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Is there any Room for Privacy and Data Protection within the WTO Rules?*

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Abstract. This paper involves an approach to the historical background that justifies the adoption of the public policy on privacy within the EU. It analyses the exception contained in Article XIV (c) (ii) of the GATS to the application of WTO rules, and its connection with European data privacy protective measures (mainly Directive 95/46/EC). A study of WTO Dispute Settlement decisions using the "necessity test" and analysing the "chapeau" is made, in order to have a closer look at the reasoning usually followed and the elements to be met for the exception to be applicable.

Key words: data protection, privacy, WTO, e-commerce, Directive 95/46/EC, GATS, public policy

1. Introduction

Directive 95/46/EC[1] was passed with the objective of preventing Member States from restricting or prohibiting the free flow of personal data between them for reasons connected with the protection of fundamental rights and freedoms of natural persons, and in particular their right to Privacy with respect to the processing of personal data.[2]

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[1] *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*, Official Journal L 281, 23/11/1995 P. 0031 – 0050. Hereinafter: "the Directive".

[2] Article 1 of the Directive.

It harmonises some general principles in order to achieve this goal, describing rights and obligations when dealing with Personal Data.[3] As a consequence, the Directive regulates the protection of personal data and related fundamental rights.

Indeed, we see that the Directive aims at regulating the Internal Market since the different level of protection given by national laws on Data Protection could constitute an obstacle to trade among Member States.[4]

If we go beyond the European Internal Market, through a global approach, we see that the Internet and e-commerce revolution is a challenge for the integration of international law, a process that has to be developed without jeopardising essential values of societies. There is no doubt that e-commerce is a key opportunity to expand businesses and culture, using the facility given by the absence of geographic boundaries, typical of global networks. This possibility has to be maximised by the consideration of sustainable development principles,[5] taking into account the risks to human dignity and self-determination that are intrinsic to this economic reality.

Fundamental rights should neither be put aside by international trade,[6] nor considered only as an obstacle to it. They are a way to facilitate a "healthy"

[3]In this paper, we use the terms "Privacy" and "Personal Data Protection" indistinctively. However, we can note, very briefly, intrinsic differences. The protection of personal data has a double relationship with privacy: it falls within its concept, as an aspect of it, and also goes beyond it. "Privacy" is a fundamental right defined in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms:"*1. Everyone has the right to respect for his private and family life, his home and his correspondence*". "Personal Data Protection" is a concept that falls within this definition, since it is an abstraction of this "private" reality transforming it into "data". Nevertheless, the protection of personal data goes beyond Article 8 due to its intimate relationship with the safeguarding of other fundamental rights recognised in the Convention, which exercise could be affected by an illegitimate use of personal data: Right to a fair trial (Article 6), Freedom of thought, conscience and religion (Article 9), Freedom of expression (Article 10), Freedom of assembly and association (Article 11), and Prohibition of discrimination (Article 14).

[4]Recital 7 of the Directive.

[5]European Commission "*Towards a Sustainable Information Society*", DG Information Society – Unit C1: New Methods of Work. Report of the Conference on 21–22 February 2000.

[6]"*L'ancienne revendication d'une séparation complète entre les échanges et les droits de l'homme a été dépassée par les évenéments. Du fait des évolutions des années 1990, il est plus d'actualité d'examiner les modalités d'établissement d'un lien entre les échanges et les droits de l'homme en termes juridiques et pratiques (. . .)*", Barbara Brandtner and Allan Rosas "*Préférences Commerciales et Droits de l'Homme*", *in "L'Union Européenne et les Droits de l'Homme"*, Dir. Philip Alston, Bruylant, Bruxelles, 2001, pp. 727–751.

economic progress. They are part of human beings' nature, as interaction between individuals is, commerce being an expression of this interaction.[7]

Technological complexity may sometimes create difficulties in recognising risks to certain fundamental rights, like the case of privacy. For instance, it is not easy to see that an IP address[8] stored in the logfile of a web-administrator could be considered as personal data and give place to certain series of rights to the data subject and obligations to the data controller. The evolution of international trade through e-commerce services should not be blind to this context.

However, one of the points to analyse would be the way to solve, in a global context, the differences of legal conceptions, like the fact that privacy is a fundamental right in some parts of the world, but not in others. What would actually be the legitimate legal mechanisms for privacy protection in such a multi-cultural global framework?[9]

In this article, we will evaluate the position of Directive 95/46/EC (particularly the regulation of trans-border data flows) within the World Trade Organisation (WTO) context. What is its "*raison d'être*" in an international commerce framework?[10] Can it be considered as an exception to the application of the WTO rules?

[7]"*Plutôt que de diaboliser le commerce mondial et de pretender renoncer à l'économie de marché, mieux vaut utiliser leur dinamisme et leur effet d'overture et en réduire les effets pervers par une égale reconnaissance de tous les droits fondamentaux.*" Mireille Delmas-Marty "*Commerce Mondial et Protection des Droits de l'Homme*", Publications de l'Institut International des Droits de l'Homme, Institut René Cassin de Strasbourg. Bruylant, Bruxelles, 2001.

[8]For surfing on the Internet, every computer is identified by a single numerical IP address of the form A.B.C.D., where A,B,C, and D are numbers in the range of 0–255 (e.g. 125.44.63.122). See Article 29 Data Protection Working Party, Working Document "*Privacy on the Internet. An integrated EU Approach to On-line Data Protection*", adopted on 21 November 2000.

For a practical example of the data protection implications of IP addresses see the Opinion issued by the Belgian Data Protection Authority "*Avis d'initiative concernant la compatibilité de la recherché d'infractions au droit d'auteur commises sur Internet avec les dispositions juridiques protégeant les données à caractère personnel et les telecommunications*", Numéro de rôle 44/2001. See also Guillaume Rue and Fabrice De Patoul "*L'affaire Napster ou le difficile équilibre entre le droit d'auteur et le respect de la vie privée*", Revue Ubiquité. Dr. tech. Info. FUNDP. DGTIC. CRID. N° 12. Juin 2002. Belgium.

[9]María Verónica Perez Asinari and Jan Dhont "*Regulating Data Protection from a Cross-Cultural Perspective*", study to be published by the CRID (in the context of the project "*Privacy: Human Liberty or Consumer Right? The EU-US Debate*", Fonds Special de Recherche F.S.R.).

[10]An approach to this reasoning has been outlined in María Verónica Perez Asinari "*La protección de datos de carácter personal en la Unión Europea. Búsqueda del equilibrio entre el respeto por los derechos fundamentales y la consecución del mercado interior. Cuestiones de Derecho Internacional Privado que se plantean. Transferencia de datos personales a terceros países*". Tesina final. Master en Derecho Comunitario, Universidad Complutense de Madrid, June 2000. Available at: http://www.droit.fundp.ac.be/publications/vperez.pdf.

2. Reference to the Evolution of Data Privacy Considerations, from the EEC to the EU

The seventies are characterised by the passing of European national laws on data protection,[11] which was, from the very beginning, understood as a potential obstacle for trade within the European Internal Market.

Nevertheless, more than twenty years have been necessary to reach harmonisation in this area, mainly due to discussions on the lack of competence of the EEC on fundamental rights. In the meantime, the OECD Guidelines[12] were issued, in 1980. The Council of Europe Convention, No. 108 was passed,[13] followed by a Commission Recommendation 81/679/EEC,[14] where Member States are advised to sign and ratify this Convention.

During the year 1990, the Commission issued a Communication[15] on the protection of personal data and the security of information systems, and the Council presented a first draft Directive on the protection of persons as regards the processing of personal data (SYN 287). The legal basis used was *ex*-Article 100 A of the European Community treaty.[16] Finally, on 24 October 1995, Directive 95/46/EC was passed.

Nowadays, the European Union has gone further as regards its competence in fundamental rights. The Treaties of Amsterdam[17] and Nice[18] have incorporated

[11]Land of Hesse (1970); Sweden (1972); Federal Republic of Germany (1977); Denmark (1978); France (1978); Luxemburg (1979).

[12]*OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, 23 September 1980. Available at: http://www.oecd.org/dsti/sti/it/secur/prod/PRIV-EN.HTM, last visited 31/05/02.

[13]*Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data* ETS no.: 108, Strasbourg 28-01-1981. Available at: http://conventions.coe.int/treaty/en/Treaties/Html/108.htm.

[14]*Recommandation de la Commission du 29 juillet 1981 concernant une Convention du Conceil de l'Europe relative à la protection des personnes à l'égard du traitement automatisé des données à caractère personnel* (81/679/CEE). JOCE N° L 246/31, 29/08/81.

[15]*Comunicacion de la Comisión sobre la protección de las personas en lo referente al tratamiento de datos personales en la Comunidad y a la seguridad de los sistemas de información*. COM/90/314 Final , 24-02-90.

[16] "*Article 95 (ex Article 100a): 1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. (. . .)*" "*Article 14 (ex Article 7a): (. . .) 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty. (. . .)*" Treaty establishing the European Community (signed in Rome on 25 March 1957), consolidated version, available at: http://europa.eu.int/eur-lex/en/treaties/selected/livre2_c.html.

[17]Articles 6, 7, 46, and 49 TUE.

[18]Articles 7 and 46 TUE. (The Treaty of Nice has not modified Articles 6 and 49 of the Treaty of Amsterdam. See OJEC 10.03.2001, C 80/1).

precise references to the respect to these rights by the EU. Furthermore, the EU Charter of Fundamental Rights[19] has included not only the right to privacy but also a specific right to data protection:[20] "*Article 8. Protection of personal data.*

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority."

Although it is the first time that a Charter of Fundamental Rights incorporates explicitly this right, that fact does not undermine its value.[21] Fundamental rights are not *numerus clausus*, they have to be adapted to protect the individual against new threats to his dignity – not only physical but also moral – created by the evolution of society. Moreover, many modern Constitutions have incorporated this right as a fundamental value to be protected.[22]

3. The World Trade Organisation

The World Trade Organisation (WTO) is the only global international organisation dealing with the rules of trade between nations. Its rules emerge

[19]"*Finalement, la Charte des droits fondamentaux, telle qu'adoptée lors du Sommet de Nice, n'a pas d'effet contraignant; il faut néanmoins s'attendre à ce qu'elle exerce une certaine influence sur la pratique juridique.*" Hans C. Krüger and Jörg Polakiewicz "*Propositions pour la création d'un système cohérent de protection des droits de l'homme en Europe*" Revue Universelle des Droits de l'Homme, Vol. 13, No. 1–4, 2001, pp. 1–14.

[20]See Article 29 Data Protection Working Party "*Recommendation 4/99 on the inclusion of the fundamental right to data protection in the European catalogue of fundamental rights*", adopted on 7 September 1999. Available at: http://www.europa.eu.int/comm/internal_market/en/dataprot/wpdocs/wp26en.htm.

Full text of the *Charter of Fundamental Rights of the European Union*, OJEC C 364/1, 18-12-200. Available at: http://europa.eu.int/comm/justice_home/unit/charte/pdf/texte_en.pdf.

[21]For another perspective see Lucas Bergkamp "*EU Data Protection Policy. The Privacy Fallacy : Adverse Effects of Europe's Data Protection Policy in an Information-driven Economy*" , Computer Law & Security Report, Vol. 18, No. 1, 2001, pp. 31–47. The author has considered, while commenting on the incorporation of the Protection of Personal Data to the EU Charter of Fundamental Rights, that "*An unfortunate consequence of including this right among truly fundamental rights, such as the prohibition of torture and slavery and the freedom of expression, is that the notion of fundamental right seriously devaluated, with adverse consequences for the respect for the core human rights.*"

[22]Portuguese Constitution, Article 35. Spanish Constitution, Article 18, etc.

from the WTO agreements, negotiated and signed by the world's trading nations. The goal is to help producers of goods and services, exporters, and importers conduct their business.[23]

The current set of agreements were the outcome of the 1986–94 Uruguay Round negotiations which included a major revision of the original General Agreement on Tariffs and Trade (GATT). The Uruguay Round also created new rules for dealing with trade in services, relevant aspects of intellectual property, dispute settlement, and trade policy reviews.[24] The agreements include individual countries' commitments to lower customs tariffs and other trade barriers, and to open and keep open services markets.

As regards the participation of the EU in the organisation, both Member States and the Community itself are members of the WTO (indeed, this double participation has generated a plethora of controversy).[25]

[23]"*What is the WTO?*", available at: http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm, last visited 07/05/02.

See Thiébaut Flory "*L'organisation mondiale du commerce. Droit institutionnel et substantiel*", Bruylant, Bruxelles, 1999.

[24]"*The WTO agreements*", available at: http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr03_e.htm, last visited 07/05/02.

[25]See Avis de la Cour du 15 novembre 1994. Compétence de la Communauté pour conclure des accords internationaux en matière de services et de protection de la propriété intellectuelle – Procédure de l'article 228, paragraphe 6, du traité CE. Avis 1/94. Recueil de jurisprudence 1994 page I-05267. "*En consequence, La Cour émet l'avis suivante: (1) La Communauté est seul compétente, au titre de l'article 113 du traité CE, pour conclure les Accords multilatéraux relatifs au commerce des marchandises. (2) La compétence pour conclure le GATS est partagée entre la Communauté et ses Etats membres. (3) La compétence pour conclure le TRIPs est partagée entre la Communauté et ses Etats membres.*"

See Piet Eeckhout "*The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*" Common Market Law Rev. 34: 11–58, 1997. Kluwer Law International. "*(. . .) I would argue that one domestic legal status is clearly to be preferred over sixteen.*"

See Pierre Pescatore "*Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an escape from a Programmed Disaster?*" Common Market Law Rev. 36: 387–405, 1999. Kluwer Law International. "*There were good reasons to have the WTO Agreement signed and accepted jointly by the Community and its Member States, but on grounds totally different from those retained by the Court in Opinion 1/94.*"

The ECJ had to decide on its competence as regards the TRIPs, which actually decided positively, in the case "*Hermès International* (a partnership limited by shares) v *FHT Marketing Choice BV*": "*(. . .)23 They refer in that regard to paragraph 104 of Opinion 1/94 of 15 November 1994 ([1994] ECR I-5267), in which the Court held that the provisions of the TRIPs Agreement relating to 'measures . . . to secure the effective protection of intellectual property rights', such as Article 50, essentially fall within the competence of the Member States and not that of the Community, on the ground that at the date when that Opinion was delivered, the Community had not exercised its internal competence in this area apart from in Council Regulation (EEC) No. 3842/86 of 1 December 1986 laying down measures to prohibit the release for free circulation of counterfeit goods (OJ 1986 L 357, p. 1). According to the Netherlands, French and United Kingdom Governments, since the Community has still not adopted any further harmonising measures in the area in question, Article 50 of the TRIPs Agreement does not fall within the scope of application of Community law and the Court of Justice therefore has no jurisdiction to interpret that provision. 24 It should be pointed out, however, that the WTO Agreement was concluded by the Community and ratified by its Member States without any allocation between them of their respective obligations towards the other contracting parties. (...)29 It follows that the Court has, in any event, jurisdiction to interpret Article 50 of the TRIPs Agreement.*" Judgment of the Court of 16 June 1998. Reference for a preliminary ruling: Arrondissementsrechtbank Amsterdam – Netherlands. Agreement establishing the World Trade Organisation – TRIPS Agreement – Article 177 of the Treaty – Jurisdiction of the Court of Justice – Article 50 of the TRIPS Agreement – Provisional measures. Case C-53/96. *European Court reports 1998 Page I-03603.*

3.1. *Article XIV of the GATS. A Reference to Privacy and the Protection of Personal Data*

After the description made above, one may wonder whether the result of the harmonisation process within the EU on data protection would not constitute, paradoxically, an obstacle to international trade itself, from a WTO perspective.[26]

In the context of e-commerce, for instance, privacy poses a major concern, because even if some personal data gathering is necessary to deliver a product or to provide a service on-line, sometimes the data asked can be excessive, remain out of the control of the data subject, be sensitive data, etc.[27] Data collection for cyber-marketing, or the flows of human resources data are other examples of business realities – services, – where the trans-border flow of "European data" has to be assessed in the light of the Directive.

Some authors have referred to the Directive as "improperly extraterritorial" or "protectionist".[28] As regards this first adjective, we can point out that one

[26]During the Clinton administration, Ira Magaziner – former responsible person for US discussions on e-commerce, – has declared that she would "*challenge EU privacy rules under the theory that they represent barriers to trade*", see "*Notes from the OECD Ministerial Meeting on Electronic Commerce*" at Ottawa, Ontario, Canada, October 9, 1998, James Love, Consumer Project on Technology, available at: http://www.cptech.org/ecom/ottawa.html, last visited 11/06/02.

[27]See mainly Article 6 (Principles relating to data quality), Article 7 (Criteria for making data processing legitimate), Article 8 (Special categories of processing), Articles 10 and 11 (Information to be given to the data subject), Article 12 (The data subject's right of access to data), and Article 14 (The data subject's right to object) of Directive 95/46/EC.

[28]Peter P. Swire and Robert E. Litan "*None of your Business. World data Flows, Electronic Commerce, and the European Privacy Directive*", Brokkings Institution press, Washington DC, 1998. "*The title of this book, None of your Business, suggests two ways in which restrictive data protection laws might clash with free trade agreements that have been signed by the United States, the members of the European Union, and most other countries in the world. First, the United States and other non-EU countries may argue that the Directive is an improperly extraterritorial enactment and that it is none of Europe's business to dictate*

of the rationales of Article 4 of the Directive, in conjunction with Articles 25 and 26, is preventing circumvention to National laws,[29] due to the extremely technical easiness facility of sending information to equipment located in countries where the protection is less strict or non-existent. Even if this Article has an extraterritorial effect, it is not "improper" due to those reasons.

In what follows, we will focus on an assessment to elucidate whether the EU is legally competent to regulate in this area from an international trade point of view.

Then, the answer has, firstly, to be looked for in the WTO agreements and documents. There we find Article XIV of the General Agreement on Trade in Services (GATS)[30] which says: "*General Exceptions: Subject to the*

how personal information should be handled outside Europe. Second, there is a suspicion among some that the Directive may serve protectionist goals, saying 'none of your business' to non-European companies that face the barrier of having to comply with complex European privacy laws.(. . .)"

For another perspective see Gregory Shaffer "*The Power of EU Collective Action: The Impact of EU Data Privacy Regulation on US Business Practice*", European Law Journal, Vol. 5, No. 4, December 1999, pp. 419–437.

[29]This is "fraude à la loi". See Bernard Audit "*La Fraude à la loi*", Dalloz, Paris, 1974. Henri Batiffol, Paul Lagarde "*Droit International Privé*", Tome I, pp. 463–470. Librairie générale de droit et de jurisprudence. Paris, 1974). For an approximation to Private International law matters see Perez Asinari, *op. cit.* There, we make a distinction between Public law and Private law implications of data protection, consequences as regards applicable law and competent jurisdiction, etc. Indeed; we find appropriate the term "interlegal" used by Professor Bing: "*The area of law is in this paper referred to as 'interlegal'. A more common term is 'private international law', this is avoided because within the scope to be addressed in the ECLIP project, also issues related to public law will be discussed, for instance with respect to data protection (which involves a national data protection authority organised under national public law), (. . .).*" Jon Bing "*The identification of applicable law and liability with regard to the use of protected material in the digital context*" ECLIP (Electronic Commerce Legal Issues Platform), ESPRIT project 27028, Deliverable 2.1.5. Available at: http://www.eclip.org, last visited 08/05/02.

See also Article 29 Data Protection Working Party "*Working document on determining the international application of EU data protection law to personal data processing on the Internet by non-EU based web sites*", 5035/01/EN/Final – WP 56 –, 30 May 2002. Available at: http://www.europa.eu.int/comm/internal_market/en/dataprot/wpdocs/wp56_en.pdf.

[30]Within the GATT, the analogue to this article does not mention "Privacy", but a general reference is made under item (d): "*Article XX General Exceptions: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (. . .); (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, (. . .).*" See "*Legal Texts: WTO Agreements*", available at: http://www.wto.org/english/docs_e/legal_e/final_e.htm , last visited 15/05/02.

requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;
(b) necessary to protect human, animal or plant life or health;
(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
(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;[31]
(iii) safety;"[32]

3.1.1. *Evaluation of the Conditions to Apply the Exception*

Privacy and personal data protection measures are, then, an exception to the application of the GATS' rules, only if they are necessary, not applied in an arbitrary or unjustifiable discriminatory way, and if they are not a disguised restriction on trade in services.

There has not been a dispute on privacy measures under the WTO dispute settlement mechanisms yet. There have been speculations on one or the other side. A tentative approach would be an examination to the application of the "necessity test" and the interpretation of the "chapeau" (introductory clause) in dispute settlement mechanisms when dealing with Article XX of the GATT, to have an overview of the elements and characteristics analysed in order to accept or reject the use of the exception invoked, and try to deduce a conclusion from the analogy *vis-à-vis* Article XIV, if possible.

3.1.1.1. *The "Necessity Test". Can we Make some Deductions from Analogy?*

The first premise to analyse is to what extent a privacy or personal data protection measure (legislation), which would affect one or several WTO rules

[31]Underlined by us.

[32]*General Agreement on Trade in Services*, available at: http://www.wto.org/english/tratop_e/serv_e/2-obdis_e.htm, last visited 08/05/02.

(specifically GATS rules),[33] would be "necessary" in order to benefit from the exception clause.

The necessity test has to be made when a country invokes Article XIV of the GATS, Article XX of the GATT, or other exceptions to the WTO rules.[34]

The WTO Working Party on Domestic Regulation has pointed out that "*the necessity test – especially the requirement that regulatory measures be no more trade restrictive than necessary – is the means by which an effort is made to balance between two potentially conflicting priorities: promoting trade expansion versus protecting the regulatory rights of governments.*"[35]

3.1.1.1.1. *Dispute Settlement Decisions and Analysis of the "Necessity Test"*
In this section we will analyse five cases, which have been decided on some of the exceptions to the GATT rules, namely Article XX(b) – the health clause, – and Article XX(d), – compliance with laws or regulations which are not inconsistent with the provisions of the Agreement. We are not concerned with the facts described in those cases, unless they are important for the comprehension of the significance given to the concepts interpreted, and their relevance to our data protection interest.

"United States – Section 337 of the Tariff Act of 1930"

In the case "United States – Section 337 of the Tariff Act of 1930"[36] the "necessity test" was made on Article XX(d). The findings of the Panel in this

[33]Considering mainly the role of information society technologies in the provision of international services, and the privacy risks derived either from the way those services are provided (personal data requesting and processing, in general), or from architecture or "Code" itself.

[34]"Necessity tests" for the application of "exceptions" are also present in: Article 2.2 and 2.3 of the *Agreement on Technical Barriers to Trade* (TBT), available at: http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf, last visited 17/06/02; Articles 2.2 and 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS), available at http://www.wto.org/english/docs_e/legal_e/15-sps.pdf, last visited 17/06/02; Paragraph 5(e) of the GATS Annex on Telecommunications, available at http://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm, last visited 17/06/02.

[35]Working Party on Domestic Regulation, "*Application of the necessity test: issues for consideration*", 8 October 1999, Job No. 5929, Informal note by the Secretariat. Available at: http://www.wto.org.english/tratop_e/serv_e/serv_reg_secretariatnot_e.htm, last visited 21/05/02.

[36]"United States – Section 337 of the Tariff Act of 1930", GATT, Report by the Panel adopted on 7 November 1989 (L/6439-36S/345), available at: http://www.worldtradelaw.net/, last visited 06/06/02. The dispute was, briefly, the following: "*The request for consultations resulted from an examination of a specific case where for the purpose of enforcing private intellectual property rights imported goods were subjected to a separate and distinct procedure solely by virtue of their non-US origin. The EC considered that a denial of national treatment within the meaning of Article III of the General Agreement resulted from the different rules applicable under Section 337 and that this denial does not fall within the provisions of Article XX(d) of the General Agreement. The EC therefore considered the benefits accruing to it under the General Agreement were nullified and impaired through the application of the provisions of Section 337.*"

regard were the following: "*5.9. (. . .) that Article XX is entitled 'General Exceptions' and that the central phrase in the introductory clause reads: 'nothing in this Agreement shall be construed to prevent the adoption or enforcement . . . of measures . . .'. Article XX(d) thus provides for a limited and conditional exception from obligations under other provisions. The Panel therefore concluded that Article XX(d) applies only to measures inconsistent with another provision of the General Agreement, and that, consequently, the application of Section 337 has to be examined first in the light of Article III:4. If any inconsistencies with Article III:4 were found, the Panel would then examine whether they could be justified under Article XX(d).*"

"*5.22. Having found the elements of section 337 summarised in paragraph 5.20 above to be inconsistent with Article III:4, the Panel considered whether these inconsistencies can be justified under Article XX(d). The Panel noted that the parties to the dispute agreed that, for the purposes of Article XX(d), Section 337 can be considered as 'measures . . . to secure compliance with' United States patent law. It then examined whether, in respect of the elements of Section 337 found to be inconsistent with Article III:4 of the General Agreement, the conditions specified in Article XX(d) to justify measures otherwise inconsistent with the GATT are met. These are:*

> *that the 'laws or regulations' with which compliance is being secured are themselves 'not inconsistent' with the General Agreement;*
> *that the measures are 'necessary to secure compliance' with those laws or regulations;*
> *that the measures are 'not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.*"

The Panel noted that each of these conditions must be met if an inconsistency with another GATT provision is to be justifiable under Article XX(d).

It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d), if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. In cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.

In the view of the Panel, what has to be justified as "necessary" under Article XX(d) is each of the inconsistencies with another GATT Article found to exist.

"*5.28. The United States suggested that Section 337 can be justified because, under United States law, it provides the only means of enforcement of United*

States patent rights against imports of products manufactured abroad by means of a process patented in the United States (paragraph 3.62). The Panel considered that, even if it were accepted that a different scheme for imports alleged to infringe process patents is necessary, this could not in itself justify as 'necessary' in terms of Article XX(d) any of the specific inconsistencies with Article III:4 (. . .). In any event, the Panel did not consider that a different scheme for imports alleged to infringe process patents is necessary since many countries grant to their civil courts jurisdiction over imports of products manufactured abroad under processes protected by patents of the importing country. The Panel noted that, in the 1988 Omnibus Trade and Competitiveness Act, the United States has in fact amended its law to this effect."

The Panel concluded that Section 337 of the United States Tariff Act of 1930 is inconsistent with Article III:4, in that it accords to imported products challenged as infringing United States patents treatment less favourable than the treatment accorded to products of United States origin similarly challenged, and that these inconsistencies cannot be justified in all respects under Article XX(d).

In this case, a description of the methodology to follow is made, not only as regards the "necessity test" itself, but also as regards the whole procedure to use while examining the viability of the exception.

The steps to contemplate are, then, the following:

(1) Point 5.22 of the Report by the Panel resumes the procedure in three items. However, we have to integrate Point 5.9 to this list in what concerns the fact that "(. . .) *Article XX(d) applies only to measures inconsistent with another provision of the General Agreement (. . .)*".

This reference becomes a general premise. The first analysis to be made should determine whether the measure under discussion is inconsistent with a provision of the General Agreement. This is applicable also to the GATS. For example, we would examine whether the measure under discussion is contrary to Article II "Most-Favoured-Nation Treatment", or Article VI "Domestic Regulation", etc.

(2) If the measure is inconsistent with another provision of the General Agreement, the second step will consist in evaluating whether "*(. . .) the 'laws or regulations' with which compliance is being secured are themselves 'not inconsistent' with the General Agreement*".

We have to think about the spirit of the Agreement. As for the GATS, the reference is the Preamble. There we find an explicit mention highlighting the importance of "*giving due respect to national policy objectives*",[37] and also the recognition of "*the right of Member States to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives (. . .)*".[38]

[37]Preamble of the GATS, third paragraph.

(3) The third step consists in the evaluation of whether the measures are "necessary to secure compliance" with those laws or regulations. The Panel considered that this evaluation should search whether the State would have an available alternative measure that it could reasonably be expected to employ and which is not inconsistent with other GATT (or GATS) provisions. If the result of the search is positive, the use of the exception has to be excluded.

(4) The last step is then, to assess whether the measures are "*not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade*".[39]

Hence, the outcome of the analysis of these factors will determine whether the exception is likely to be applicable.

"Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes"

The same reasoning can be found in the case "Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes".[40] The claim for the application of an exception was based on Article XX(b) of the GATT. Then, the Panel examined whether Thai import measures affecting cigarettes, while contrary to Article XI:1, were justified by Article XX(b).

The Panel accepted (following what had been agreed by the parties to the dispute and the expert from the WHO) that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b). The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalisation; however, for a measure to be covered by Article XX(b) it had to be "necessary".

The Panel concluded that the import restrictions imposed by Thailand could be considered "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.

Then, the Panel found that a non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4 requiring

[38]Preamble of the GATS, fourth paragraph.

[39]See *infra*.

[40]"Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes", GATT, Report of the Panel adopted on 7 November 1990 (DS10/R – 37S/200), available at: http://www.worldtradelaw.net/, last visited 06/06/02. "*(. . .) the United States requested consultations with Thailand under Article XXIII:1, concerning restrictions on imports of and internal taxes on cigarettes maintained by the Royal Thai Government (. . .).*"

complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement. Indeed, the Panel found that there were various measures consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which, taken together, could achieve the health policy goals that the Thai government pursues by restricting the importation of cigarettes inconsistently with Article XI:1. The Panel decided therefore that Thailand's practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was an inconsistency with the General Agreement and not "necessary" within the meaning of Article XX(b).

This case identified firstly the GATT rule violated by the measure. Then, it stated that the exception clause allows, indeed, contracting parties to give priority to health (public policy issue) over trade liberalisation. Nevertheless, while searching for an alternative measure the Panel found that "*requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement. (. . .).*"

Another important fact for determining the Panel's decision was Thailand's practice of permitting the sale of domestic cigarettes while prohibiting importation. Again, this "inconsistency" was found "not necessary". The protection of public policy that allows the use of the exception clause supposes the same internal compromise and attitude as the one being asked of the third country.

"United States – Standards for Reformulated and Conventional Gasoline"

The case "United States – Standards for Reformulated and Conventional Gasoline"[41] makes a statement on the interpretation of Article XX after the Uruguay Round: "*(. . .) Article XX of the General Agreement contains provisions designed to permit important state interests - including the protection of human health, as well as the conservation of exhaustive natural resources – to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the WTO Agreement and in the Decision on Trade and Environment, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship to trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.*"

[41]"United States – Standards for Reformulated and Conventional Gasoline", WTO, Report of the Appellate Body, 29 April 1996, (WT/DS2/AB/R), available at: http://www.worldtradelaw.net/, last visited 06/06/02. "*That Panel had been established to consider a dispute between the United States, on the one hand, and Venezuela, later joined by Brazil, on the other. The dispute related to the implementation by the United States of its domestic legislation known as the Clean Air Act of 1990 (the 'CAA') and, more specifically, to the regulation enacted by the United States' Environmental Protection Agency (the 'EPA') pursuant to that Act, to control toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the United States.*"

Those "important state interests" are also recognised[42] and broadened[43] in the GATS. The importance of coordinating policies is not only of vital interest in environmental areas but also in other areas, mainly where the Member States have internal, supranational, and international commitments, that is, due to their National Constitutions, Supranational Treaties (like TUE and TCE), and International Conventions (like the European Convention on Human Rights and Fundamental Freedoms or Council of Europe Convention, No. 108).

WTO Members, as pointed out by the Panel, have a large measure of autonomy to determine their own policies on the issues recognised in the exception clauses of the different WTO agreements. The limit to this autonomy is the respect to the requirements of those agreements in general and the respect to the steps to follow for the application of an exception in particular.

"Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef"

For an analysis of the semantics of the term "necessary", and the "balance" to be made, we can refer to the case "Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef"[44]:

"*159. We turn, therefore, to the question of whether the dual retail system is 'necessary' to secure compliance with the Unfair Competition Act. Once again, we look first to the ordinary meaning of the word 'necessary', in its context*

[42]In the Preamble, as already noted.

[43]In Article XIV.

[44]"Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef", WTO, Report of the Appellate Body, 11 December 2000, (WT/DS161/AB/R – WT/DS169/AB/R), available at: http://www.worldtradelaw.net/, last visited 06/06/02. "*(. . .) The Panel was established to consider a complaint by Australia and the United States with respect to Korean measures that affect the importation of certain beef products. The aspects of these measures relevant for this appeal relate to, first, domestic support provided to the beef industry and to the Korean agriculture sector more generally, and, second, the separate retail distribution channels that exist for certain imported and domestic beef products (. . .).*"

and in the light of the object and purpose of Article XX, in accordance with Article 31(1) of the Vienna Convention."

"160. The word 'necessary' normally denotes something 'that cannot be dispensed with or done without, requisite, essential, needful'. We note, however, that a standard law dictionary cautions that: '[t]his word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conductive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity.' (Black's Law Dictionary, West Publishing, 1995, p. 1029)."

The Panel pointed out that, as used in the context of Article XX(d), the reach of the word "necessary" is not limited to that which is "indispensable" or "absolute necessity" or "inevitable". Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). They stated that other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in their view, to a range of degrees of necessity. At one end of this continuum lies "necessity" understood as "indispensable"; at the other end, is "necessary" taken to mean 'making a contribution to'. They considered that a "necessary" measure is, in the continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simple "making a contribution to".

The Panel wrote that, determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.

The perspective of the Panel changes here in comparison with the decisions analysed above. It does not focus on the search for an "alternative measure" non- or less restrictive to commerce than the one under controversy, but on the necessity of this measure itself. That is, the analysis of what "necessity" means, concluding that it can fluctuate from something "indispensable" to something that "makes a contribution to". Even if a necessary measure should be closer to indispensability, this is not an absolute statement. That is why the study should be complemented by a qualification given by other factors.

The Vienna Convention on the Law of Treaties[45] envisages a semantic analysis as one of the methodologies to interpret treaties.[46]

The definition of the word "necessary" makes reference to a range of degrees. The Panel states that for "necessity tests" the measure has to be closer to the first characteristic (mentioned *supra*) than to the second. However, this is not a mathematic equation, and will involve, in every case, a balance of different factors:

(1) The contribution made by the compliance measure to the enforcement of the law.

Data privacy enforcement is one of the challenges in Europe at the moment. There is no clear statistics as regards compliance with trans-border data flows regulations, being that this regulation one of the instruments the European Union designed to contribute to compliance with the EU Directive on Privacy in what concerns European data.

[45]The Vienna Convention on the law of treaties (with annex) was concluded at Vienna on 23 May 1969 and came into force on 27 January 1980. Available at: http://www.unog.ch/archives/vienna/vien_69.htm.

[46]*SECTION 3. INTERPRETATION OF TREATIES*

Article 31

General rule of interpretation

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

a. any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
b. any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
c. any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

Article 32

"Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

a. leaves the meaning ambiguous or obscure; or
b. leads to a result which is manifestly absurd or unreasonable."

Notwithstanding, the absence of application reports does not undermine the fact that regulating trans-border data flows is a way to ensure that European data will not be sent to countries not giving "adequate" rights to the data subject and obligations to the data controller.

(2) The importance of the common interests or values protected by that law.

The importance of data privacy regulations is determined, as already mentioned, by the compromises assumed by the EU Member States in their National Constitutions, EU treaties, and International Conventions on Human Rights.

In Europe, privacy is not considered simply as a "tort" or a "consumer right". The value, connected to "human dignity" and "human self-determination", is higher, and the responsibility of the states regarding this, concomitant.

(3) The accompanying impact of the law on international trade.

Privacy regulations are normally considered restrictive to international trade in services, for example, when speaking about human resources information management, website administration, cyber-marketing, or e-commerce.

However, proper privacy protection can improve trust in services, and as a consequence, the impact can be positive to international trade in services.

The result of a cost-benefit analysis would not be the same if the variables for calculation do not include, for instance, issues like the level of awareness/education of individuals as regards privacy issues connected to the Internet. Continuing with this example, costs may increase if information duties of e-retailers or cyber-marketing companies increase, due to the requirements of European legislation. Nevertheless, people would be more active in e-commerce if scandals of Internet personal data misuse would be prevented.

"European Communities – Measures Affecting Asbestos and Asbestos-Containing Products"

Another case where the "necessity test" was made on the Article XX(b) exception is "European Communities – Measures Affecting Asbestos and Asbestos-Containing Products".[47] In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued was both vital and important in the highest decree. The remaining question, then, was whether there would have been an alternative measure that would have achieved the same end, that was less restrictive of trade than a prohibition.

[47]"European Communities – Measures Affecting Asbestos and Asbestos-Containing Products", WTO, Report of the Appellate Body, 12 March 2001, (WT/DS135/AB/R), available at: http://www.worldtradelaw.net/, last visited 06/06/02. *"The Panel was established to consider claims made by Canada regarding French Decree No. 96-1133 concerning asbestos and products containing asbestos (décret relatif à l'interdiction de l'amiante, pris en application du code de travail et du code de la consommation) (. . .)."*

Canada asserted that "controlled use" represented a "reasonably available" measure that would serve the same end. The issue was, thus, whether France could reasonably be expected to employ "controlled use" practices to achieve its chosen level of health protection – a halt in the spread of asbestos-related health risks.

In the view of the Panel, France could not reasonably be expected to employ any alternative measure if that measure would, in effect, have prevented France from achieving its chosen level of health protection. On the basis of the scientific evidence before it, the Panel found that, in general, the efficacy of "controlled use" remained to be demonstrated. Moreover, even in cases where "controlled use" practices were applied "with greater certainty", the scientific evidence suggested that the level of exposure can, in some circumstances, still be high enough to be a "significant residual risk of developing asbestos-related diseases."

"175. (. . .) As a result (. . .) the Decree is 'necessary to protect human . . . life or health' within the meaning of Article XX(b) of the GATT 1994."

This decision returns to the methodological approach of trying to determine whether "alternative measures" are available.

Scientific evidence was a key issue for this case. The means of proof to demonstrate the "necessity" would be different in the privacy sphere. Computer scientists can demonstrate, for instance, that a given technology application used in global networks poses privacy risks. However, potential damages would be more difficult to measure in this realm than in environmental or health issues, due to the fact that privacy damages could be economic, but also moral or psychological, present or future. So, the quantification of damages became an intricate fact.

Coming back to the example of the IP address, a system administrator is not able to connect it directly with other data of the user, but he can identify, using "Who is" services,[48] who is the Internet Access Provider that has given this number. Theoretically, this connection is not allowed without a warrant. However, in the future, it will be easier to make this identification due to the architecture of the new protocol IPv6[49] and the possibility of the integration of a unique identification number in the IP address.

[48]RIPE (Réseaux IP Européens, http://www.ripe.net), ARIN (American Registry for Internet Numbers, http://www.arin.net/), APNIC (Asia Pacific Network Information Centre, http://www.apnic.net/), etc.

[49]See *"Internet Protocol, Version 6 (IPv6) specification"*, Network Working Group, December 1998. Available at: http://www.arin.net/library/rfc.rfc2460.txt, last visited 22/06/02. Jean-Marc Dinant *"The arrival of the new Internet network numbering system IPv6 and its major risks to data protection"*, ECLIP (Electronic Commerce Legal Issues Platform), IST Project 1999-12278. Available at: http://www.eclip.org, last visited 08/05/02. See also Article 29 Data Protection Working Party, Opinion 2/2002 on *"The use of unique identifiers in telecommunication terminal equipments: the example of IPv6"*, adopted on 30 May 2002.

Indeed, it is difficult to imagine, at first glance, fundamental rights implications of the improper use of an IP address or certain kind of tools or software.[50] We can think that the simple fact of visiting a website does not determine the identity, profile or other characteristics of a person. Yet, this data can be linked with other data, like the one obtained through an e-commerce operation, name, address, e-mail, credit card number, further data/ preferences, etc.

Also, depending on the characteristics of the website, documents downloaded, or the type of product ordered, it would be possible to infer aspects revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, health or sex life.[51] Even if we do not think about extreme cases of "black lists" for discrimination purposes,[52] those profiles would be used for marketing purposes of determinate products or services, data that were obtained, most of the times, without the knowledge of the data subject. We are not denying marketing, just pointing out a question of transparency and fairness in the collection and further use of data.

With those examples, we just intend to show how difficult is to measure and prove potential damages in privacy violations from a quantitative point of view.

3.1.1.2. *Non Discriminatory Application. The "Chapeau" of Article XIV of the GATS.*

We have to explore now what would be an "arbitrary or unjustifiable discrimination" and a "disguised restriction".

[50]Like cookies (we are not speaking about session cookies, but permanent cookies, cookies showing a characteristic of a given Internet user, or cookies containing a Global Unique Identifier. See Dinant, *op. cit.* or spywares. See Cécile Ducourtieux and Stéphane Foucart "*Les profileurs du Net traquent les internautes à leur insu*", Le Monde, 10 May 2002, page 20.

[51]Article 8.1 of the Directive (sensitive data).

[52]It is not even necessary to evoke the Nazi period to describe dangers arisen from "black lists". A discriminatory scandal has recently taken place in Spain, during the recruitment process conducted by a supermarket, where people was rejected for being "foreigner", "ugly", "fat", "handicapped", "South American", having "dark skin", "Andaluzian accent", etc. See "*Escándalo en España por un insólito caso de discriminación*", Diario Clarín, 5 July 2002. Available at: http://www.clarin.com/diario/hoy/s-03801.htm, last visited 05/07/02. See also Joel R. Reidenberg "*E-Commerce and Trans-Atlantic Privacy*", Houston Law Review, 10/ 03/01, p. 723. The author gives several references of different companies of direct marketing services that offer lists of "*heavy black women who are offered as targets for self-improvement products*", or "*new ethnic system. . . identifying individuals who may speak their native language, but do not think in that manner.*" We have to point out that off-line risks for fundamental rights can be increased by the use of technologies without due respect for privacy and data protection principles. Technology is not itself "privacy killing", but the way it is designed or programmed. Indeed, it can be "privacy enhancing".

A "discrimination" would be "arbitrary or unjustified" if the EU, or the Member States, when applying the law to a concrete case, would allow the transfer of personal data to one country and forbid it, under the same circumstances, to another one, alleging that it does not present an "adequate protection", given the situation that both countries have similar regulations, or present the same lack of regulation in a specific sector, for example, the private one.

A "disguised restriction" is a sophisticated or obscure barrier to international commerce. It is a burden coming from the legal or administrative framework, which reason to exists is not necessary or weak, and is funded on protectionism.

3.1.1.2.1. *Dispute Settlement Decisions and Analysis of the "Chapeau"*

We will examine two decisions that have interpreted the "chapeau" of Article XX of the GATT to see in practise how the concepts described are applied. The analogy with Article XIV is also pertinent here.

"United States – Standards for Reformulated and Conventional Gasoline"

This case[53] makes explicit reference to the interpretation of the introductory clause: "*The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [what was later to become] Article XX.' This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of a legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the parties concerned.*"[54]

"'*Arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised discrimination in international trade. It is clear to us that concealed or unannounced restriction or discrimination in international trade*

[53]"United States – Standards for Reformulated and Conventional Gasoline", WTO, Report of the Appellate Body, 29 April 1996, (WT/DS2/AB/R), available at: http:// www.worldtradelaw.net/, last visited 06/06/02.

[54]Page 22 of the Report of the Appellate Body.

does not exhaust the meaning of 'disguised restriction'. We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade. The fundamental theme is to be found in the purpose and the object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."[55]

The chapeau is based on the legal generic principle of good faith, under which, an "extravagant" use of a right constitutes an abuse or illicit action. Consideration of the chapeau is what will differentiate commercial protectionism from protective public police.

"United States – Import Prohibition of Certain Shrimp and Shrimp Products"

An extensive analysis of the concepts denoted by the chapeau is made in the Report of the Appellate Body issued in this case:[56] "*149. (. . .). If the measure is not held provisionally justified under Article XX(g), it cannot be ultimately justified under the chapeau of Article XX. On the other hand, it does not follow from the fact that a measure falls within the terms of Article XX(g) that that measure also will necessarily comply with the requirements of the chapeau (. . .).*"

This paragraph is concordant with the methodology to follow, already described *supra*, that requires the compliance with all the steps. The non-accordance with one of them results in the impossibility to apply the exception.

"*152. At the end of the Uruguay Round, negotiators fashioned an appropriate preamble for the new WTO Agreement (. . .). In recognition of the importance of continuity with the previous GATT system, negotiators used the preamble of the GATT 1947 as the template for the preamble of the new WTO Agreement. Those negotiators evidently believed, however, that the objective of 'full use of the resources of the world' set forth in the preamble of the GATT 1947 was no longer appropriate to the world trading system of 1990's. As a result, they*

[55]Page 25 of the Report of the Appellate Body.

[56]"United States – Import Prohibition of Certain Shrimp and Shrimp Products", WTO, Report of the Appellate Body, 12 October 1998, (WT/DS58/AB/R), available at: http://www.worldtradelaw.net/, last visited 06/06/02. In this case India, Malaysia, Pakistan and Thailand had submitted a "*complaint regarding a prohibition imposed by the United States on the importation of certain shrimp and shrimp products by Section 609 of Public Law 101-162 (. . .) and associated regulations and judicial rulings.*"

decided to qualify the original objectives of the GATT 1947 with the following words: '. . .while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, . . .'."

"*153. We note once more that this language demonstrates a recognition by the WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intention of the negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994. (. . .).*"

Here, the Appellate Body makes use of the tools for interpretation of international treaties described in the Vienna Convention. Article 31.2 refers to the Preamble, and Article 32, "Supplementary means of interpretation", refers to the preparatory works. The Appellate Body conducts the evaluation of the chapeau background considering the historical context, from the GATT 1947 to the GATT 1994, and the changes in the trading system. The intention of the negotiators was clear, the global reality was not the same, so the adaptation of international trade to this new reality, by the creation of new constrains, was a "must".

The same can be said as regards the GATS, its Preamble, and Article XIV. The preambular language, "respect to national policy objectives", adds "colour, texture and shading" to Article XIV. And the historical analyses would be important to interpret the policy objectives, which within an information society, can change even faster than predicted by the Moore's law.[57] Internet services, its advantages and risks, are not the same in 2002 as they were in 1994. The Doha Declaration[58] echoes this complexity.

Then, the Panel turned to the "chapeau" considering that it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the Members under the GATT 1994, on the other hand. In fact, exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode the substantive treaty rights of other Members. The exceptions of Article XX, the Panel said, recognise the legitimate nature of the policies and interests

[57]Moore's Law. 1964 – The density of semiconductor chips doubles every year. 1975 – The density of chips doubles every year and a half. See http://www.cs.bris.ac.uk/Teaching/Resources/COMS11301/techno.html.

[58]See *infra*.

there embodied, the right to invoke one of those exceptions is not to be rendered illusory.

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

"*159. The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g. Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.*"

This interpretation is entirely applicable to the chapeau of Article XIV of the GATS. *Bona fide* is the inspired principle of law. The evaluation of the equilibrium between the Member State's right to regulate and its obligation as regards the WTO Agreements should be made by the state when introducing regulatory measures for an important public policy, and, if a controversy arises, it will be left to a Panel to make the proper assessment.

3.1.1.3. *Overview of the above Considerations and Findings vis-à-vis the EU privacy and Personal Data Protection Approach to Trans-border Data Flows.* In the case "United States – Section 337 of the Tariff Act of 1930" the reasoning followed was to, first, identify the WTO rule with which the measure would be in conflict. If there are inconsistencies between them, it has to be analysed whether all the conditions to apply an exception to the application of the WTO rules are met. The "necessity" of the measure is one of these conditions, which would be justified if no alternative measure, less restrictive to commerce, would be reasonably applicable, or, following "Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef", the presence of the factors that can qualify the measure as closer to "indispensable" or "making a contribution to", and the consequences of this fluctuation in what concerns the determination of the "necessity".

When dealing with the "health" exception, the Panels look also for the possibility of a reasonable alternative measure to be applied. An important

element in those cases is the scientific evidence presented by the parties establishing the questioned measure. In "Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes" the "necessity test" did not succeed since other potential measures less restrictive to trade were found likely to be applicable, safeguarding at the same time, the Panel said, the public health policy argument that was invoked. Nevertheless, alternatives were not found in "European Communities – Measures Affecting Asbestos and Asbestos-Containing Products", and the prohibition created by the Decree under dispute was considered to be necessary, thus, applicable even if it was restrictive to commerce.

A conflict with Article II of the GATS (first step),[59] "Most-favoured Nation Treatment" principle, could be envisaged as regards the application of the EU privacy and personal data protection legislation (specifically what is foreseen as regards trans-border data flows): "*1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.*"

We can think about data processing services. Those located in the US, for instance, will receive a different treatment than those located in Switzerland[60] or Hungary,[61] unless they have joined the "Safe Harbor".[62] This because Article 25.1 of the Directive establishes a prohibition to trans-border data flows to countries not giving an adequate protection to personal data. The "in-

[59]We do not see that the main inconsistency would be as regards Article VI (Domestic regulation) or Article XVII (National treatment) of the GATS. The treatment to non-EU service providers is not less favourable than to EU service providers. Indeed, when adequacy finding Decisions have been passed, third countries do not have to comply with the Directive itself but with their own legal regime, with which they are familiarised, to process "European data". The same can be said as regards contracts. If a trans-border data flow has been authorised due to a contract, the service provider will have to comply with the contract. It is clear that whatever the circumstance or means used to make a transfer possible, the rights of the data subjects, and the obligations of the controller, should always be preserved, in an "adequate" way *vis-à-vis* the Directive.

[60]Commission Decision of 26 July 2000 pursuant to Directive 95/46/CE of the European Parliament and of the Council on the adequacy of the protection provided in Switzerland. OJEC L 215, 25/08/2000.

[61]Commission Decision of 26 July 2000 pursuant to Directive 95/46/CE of the European Parliament and of the Council on the adequacy of the protection provided in Hungary. OJEC L 215, 25/08/2000.

[62]Commission Decision 2000/520/EC of 26.7.2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the Safe Harbor privacy principles and related frequently asked questions issued by the US Department of Commerce – Official Journal L 215/7 of 25.8.2000, available at: http://www.europa.eu.int/comm/internal_market/en/dataprot/adequacy/dec2000520ec.pdf.

consistency" is indeed this prohibition, creating a differentiate treatment among third countries. The same can be envisaged as regards human resources information management, or e-commerce operations, where the flow of personal data could be subject to certain restrictions. However, European data protection regulations seems to be not by "themselves" inconsistent with the GATS (second step) if we consider the wording of the Preamble, third and fourth paragraphs (see *supra*).

Then, we have to assess if given the inconsistency the exception would be applicable. To apply Article XIV(c)(ii), we will consider the "necessity test" and then the "chapeau". Is EU data protection legislation necessary? (third step).

The Directive was passed to harmonise data protection within the EU Internal Market, to assure that a minimum set of principles would be respected in all the Member States, and by doing so, permitting the free flow of information among them.

Indeed, the Directive represents the common data protection policies and constitutional traditions of all the Member States. Even more, it represents their international engagement for the protection of the fundamental right to privacy expressed in the European Convention for the Protection of Human Rights and Fundamental Liberties[63] (Rome 1950), Council of Europe Convention, No. 108; and supranational position: the EU and EC treaties and the European Union Charter of Fundamental Rights.

Nevertheless, the protection to personal data assured within the EU can be easily circumvented by the use of new technologies, sending the information to countries where all the principles, rights and obligations expressed in the Directive and transposed to national laws are not compulsory or less protected (e.g., absence of a public independent authority dealing with data protection matters, purpose limitation principle, restrictions on onwards transfers, etc). To avoid the risk of violation of privacy rights the Directive has established a measure, the prohibition we have already mentioned. Is this measure "necessary"? Are there "alternative measures less restrictive to commerce"? Is Article 25.1 "closer to indispensable"? Articles 25 and 26 of the Directive give a set of "alternatives" to be used to make transfers possible. Article 25.1 would be closer to indispensable, though necessary, if no other way is found to protect the rights of the data subjects.

[63]See Dimitri Yernault "*L'efficacité de la Convention Européenne des Droits de l'Homme pour contester le système 'Echelon'*", in: Sénat et Chambre des Représentants de Belgique, "*Rapport sur l'existence éventuelle d'un réseau d'interception des communications, nommé 'Echelon'* ", 25 Février 2002. In this article, the author studies the nature of the ECHR: (1) as an instrument guaranteeing "European public order", considered as a coherent whole, in the sense that it was qualified by the Strasbourg Court in 1995; (2) as an international treaty that gives place to the State's international liability; and (3) as an international treaty of a particular nature, due to its Article 53, by virtue of which adherent States recognise its legal pre-eminence over any other internal or international regulation that would be less protective of Fundamental Rights than the Convention itself.

The measure established by Article 25.1 of the Directive is not rigid. Article 25.2 states the way "adequacy" should be analysed: "*The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.*"

The specific circumstances mentioned are not limitative but exemplificative. This is particularly important for global companies operating in so many countries that makes it extremely burdensome to have a unique company policy compliant with all the laws to which they are subject. Other examples of circumstances to be considered could be internal ethics codes, level of education/ awareness on privacy matters of employees processing data, level of clarity of a privacy policy, enforcement methods, independence of enforcement bodies, etc.

Article 26 of the Directive contains a set of derogations to the general rule regulating that Member States shall provide that a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection may take place on condition that (a) the data subject has given his consent unambiguously to the proposed transfer; or (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of precontractual measures taken in response to the data subject's request; or (c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party; etc.

Some businesses find the derogations not suitable for global activities or huge and diverse data flows, considering also that an analogue norm to Article 7.f) of the Directive is not included in this list. Others may find the solution in one of these items.

Apart from that, Article 25.6 provides that the Commission may find that a third country ensures an "adequate level of protection" by reason of its domestic law or of the international commitments it has entered into, particularly upon conclusion of the negotiations referred to in paragraph 5, for the protection of the private lives and basic freedoms and rights of individuals.

We have to bear in mind the difference between "adequate"[64] and

[64]See Yves Poullet, Bénédicte Havelange, Axel Lefebvre, Marie-Hélène Boulanger, Herbert Burkert, Cécile De Terwangne "*Elaboration d'une méthodologie pour évaluer l'adéquation du niveau de protection des personnes physiques à l'égard du traitement de données à caractère personnel*", Centre de Recherches Informatique et Droit (CRID). Commission Européenne – DG XV. Contrat ETD/95/B5-3000/165. Décembre 1996.

"equivalent".[65] The last adjective supposes the finding of "the same" legal rules in the third country, in order to authorise trans-border data flows. The first supposes a case-by-case, pragmatic, and functional analysis. Whilst equivalence posses the risk of "legal imperialism" which would be easily identified as an "arbitrary or unjustifiable discrimination", the second poses the risk of "subjectivity".

The Article 29 Data Protection Working Party[66] has issued several documents[67] describing the criteria to be applied to third countries. Those documents were the basis for the studies conducted prior to the European Commission adequacy findings.

This system sets forth a dilemma for the solution of the correct addressing of the "chapeau" (fourth step). On the one hand, we have the obligation of the European Union and the Member States to respect the European Convention on Human Rights and Fundamental Liberties, and concordant instruments, in what concerns privacy and European personal data, the breach of which would involve the liability of the Member States, and the protection of which outside the EU is intended through the regulation of trans-border data flows. On the other hand, we have the adequacy finding mechanism, which could give room to a subjective analysis of third countries' legal systems, constituting a risk of "arbitrary or unjustifiable discrimination" if not applied properly.

The logical reasoning to analyse the application of the adequacy finding procedure would be the following: "Thesis": the adequacy finding procedure was (or was not) used in a discriminatory way. "Antithesis": this would involve the analysis of all the premises considered in the procedure, whether they derived from an objective assessment or not. "Synthesis": this would be the finding of the Panel in the hypothetical case of a dispute.

The Directive offers other possibilities to make international transfers possible, Article 26.2 states that a Member State may authorise a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25.2, where the controller adduces adequate safeguards with respect to the protection of privacy; such safeguards may in particular result from appropriate contractual

[65]Convention No. 108 requires "equivalent" protection for trans-border data flows.

[66]The Working Party has been established by Article 29 of Directive 95/46/EC. It is the independent EU Advisory Board on data protection and privacy.

[67]Article 29 Data Protection Working Party "*Discussion Document: First Orientations on Transfers of Personal Data to Third Countries – Possible Ways Forward in Assessing Adequacy*", 26 June 1997, WP 4, available at: http://www.europa.eu.int/comm/internal_market/en/dataprot/wpdocs/wp4en.htm.

Article 29 Data Protection Working Party "*Working Document: Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU data protection directive*", 24 July 1998, WP 12, available at: http://www.europa.eu.int/comm/internal_market/en/dataprot/wpdocs/wp12en.htm.

clauses. Those safeguards, apart from contracts,[68] could have the form of Privacy Policies, Codes of Conduct,[69] etc.

The standard contractual clauses[70] (Article 26.4 of the Directive) are also other possibilities given to facilitate the international flow of information, while providing the data subject with an "adequate protection" framework.

At a national level, if none of those possibilities are met, authorisation from the National Data Protection Authority has to be asked.

In sum, the "four steps" methodology can result in the legitimation of the European Union use of the exception foreseen in Article XIV (c) (ii) to regulate trans-border data flows in order to protect privacy and data protection under the scope of application of the Directive 95/46/EC. It is important to point out that the "adequacy system" is much more preferable than the "equivalence system" since it assures comprehensive analysis and reduces substantially the risks of "arbitrary or unjustifiable discrimination" due to the fact that what is going to be evaluated is the presence and enforcement of the "principles", not the way they are instrumented, thus being respectful of different legal cultures.

3.2. The WTO and Internet Privacy. A Clarification

It is important to note that the WTO has posted on its website a comment making references to Internet privacy in the context of the organisation: "*Following a speech on the need for protection of on-line consumers, made in Washington on 9 January 2001, Mr. Ralph Nader was quoted as saying that 'particularly in the area of internet privacy protections, the WTO is forcing governments to forego sovereign privacy protections deemed to be overly*

[68]Article 29 Data Protection Working Party "*Working Document: Preliminary views on the use of contractual provisions in the context of transfers of personal data to third countries*", 22 April 1998, WP 9, available at: http://www.europa.eu.int/comm/internal_market/en/dataprot/wpdocs/wp9en.htm.

[69]Article 29 Data Protection Working Party "*Working Document: Judging industry self regulation: when does it make a meaningful contribution to the level of data protection in a third country?*", 14 January 1998, WP 7, available at: http://www.europa.eu.int/comm/internal_market/en/dataprot/wpdocs/wp7en.htm.

[70]The European Commission has issued two Decisions on standard contractual clauses, one dealing with transfer to a controller, and the other with transfer to a processor. Commission Decision 2001/497/EC of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC – O.J. L 181/19 of 4.7.2001. Available at: http://europa.eu.int/comm/internal_market/en/dataprot/news/1539en.pdf , and Commission Decision 2002/16/EC of 27 December 2001 on standard contractual clauses for the transfer of personal data to processors established in third countries, under Directive 95/46/EC. Available at: http://www.europa.eu.int/comm/internal_market/en/dataprot/modelcontracts/02-16_en.pdf.

restrictive to international trade'. This is difficult to understand. No decision or action on the protection of Internet privacy has ever been taken in the WTO. Far from 'forcing governments to forego sovereign privacy protections' (which it would have no power to do in any case), the WTO has had nothing whatever to do with Internet privacy. Moreover, a safeguard for individual privacy is built into the framework of the GATS itself. One of the General Exceptions in Article XIV of the GATS, overriding all other provisions, covers measures Governments might find it necessary to take for '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'".[71]

Some valuable considerations can be extracted from this institutional comment: (1) the WTO absence of power to force governments to forego sovereign privacy protections (even if the use of the auxiliary "would" could connote the intention of leaving some small room for questioning), (2) the recognition that no action on Internet privacy has been taken, whilst, at the same time, (3) the mentioning of Article XIV GATS "overriding all other provisions". These lines demonstrate the political sensitivity of the subject matter.[72]

[71] "*GATS: Fact and fiction. Misunderstandings and scare stories: The WTO and Internet privacy*", available at: http://www.wto.org/english/tratop_e/serv_e/gats_factfiction10_e.htm, last visited 08/05/02.

[72] We may compare the above mentioned comment with another one that also involves a controversial matter, which allows a government to violate WTO rules due to the policy concern involved: "*In a Canadian National Post column under the heading 'Trading Away the Public Interest' on 26 June 2000, Mr. Murray Dobbin claimed that negotiations under the GATS 'may abolish regulation' designed to protect health standards and other public interests. Commenting on a recent tragedy involving polluted water supplies, he argued that although it might be hoped that the subsequent investigation would lead to the reestablishment of high standards for health protection and public service, the expansion of the GATS 'could make returning to saner times all but impossible'. 'At stake are issues as diverse as how strict our standards are for hospitals ... and the treatment and testing of drinking water'. Leaving aside the facts that neither Canada nor any other Government has made commitments on water distribution, that foreign suppliers in Canada would have to meet the same standards as Canadian companies, that the right to regulate and to introduce new regulations is explicitly guaranteed in the GATS, and that the GATS has no power to abolish regulation, it is not true that any GATS provision would make difficult the 'reestablishment of high standards for health protection'. The protection of health is explicitly recognized in the GATS as a policy concern of overriding importance. Article XIV contains a General Exception saying that 'nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures necessary to protect human, animal or plant life or health.' The same applies to safety. This means that the need to act to protect health or safety would entitle a Government to violate any other provision in the GATS, including its own market-access commitments.*" In: "*GATS: Fact and fiction. Misunderstandings and scare stories: Right to regulate*", http://www.wto.org/english/tratop_e/serv_e/gats_factfiction11_e.htm, last visited 08/05/02. The same analogy can be inferred here as in prior points of this paper. Policy concerns of overriding importance are not only recognised in the WTO agreements, but also are under the eye of public opinion, which mainly after the Seattle events, look more carefully at international market regulation and its consequences in important social interests.

A WTO Ministerial Declaration was made in Doha the 14 November 2001, designing a work programme that incorporates a negotiating agenda and other decisions and activities.[73] One of the items is Electronic Commerce, where the privacy controversy seems to be more candent, having been included as an issue to be examined within the GATS legal framework.[74] Would standards on e-commerce consumer privacy be regulated?[75] We guess this will be debated during the negotiations.

[73] *WTO Ministerial declaration adopted on 14 November 2001*, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm , last visited 08/05/02.

[74] "*The Council for Trade in Services shall examine and report on the treatment of electronic commerce in the GATS legal framework. The issues to be examined shall include:*
– *scope (including modes of supply) (Article I);*
– *MFN (Article II);*
– *transparency (Article III);*
– *increasing participation of developing countries (Article IV);*
– *domestic regulation, standards, and recognition (Articles VI and VII);*
– *competition (Articles VIII and IX);*
– *protection of privacy and public morals and the prevention of fraud (Article XIV);*
– *market-access commitments on electronic supply of services (including commitments on basic and value added telecommunications services and on distribution services) (Article XVI);*
– *national treatment (Article XVII);*
– *access to and use of public telecommunications transport networks and services (Annex on Telecommunications);*
– *customs duties;*
– *classification issues.*"
Available at: http://www.wto.org/english/tratop_e/ecom_e/wkprog_e.htm, last visited 17/05/02.

[75] "*Specifically, economists recognize four general principles when considering the need for a negotiated set of multilateral disciplines to restrain government action or mandate certain standards. First, are the existing regulations, such as variable IPRs or environmental standards, 'trade-related' in the sense of significantly distorting trade flows? Second, do those regulations impose externalities on other countries that limit the attainment of global optimality and can multilateral rules internalise those costs? Third, if left to unilateral action, do countries choose policies that result in globally inadequate regulation, requiring policy coordination? Fourth, is it possible to compute and assign damages from failing to comply with international rules, thereby making dispute settlement a feasible task?*" Keith E. Maskus "*Regulatory standards in the WTO: Comparing intellectual property rights with competition policy, environmental protection, and core labour standards*", World Trade Review (2002), 1:2, pp. 135–152. Printed in the United Kingdom. We wonder what would be the principles to follow from a "legal" point of view.

4. Concluding Remarks

The WTO Agreements have left room for the adoption of measures to preserve national or supranational legitimate public policy goals of the Members. These measures should be adopted in a reasonable, and less trade restrictive way as possible. A case-by-case approach has to be followed, due to the very casuistic nature of the elements to analyse.

The EU objectives as regards privacy and data protection public policy are materialised in the legislation (Directives), and are the result of a common history, constitutional evolution, and engagement in international compromises. Personal data is not a "pure" commodity in the EU. The protection of privacy and personal data is a fundamental right.

The dilemma emerging from EU trans-border data flows regulation is a challenge for the Community policy-maker, due to the responsibility created by human rights instruments, and the nature of the "adequate" protection to be found in third countries.

Nevertheless, efforts to improve the global dialogue on privacy protection remain to be made. Specifically as regards the way legislation, self-regulation and technology convergence[76] can be used to properly apply the principles described in the Directive to "European data", to enforce them when necessary, whilst facilitating the management of information and trade in an international context.

An eye has to be kept on the Doha negotiating agenda on electronic commerce and its prospective results on privacy and the Internet. The WTO members will have the responsibility to balance diverging interests. The tools to respect important public choices are included in the Agreements. It would be a fallacy to think that these policies (and the legislation deriving from them) are not applicable to the individuals to whom they are addressed in the off-line world just because they are acting through the Internet. The Uruguay Round has emphasised the concept of "sustainable development" as regards the use of natural resources. It is time to extend this valuable concept to the Information Society within the WTO.

[76]Joel R. Reidenberg "Privacy Protection and the interdependence of law, technology and self-regulation". Cahiers du CRID No. 20. Bruylant, Bruxelles, 2001, pp. 127–138.