions, or whether an informal "data privacy" trade network[119] will assist with the thorny issues involved, or both, the regulation of cross-border data exchanges

---

115. Letter from Ron Kirk, U.S. Trade Representative, to Hon. John Boehner, Speaker, U.S. House of Representatives (Jan. 15, 2013), *available at* http://www.ustr.gov/sites/default/files/01152013%20ARK%20letter%20to%20Speaker%20Boehner_0.pdf.

116. *Id.*

117. *Id.*

118. *Id.*

119. *See* Sungjoon Cho & Claire R. Kelly, *Are World Trading Rules Passé?*, 53 VA. J. INT'L L. 623, 656 (2013). The authors define a "trade network" as a "'hybrid' of public and private networks composed of customs officials on the one hand, and private lawyers, academics, and transnational businesses on the other. "It is a conceptual expansion of government networks or transgovernmental regulatory networks." *Id.* With data privacy, regulatory agencies other than customs agencies would likely be involved.

is one of the most complex and urgent issues facing international traders today.