NON-DISCRIMINATION UNDER THE MOST-FAVOURED-NATION OBLIGATION AND ADEQUACY DECISIONS IN THE GENERAL DATA PROTECTION REGULATION

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ABSTRACT

Regulatory measures on cross-border data flows are essential to personal data protection laws. The General Data Protection Regulation (hereinafter "GDPR") of the European Union (hereinafter "EU") is one of such influential personal data protection regimes, which has become a model and has been adopted by many countries. The GDPR aims to ensure the protection of natural persons regarding the processing of personal data. To protect personal data outside the EU, the GDPR provides certain safeguards for its movement across the EU border. Under the GDPR, the Commission can make a finding that a third country ensures an adequate level of protection, and the transfer of personal information to that country does not require specific authorization. Given the huge number of transfers involved, the adequacy decision is critical to the cross-border transfer of personal data under the GDPR. The adequacy status of a country would have a strong impact on the competitive position of its service providers supplying digital services to consumers in the EU. The adequacy decision is therefore at the heart of the EU's Most-Favoured-Nation (hereinafter "MFN") obligations under the international trade

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rules. This paper argues that the current likeness analysis of the MFN obligations under the General Agreement on Trade in Services (hereinafter "GATS") is not optimal in solving the MFN disputes. Recent Regional Trade Agreements (hereinafter "RTAs") adopted a different approach that may solve some of the major problems under the GATS, i.e., the costs and uncertainties associated with the issues regarding whether non-discrimination obligations and necessity tests even apply to data protection measures. Under such RTAs, evaluations of data personal measures go straight to the non-discrimination test. It is more straightforward and cost-effective, and future trade negotiations should consider this approach. Instead of focusing on the relationships between the services or service suppliers, this approach focuses on the non-discrimination obligation of the data protection regimes. However, the approach raises the issue of determining the inconsistency with the MFN obligation. Considering the jurisprudence of the World Trade Organization (WTO), this paper argues that the Joint Statement Initiative (JSI) negotiations should adopt an MFN obligation that focuses on the design, structure, and process of the personal data protection regime.

KEYWORDS: *non-discrimination, MFN, adequacy decision, GDPR, JSI*

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I. INTRODUCTION

The smooth operation of the data-driven economy heavily relies on data flow. This is particularly the case for the supply of trade in services. The importance of cross-border data flows increases as technology improves.[1] Cross-border data flow through the internet has become essential for economic growth.[2] Data regulations adopted by World Trade Organization (hereinafter "WTO") Members could affect the free movement of data, which may result in a barrier to the supply of trade in services that requires free data flow.[3] The General Data Protection Regulation (hereinafter "GDPR")[4] of the European Union (hereinafter "EU") is one of such influential personal data protection regimes. Indeed, the GDPR has become a model for data protection regimes and has been adopted by many countries. The GDPR aims to ensure the protection of natural persons concerning the processing of personal data. The level of protection provided under the GDPR is very high, but from the perspective of remedies afforded to the subject of personal data, it can be problematic if the personal data is transferred outside of the EU. The Recital 101 of the GDPR stipulates that it is essential to ensure that when personal data are transferred, the level of protection of natural persons ensured in the EU by the GDPR should not be undermined. To protect personal data, the GDPR provides certain safeguards

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[1] Dorine R. Seidman, *Transborder Data Flow: Regulation of International Information Data Flow and the Brazilian Example*, 1(1) J. L. & TECH. 31, 31-32 (1986).

[2] Joshua Paul Meltzer, *The Internet, Cross-Border Data Flows and International Trade*, 2(1) ASIA & PAC. POL'Y STUD. 90, 90-92 (2015).

[3] *See* Neha Mishra, *Data Localization Laws in a Digital World: Data Protection or Data Protectionism?* 139 (NUS Ctr. for Int'l L. Rsch., Paper No. 19/05, 2016); Daniel Crosby, *Analysis of Data Localization Measures Under WTO Services Trade Rules and Commitments*, E15 INITIATIVE, Mar., 2016, at 8.

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1 [hereinafter GDPR].

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for its movement across the EU border.[5] One of the conditions under the GDPR is transfer on the basis of an adequacy decision, under which the European Commission can make a finding that a third country ensures an adequate level of protection, and the transfer of personal information to that country does not require specific authorization.[6] Other safeguards for data transfer are available in the absence of an adequacy decision, such as binding corporate rules or standard data protection clauses adopted by the European Commission, or adopted by a supervisory authority and approved by the European Commission, in accordance with the examination procedure referred to in Article 93(2).[7] These safeguards, however, would entail additional costs to the data controller or processor who engages in the data transfer, which may not be practical in many, if not most, situations. Given the vast number of transfers involved, the adequacy decision is one of the most important decisions concerning the cross-border transfer of personal data under the GDPR. Personal protection regimes in many other countries likewise adopt the adequacy mechanism.

Under the adequacy mechanism of personal data protection regimes, a country's adequacy status would substantially impact the competitive position of its service providers supplying digital services to consumers in the EU. Foreign providers of data services may be less likely to own local data infrastructures.[8] Accordingly, services and service providers, if located in a country that does not receive adequate decisions, would be put at a competitive disadvantage against those in a country that does. Therefore, the adequacy determination process has serious consequences and is critical in determining the EU's consistency with non-discrimination obligations under the General Agreement on Trade in Services (hereinafter "GATS"). As other data protection regimes have adopted the adequacy decision mechanism, this issue is not only limited to the EU but also relevant to similar data regulatory regimes.

This article focuses on the most-favoured-nation (hereinafter "MFN") obligation under the GATS and the likeness analysis required for a panel to determine the MFN conformity of the adequacy decisions under the GDPR. The likeness is required before a determination of discrimination can be made. This article argues that the current standard in the likeness analysis is not suitable for a review of the adequacy decision under the GDPR. Drawing on experiences from WTO cases, this paper argues that future negotiations on digital trade should establish an MFN obligation that focuses on the data regulatory regime.

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[5] *Id.* art. 44.
[6] *Id.* art. 45.
[7] *See id.* arts. 46-49.
[8] Anupam Chander, *The Internet of Things: Both Goods and Services*, 18 WORLD TRADE REV. s9, s15 (2019).

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This article is divided into seven sections. The second section discusses the legal provisions and procedure of adequacy decisions under the GDPR. The third section examines the MFN obligations under the GATS. The fourth section analyses the likeness analysis of the adequacy decision and points out the difficulty of this analysis under the current test established by the Appellate Body. The fifth section examines the non-discriminatory test developed in a different context under the WTO that would form a basis for a new approach. The sixth section examines the approach adopted in recent Regional Trade Agreements (hereinafter "RTAs"). Section VII concludes.

II. ADEQUACY DECISIONS UNDER THE GDPR

Under the GDPR, personal data are allowed to be transferred to a third country for processing only if certain conditions are satisfied.[9] The purpose of this restriction is to ensure the level of protection of natural persons provided under the GDPR is not undermined.[10] According to Article 45.1 of the GDPR, such transfer is allowed if the Commission has decided that the destination of such transfer ensures an adequate level of protection, i.e. an adequacy decision has been made by the Commission.

Article 45.2 provides the elements to be taken into account when making the adequacy decision. The elements to be taken into account by the Commission includes (a) the rule of law, respect for human rights and fundamental freedoms, relevant legislation, data protection rules and case law, effective and enforceable data subject rights and effective administrative and judicial redress for the data subjects whose personal data are being transferred;[11] (b) the existence and effective functioning of one or more independent supervisory authorities in the third country with responsibility for ensuring and enforcing compliance with the data protection rules, including adequate enforcement powers, for assisting and advising the data subjects in exercising their rights and for cooperation with the supervisory authorities of the Member States;[12] (c) the international commitments the third country or international organisation concerned has entered into, or other obligations arising from legally binding conventions or instruments as well as from its participation in multilateral or regional systems, in particular in relation to the protection of personal data.[13] The express stipulation of the elements to be considered for an adequacy decision is an improvement over the GDPR's predecessor,[14] the data protection

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[9] GDPR, art. 44.
[10] *Id.*
[11] *Id.* art. 45(2)(a).
[12] *Id.* art. 45(2)(b).
[13] *Id.* art. 45(2)(c).
[14] Paul Roth, *'Adequate Level of Data Protection' in Third Countries Post-*Schrems *and Under the General Data Protection Regulation*, 25(1) J. L. INFO. & SCI. 49, 55 (2017).

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Directive,[15] which is an improvement in the transparency of the decision. An independent European Data Protection Board would provide the Commission with opinions for the assessment of the adequacy of a third country's level of protection.[16]

Even though the GDPR provides these elements for the Commission to take into account when making adequacy decisions,[17] the decision is still a difficult and complex process characterized by uncertainty. Currently, the European Commission only recognizes fifteen jurisdictions, many of which are small in size and economic power. These jurisdictions include Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Republic of Korea, Switzerland, the United Kingdom, the United States (commercial organisations participating in the EU-US Data Privacy Framework)[18] and Uruguay.[19]

The decision may require negotiation and cooperation between authorities. Adequacy decisions are "'living' documents" that "need to be closely monitored and adopted in case of developments affecting the level of protection ensured by the third country."[20] Therefore, the adequacy status of a country may change over time.[21] Indeed, the Commission is tasked to continue to monitor the level of protection in third countries.[22] The Commission shall repeal, amend or suspend an adequacy decision if the third

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[15] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 [hereinafter Directive].

[16] GDPR, art. 70(1)(s).

[17] WP254 Adequacy Referential provides guidance to the adequacy assessment under the GDPR. *See generally Article 29 Working Party: Working Document on Adequacy Referential* (Feb. 6, 2018), https://ec.europa.eu/newsroom/article29/redirection/document/57550.

[18] The United States [hereinafter US] has been on and off the list over the years. A recent development is that the Court of Justice of the European Union (CJEU) considered that the United States did not provide adequate protection of personal data from the EU in Case C-311/18, Data Prot. Comm'r v. Facebook Ireland Ltd., ECLI:EU:C:2020:559 (July 16, 2020) [hereinafter Schrems II]. Following the Schrems II, the European Commission and the US went back to the negotiation. The US adopted Enhancing Safeguards for US Signals Intelligence Activities, 87 Fed. Reg. 62283 (Oct. 7, 2022) (to be codified at 28 C.F.R. pt. 201). The US Attorney General issued a Regulation on the Data Protection Review Court. 28 CFR Part 302. Based on the updated US law and practice, the European Commission concluded that the US ensures an adequate level of protection for personal data transferred under the EU-US Data Privacy Framework in the *Commission Implementing Decision of 10.7.2023 Pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the Adequate Level of Protection of Personal Data Under the EU-US Data Privacy Framework*, ¶ 1(7), COM (2023) 4745 final (July 10, 2023).

[19] *Adequacy Decisions*, EUR. COMM'N, https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en (last visited Sept. 7, 2023).

[20] *Communication from the Commission to the European Parliament and the Council Exchanging and Protecting Personal Data in a Globalised World*, at 8-9, COM (2017) 7 final (Jan. 10, 2017) [hereinafter *Globalised World*].

[21] Roth, *supra* note 14, at 59.

[22] GDPR, art. 45(3), (4).

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country no longer ensures an adequate level of protection.[23] As the decision takes time, however, the adequacy status of any country may not always correspond to its actual level of protection at any given moment.

Adequacy findings can be made in light of the extent of the EU's (actual or potential) commercial relations with a given third country, including (a) the existence of a free trade agreement or ongoing negotiations; (b) the extent of personal data flows from the EU, reflecting geographical and/or cultural ties; (c) the pioneering role the third country plays in the field of privacy and data protection that could serve as a model for other countries in its region; and (d) the overall political relationship with the third country in question, in particular with respect to the promotion of common values and shared objectives at international level.[24] These criteria suggest that when making adequacy decisions, the Commission takes into account considerations other than the strict level of data protection. For example, even though New Zealand's rules relating to onward transfers of information were considered not sufficient, the country still received adequacy status. It was because the Commission considered that it is unlikely that significant volumes of EU-sourced data would be transferred to third countries, taking into consideration "the geographical isolation of New Zealand from Europe, its size and the nature of its economy."[25] Political considerations could be taken into account when making adequacy decisions.[26] Whether these ambiguous criteria satisfy the non-discrimination principles and other rules under the GATS can be problematic. Due to the existence of adequacy requirements, services and service providers originating from different countries may receive differential treatments, which affect the condition of competition to the detriment of those whose countries are not considered adequate. The consistency of such adequacy requirements with non-discrimination obligations under trade rules therefore can be called into question. This paper does not argue that the EU's adequacy decisions are indeed inconsistent with its MFN obligations. Instead, this paper points out that adequacy decisions under the GDPR or personal protection regimes adopted in other countries do have serious concerns over discrimination. As the adequacy requirements under the GDPR have become a model adopted by data protection laws globally, the consistency of such rules with trade rules has become more critical.

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[23] *Id.* art. 45(5).
[24] *Globalised World*, *supra* note 20, at 8.
[25] *Opinion 11/2011 on the Level of Protection of Personal Data in New Zealand*, at 10 (Apr. 4, 2011), https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2011/wp182_en.pdf.
[26] CHRISTOPHER KUNER, TRANSBORDER DATA FLOWS AND DATA PRIVACY LAW 66 (2013) ("In practice, it can be difficult for a State or regional organization to pass judgment on a foreign regulatory system without political considerations playing some role.").

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III. LIKENESS ANALYSIS UNDER THE MFN OBLIGATIONS OF THE GATS

Restriction on data transfer across borders strongly impacts services and service providers originating from Members that do not receive an adequacy status. Therefore, for such Members, their services and service suppliers may be put at a competitive disadvantage. Even so, the inconsistency of the adequacy mechanism with trade rules under the WTO, particularly the GATS, is uncertain. One of the biggest hurdles and the resulting uncertainty for a claim of violation of MFN principles under the GATS for the disparate treatment under data protection law based on adequacy decisions is to establish a likeness between services and service suppliers originating from different Members with different statuses under the decisions.

Article II:1 of the GATS provides that for measures affecting trade in services, "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." The application of the MFN obligation does not require a specific commitment in a given service sector and requires non-discriminatory treatment to be afforded to "like services" and "like service suppliers." It is therefore an obligation that is applicable to all measures affecting trade in services.

The Appellate Body has held that the concept of "likeness" of services and service suppliers under Articles II:1 of the GATS is concerned with the competitive relationship of services and service suppliers.[27] The determination of likeness can only be made on a case-by-case basis, taking into account the specific circumstances of the particular case.[28] When analyzing likeness for services and service suppliers, the criteria for assessing "likeness" traditionally employed as analytical tools in the context of trade in goods, if relevant for assessing the competitive relationship of services and service suppliers, may also be employed, provided that they are adapted as appropriate to account for the specific characteristics of trade in services.[29] Accordingly, the Appellate Body noted that the characteristics of services and service suppliers or consumers' preferences in respect of services and service suppliers may be relevant for determining "likeness"

[27] Appellate Body Report, *Argentina — Measures Relating to Trade in Goods and Services*, ¶ 6.25, WTO Doc. WT/DS453/AB/R (adopted May 9, 2016) [hereinafter *Argentina — Financial Services* Appellate Body Report]; Rolf H. Weber & Rika Koch, *Relevance of WTO Law for Financial Services: Lessons from "Argentina-Financial Services"*, 2 SCHWEIZERISCHE ZEITSCHRIFT FÜR WIRTSCHAFTS-UND FINANZMARKTRECHT/SZW [SWISS J. FOR ECON. & FIN. MKT. LAW/SZW] 163, 169 (2017) (Ger.).

[28] *Id.* ¶ 6.26.

[29] *Id.* ¶ 6.31.

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under the GATS.[30] The Appellate Body stressed that the fundamental purpose of the comparison to be undertaken in order to determine "likeness" in the context of trade in services is to assess whether and to what extent the services and service suppliers at issue are in a competitive relationship.[31] The existence of a competitive relationship is a precondition for the subsequent analysis under the requirement of "treatment no less favourable" of whether the conditions of competition have been modified.[32]

The *Argentina — Financial Services* case is instructional for the purpose of the current discussion. In this case, the dispute concerns measures imposed by Argentina, mostly on services and service suppliers from countries that Argentina terms "countries not cooperating for tax transparency purposes. (hereinafter, non-cooperative countries)." The classification as a "cooperative" and "non-cooperative" country mainly depends on the fact that whether Argentina has access to tax information on service suppliers. The classification would determine the applicable measures that are imposed on the services or service suppliers, including tax treatment, valuation of transactions, criteria for applying deductions, measures affecting trade in reinsurance and retrocession services, measures affecting trade in financial instruments, registration requirements, and measures affecting the repatriation of investments.[33]

As the measures differentiate services and service suppliers based on their origin as a cooperative or non-cooperative country, this dispute concerns, *inter alia*, the MFN obligation under Article II:1 of the GATS. The Panel of the case found that the measures are inconsistent with GATS Article II:1. Here, the Panel did not conduct a full-fledged traditional approach of likeness analysis focusing on the competitive relationship between the services and service suppliers at issue. Doing so would have required the Panel to determine, among other factors, whether the ability of Argentina to have access to the tax information of the services and service suppliers would affect the characteristics of the services and service suppliers, as well as consumers' preferences regarding them.[34] The Panel considered that the factual situation in the present case made it "extremely difficult" to undertake such likeness analysis when taking into consideration the factor regarding the possibility of Argentina to have access to the service suppliers' tax information.[35] Indeed, here, the Panel considered that "the current circumstances make it impossible" for it "to compare relevant services and

[30] *Id.* ¶ 6.32.
[31] *Id.* ¶ 6.34.
[32] *Id.*
[33] *Id.* ¶¶ 5.1-.29.
[34] Panel Report, *Argentina — Measures Relating to Trade in Goods and Services*, ¶ 7.179, WTO Doc. WT/DS453/R (adopted May 9, 2016) [hereinafter *Argentina — Financial Services* Panel Report].
[35] *Id.* ¶ 7.184.

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service suppliers in order to evaluate relevant 'other factor(s)' in addition to their origin."[36]

The difficulty for the Panel signals the complexity and difficulty of applying a traditional GATT-like approach of likeness in the services context when the differential treatment is adopted under a regulatory regime that classifies services and service suppliers based on variants of different jurisdictions. Therefore, the Panel's reasoning in determining the element of likeness is that the likeness can be presumed in this case because the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is "due to origin".[37] For the Panel, it was sufficient to establish likeness for the measures at issue. Argentina appealed the Panel's decision.

When reviewing the Panel's decision, the Appellate Body noted that "likeness" indeed may be presumed where the complainant demonstrates that the measure at issue makes a distinction between services and service suppliers based exclusively on origin.[38] The Appellate Body termed this as the "presumption approach", and there is no need to conduct a likeness analysis under this approach.[39] However, the Appellate Body pointed out that the Panel did not make a finding that the distinction in the measures at issue is "based exclusively on origin".[40] Indeed, the Panel actually found that the classification of a country as cooperative or non-cooperative is not based on "origin *per se*", but on "the regulatory framework inextricably linked to such origin".[41] The differential treatment in the case was not really based on the origin, but was based on the outcome of a regulatory regime that caused the difference in possibility for Argentina to have access to the tax information and that differentiates these two groups of countries.[42] Without a finding of distinction based exclusively on origin, the Appellate Body held that the Panel should not have made the presumption of likeness. Instead, the Panel should have undertaken an analysis of "likeness" and considered various criteria relevant for an assessment of the competitive relationship between the services and service suppliers of cooperative and non-cooperative countries.[43]

Under the presumption approach, the Appellate Body would require that a claimant should bear the burden of proving that the measure at issue is based exclusively on origin. As the classification based on the regulatory regime of the country where the supplier is situated is not considered based

[36] *Id.*
[37] *Id.* ¶ 7.166.
[38] *Argentina — Financial Services* Appellate Body Report, *supra* note 27, ¶ 6.52.
[39] *Id.* ¶ 6.35.
[40] *Id.* ¶ 6.60.
[41] *Argentina — Financial Services* Panel Report, *supra* note 34, ¶ 7.166.
[42] *Id.*
[43] *Argentina — Financial Services* Appellate Body Report, *supra* note 27, ¶ 6.61.

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on "origin *per se*", the claimant's burden of proof would be very difficult to overcome. Here, under the traditional likeness analysis, the claimant would have to show that the possibility of access to tax information on foreign suppliers would *not* have an impact on the competitive relationship to the level that the services and service suppliers at issue are like. This is a difficult task, which is the reason that the Panel avoided it in the first place. This task cannot be avoided if the Panel choose to conduct a likeness analysis, instead of the presumption approach, as it is the burden of the claimant to demonstrate likeness between the services or service suppliers situated in countries belonging to different classification under the regulatory regime.

This case demonstrates the particular difficulty of likeness analysis under the GATS in such a context. The factors that led to differential treatments of services and service suppliers under the measures at issue might or might not affect the likeness between the services and service suppliers. The difficulty shows the limit of the traditional likeness analysis in this type of situation. There is an inherent difficulty for the traditional likeness analysis to determine the consistency of a measure that distinguishes services or service suppliers based on the regulatory regime of the origin of the services or service suppliers. The panel's task under the current test is complicated and difficult. In addition, the claimant's burden of proof is a serious hurdle that may make its rights to non-discriminatory treatment elusive.

IV. THE ADEQUACY DECISION AND LIKENESS ANALYSIS OF THE NON-DISCRIMINATORY OBLIGATIONS UNDER THE GATS

Depending on how the service is provided, trade in services might be affected by a limitation on the transfer of personal data. Adequacy decisions under the GDPR, if other conditions are not met, could determine whether personal data can be transferred to a certain country, which may affect the competitive conditions of services and service suppliers originating from different countries.[44] For example, for data storage services, a prohibition on the transfer of data to the country where the server of the service provider is located could arguably hinder its supply of services under Mode I.[45]

[44] *See* Crosby, *supra* note 3, at 8.

[45] It should be noted that personal data may be stored in a server located in a location that is different from the service suppliers. For example, data processing services could be provided by a company of country A to consumers of country B through servers located either in country A, country B, or country C. The adequacy status of country A may or may not result in discrimination against service providers of country A. *See* Chen Tsai-fang (陳在方), *Tsung Fuwu Mauyitzyouhua Jiaudu Luen Tz liau Tzai Di Hua Tsuoshr* (從服務貿易自由化角度論資料在地化措施) [*Discussing Data Localization Measures from the Perspective of Service Trade Liberalization*], *in* DI SHR CHI JIE GUOJI JINGMAU FASHIUE FAJAN SHIUESHU YANTAU HUEI LUENWEN JI (第十七屆國際經貿法學發展學術研討會論文集) [PROCEEDINGS OF THE 17TH ACADEMIC SEMINAR ON THE DEVELOPMENT

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Competitive conditions between service suppliers located in countries with different adequacy status could be disrupted under the GDPR. In this regard, there are situations where adequacy decisions might violate MFN principles under Article II:1 of the GATS. Accordingly, a WTO Member who does not receive adequacy status might argue that its services or service suppliers are discriminated against vis-à-vis services or service suppliers originating from a jurisdiction where adequacy status has been granted.[46] To deal with this claim, a panel would have to determine that whether services and service suppliers originating from jurisdictions with different adequacy status are "like".

The mechanism of adequacy decision works similarly to the measures in the *Argentina — Financial Services* in that they both distinguish different jurisdictions and provide differential treatment to services and services supplies based on the classification. Under the GDPR, whether the transfer of personal data to a particular jurisdiction is allowed depends on the adequacy status of the destination. In this context, the differential treatment between services and service suppliers is "due to origin" but is not "based exclusively on origin".[47] Similarly, here, the classification of a country as adequacy or non-adequacy is not based on "origin *per se*", but on "the regulatory framework inextricably linked to such origin."[48] Accordingly, even though the mechanism of adequacy decisions distinguishes services and service suppliers based on their origin, the situations here do not support a presumption of likeness. A likeness analysis is still required. For the purpose of the article, we assume that there is nothing specific that would undermine likeness between services or service providers in question other than the level of protection of personal data. Under the likeness analysis, it is the claimant that should demonstrate the likeness between the services or service suppliers situated in countries belonging to different classifications despite various levels of protection for personal data. If the *prima facie* case was made, it is then for the respondent to demonstrate the lack of likeness between the services or service suppliers due to various levels of protection for personal data of their origins.

Identical services and service suppliers originating from different jurisdictions with various levels of protection for personal data could be unlike if the consumer preferences are indeed clear and strong enough due

OF INTERNATIONAL ECONOMIC AND TRADE LAW] 7, 43-45 (Yang Guanghua (楊光華) ed., 2017). This paper focuses on the simpler situation of data storage services to address the issue of likeness. For services such as data processing services, a determination of most-favoured-nation [hereinafter MFN] violation would entail more complicated analysis.

[46] *See* Kristina Irion et al., *Trade and Privacy: Complicated Bedfellows? How to Achieve Data Protection-Proof Free Trade Agreements*, IVIR 30 (July 13, 2016), https://www.s2bnetwork.org/wp-content/uploads/2015/09/dp_and_trade_web.pdf.

[47] *Id.* at 29.

[48] *Argentina — Financial Services* Panel Report, *supra* note 34, ¶ 7.166.

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to this factor. However, this determination has to be made based on consumer preferences with regard to the safety characteristics of the services or the service suppliers themselves. It should not simply be made based on whether the origin of the services or the service suppliers have received the adequacy decisions. Otherwise, a country could easily manipulate the status of the origin of the services or service suppliers in order to affect the outcome of the likeness analysis.[49] In this regard, the adequacy decision is like a label that affects consumer preferences, the effect of which should be separated from the likeness analysis. Accordingly, the label that a Member puts on the origin of the services and service suppliers should not be considered as the factor for likeness determination.

Services and service suppliers from different jurisdictions could be like in every other regard, but different levels of protection could mean that the possibility for the occurrence of a breach of personal data can be different, and the remedies available against the breach can also be different. In this regard, if consumers consider this difference to be important, there is a possibility that it could render the services and service suppliers unlike. It is a difficult task for both the claimant and the respondent, and the allocation of the burden of proof would dictate the outcome of the case.

In addition, this analysis involves complex factual analysis, which was the reason that the Panel in *Argentina — Financial Services* tried to avoid this step. It is a difficult and time-consuming process that a panel is ill-suited to perform. A panel would need to determine the level of protection of personal data of the exporting countries involved, and whether the difference is indeed so significant that could render the services or service suppliers unlike. As noted, a panel tasked to compare services and service suppliers based on their respective levels of protection should not simply rely on adequacy decisions made by the importing Member but may need to conduct its own process of adequacy decisions. However, WTO panels are not well suited to make such determinations.

The design, structure, and implementation of the process of making adequacy decisions in personal protection regimes may lead to decisions that are not always accurately reflect the level of personal data protection in different jurisdictions, which could result in discrimination. The adequacy decision itself does not necessarily represent the actual level of protection for personal data of a given jurisdiction. Even assuming that services and service suppliers originating from different jurisdictions with various levels

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[49] The Appellate Body recognized that actual consumer demand may be influenced by regulatory barriers or other measures, and latent demand should be examined. Appellate Body Report, *Korea — Taxes on Alcoholic Beverages*, ¶¶ 115, 123, WTO Doc. WT/DS75/AB/R, WT/DS84/AB/R (adopted Feb. 17, 1999). It may be highly relevant to examine such latent demand that is suppressed by regulatory barriers. Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 123, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001). The author would like to thank the anonymous reviewer for raising this point.

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of protection for personal data are not "like" if the consumer preferences are indeed sufficiently clear and strong regarding this issue, the level of protection for personal data of a given country may not always correspond perfectly with its status of adequacy from the perspective of the EU. It is especially true when the adequacy decision is a complicated and time-consuming process, which suggests that the status may not always reflect the true level of protection with regard to personal data. It is also because the Commission may take into consideration some criteria that are beyond the actual level of protection.[50] In addition, the level of protection is a matter of degree, and a binary decision of adequacy is not capable of reflecting various levels of protection. Accordingly, the traditional likeness analysis that focuses on the comparison of services and service suppliers in question is not suitable for the situation where the differential treatment is a result of adequacy decisions. Here, the appropriate focus of the review should be the source of the differential treatment: the regime that differentiates the services and service suppliers.

Under the current provisions of the GATS, the personal data protection regulatory regime could still become the focus of review if the WTO Member adopting the measure is forced to justify the measure through exceptions. Article XIV of the GATS prescribes that the measure found inconsistent with the obligations under the GATS can be justified if the measure satisfies the elements under the subparagraphs of the Article and is "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail", among other elements contained in the chapeau. This would be a channel where the non-discriminatory requirement could be imposed on the regulatory regime. However, to get to this stage, the claimant must first prove that its services and service suppliers at issue are discriminated against, which would require a likeness determination, with all the difficulties entailed as discussed above.

The traditional likeness analysis may have an appeal to adopt a unifying method, but it may not be an appropriate tool for the likeness analysis under a situation that involves differential treatment based on different regulatory regimes. Recourse to the MFN obligation that focuses on the non-discriminatory treatment of the services involved is a roundabout way to deal with the measure themselves and the externalities such measures cause. Instead of focusing on the relationships between the services or service suppliers, an approach that focuses on the design, structure, and process of the regulatory regime may be a better way to determine the consistency with the non-discriminatory obligations under the multilateral trading rules.

[50] *See Globalised World*, *supra* note 20, at 8.

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Below the paper will explore the insights of *EC — Tariff Preferences* case[51] that provides a direction for this issue.

V. LESSONS FROM THE JURISPRUDENCE OF THE ENABLING CLAUSE

The Appellate Body's understanding of the concept of non-discrimination in the case of *EC — Tariff Preferences* is instructional here. In the case, the challenged measure is the European Communities' scheme of generalized tariff preferences for developing countries and economies in transitions, which provides five different tariff preference arrangements. Under one of the arrangements, the Drug Arrangements, greater tariff reductions were granted to twelve beneficiary countries. As this measure is inconsistent with the MFN principle under Article I:1 of the GATT 1994, the issue here is whether the measure at issue can be justified by the Enabling Clause.

According to footnote 3 to paragraph 2(a) of the Enabling Clause, a preferential tariff treatment has to be "non-discriminatory" for it to be justified.[52] The Appellate Body considered that the term "non-discriminatory" in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different General System of Preference (hereinafter "GSP") beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause.[53] In granting such differential tariff treatment, however, the Appellate Body stressed that preference-granting countries are required, by virtue of the term "nondiscriminatory", to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the "development, financial and trade needs" to which the treatment in question is intended to respond, as required under the Enabling Clause.[54]

It is an approach that focuses on the regulatory regime's treatment of the origin, instead of the relationship between different products. The relevant provision of the Enabling Clause permits this approach because its texts do not focus on individual products or services. This moves the object of review from individual products to the regulatory regime itself, which is more on point. The GSP scheme at issue does not focus itself on individual products, and the object of the review should be set accordingly.

It is also the case for the adequacy decisions under the GDPR. At the level of adequacy decisions, the personal data protection rules focus on

[51] Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc. WT/DS246/AB/R (adopted Apr. 20, 2004).
[52] *Id.* ¶ 146.
[53] *Id.* ¶ 173.
[54] *Id.*

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regulatory regimes of each country subject to the decision, not specific service or individual service providers. The impact of the decision will fall on all services the supply of which would depend on data transfer to the country the service supplier situated. A review that focuses on the adequacy decision itself is needed to ensure non-discriminatory treatment. A sporadic review based on a comparison between specific services and individual service suppliers is not going to cut it. The traditional method cannot ensure sufficient protection due to its whack-a-mole character. In addition, huge resources would be wasted on the evaluation of the various levels of data protection of the origin of the services and a determination of whether the difference in the level of protection for personal data would affect the likeness of the services and service suppliers at issue. A new approach is therefore needed.

VI. THE MFN OBLIGATION FOR PERSONAL DATA PROTECTION REGIME IN REGIONAL TRADE AGREEMENTS

The traditional approach focused on the comparison between specific services and service suppliers is limited and difficult to apply when a personal data protection regime is the cause of the potential discriminatory treatment of services and service suppliers. However, the current texts under the GATS restrict the possibility of a shift of the focus on the regulatory regime itself. The MFN obligation under the GATS does not prescribe a regime-focused review. While the data flow is critical for the supply of services related to digital trade, GATS itself does not provide any obligation that limits the restriction of data flow. It would not be feasible for the MFN provision to include a direct focus on personal data protection measures under the current texts of the GATS.

In light of the limit of the GATS provision, facing the difficulty in the multilateral negotiations, some WTO Members seek to deal with the issue in regional trade agreements. Through RTAs, some countries have established rules that provide direct regulation on restrictions on data transfer. RTAs such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter "CPTPP"),[55] the United States-Mexico-Canada Agreement,[56] and Agreement Between the United States of America and

[55] Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 14.11.2, Mar. 8, 2018, https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56101/Part/I-56101-080000028056a333.pdf [hereinafter CPTPP] (providing that "Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.").

[56] United States-Mexico-Canada Agreement art. 19.11.1, Nov. 30, 2018, 57 I.L.M. 1152 [hereinafter USMCA] (providing that "No Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means if this activity is for the conduct of the business of a covered person.").

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Japan Concerning Digital Trade,[57] and the Digital Economy Partnership Agreement[58] has provided direction obligation that ensures cross-border data flow. Certainly, as the EU is not a party to these RTAs, GDPR is not subject to these rules.[59] They are nonetheless an important indication that could influence the direction of future trade rules, such as the WTO electronic commerce negotiations under the Joint Statement Initiative on Electronic Commerce (hereinafter "JSI").[60] The negotiators of these RTAs do not choose to impose non-discriminatory obligations on personal data protection regimes directly.[61] Recognizing the importance of cross-border data transfer in digital trade, these RTAs provide an obligation to ensure free cross-border data flow.[62] A personal data protection law restricting cross-border data flow would then need to be justified under an exception that would require, among others, that the measure does not constitute discrimination. This approach is different from the GATS in that there is no need to prove likeness and discrimination in the first place.[63] Therefore, this

[57] Agreement Between the United States of America and Japan Concerning Digital Trade art. 11.1, Oct. 7, 2019, 1 USC. 113 (providing that "Neither Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means, if this activity is for the conduct of the business of a covered person.") [hereinafter U.S.-Japan Digital Trade Agreement].
[58] Digital Economy Partnership Agreement art. 4.3.2, June 11, 2020, http://www.sice.oas.org/trade/DEPA/DEPA_Text_e.pdf [hereinafter DEPA] (providing that "Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.").
[59] In recent Regional Trade Agreements [RTAs], EU's approach to cross-border data flows and personal data protection is to establish an obligation not to restrict cross-border data flows by requiring data localization measures, and at the same time to ensure the right to adopt or maintain measures to ensure the protection of personal data and privacy. Free Trade Agreement Between the European Union and New Zealand, July 9, 2023, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en; Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part arts. 201-02, Dec. 30, 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.149.0 1.0010.01.ENG; *see also* Mira Burri, *The Impact of Digitalization on Global Trade Law*, 24 GER. L.J. 551, 569-70 (2023).
[60] World Trade Organization, *Joint Statement on Electronic Commerce*, WTO Doc. WT/L/1056 (Jan. 25, 2019).
[61] Article 14.8.3 of the CPTPP provides a soft approach on the non-discriminatory practices of personal information protection laws, CPTPP, *supra* note 55, art. 14.8.3 (providing that "Each Party shall endeavour to adopt non-discriminatory practices in protecting users of electronic commerce from personal information protection violations occurring within its jurisdiction."). Similar provision can be found at Article 19.8.4 of the USMCA, USMCA, *supra* note 56, art. 19.8.4; and Article 11.2(a) of the US-Japan Digital Trade Agreement, US-Japan Digital Trade Agreement *supra* note 57, art. 11.2(a); Article 4.2.4 of the DEPA provides a harder obligation by providing "Each Party shall adopt non-discriminatory practices in protecting users of electronic commerce from personal information protection violations occurring within its jurisdiction.", DEPA, *supra* note 58, art. 4.2.4. The point of these rules is encouragement or requirement for parties to provide protection for users of electronic commerce and do not, at least not explicitly, impose non-discriminatory obligations on cross-border data transfer.
[62] Andrew D. Mitchell & Neha Mishra, *WTO Law and Cross-Border Data Flows: An Unfinished Agenda*, *in* BIG DATA AND GLOBAL TRADE LAW 102 (Mira Burri ed., 2021).
[63] *See* Article 14.11.3(a) of the CPTPP, CPTPP, *supra* note 55, art. 14.11.3(a): providing that

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approach adopted in these RTAs ensures personal data protection regimes are non-discriminatory.

Article 14.11.3(a) of the CPTPP, for example, provides that:

> Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure . . . is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade . . . .

The exceptions to the cross-border data flow are modeled to the chapeau of the general exceptions under GATT and GATS. Under the current interpretation of these provisions under the WTO, which an interpretation of the FTA provisions could seek guidance from,[64] these exceptions that are currently provided under the FTAs, together with a prohibition to restrict cross-border data flow, are sufficient to ensure the personal data protection regimes would be consistent with the MFN principle. The Appellate Body has held that whether a measure is applied in a particular manner "can most often be discerned from the design, the architecture, and the revealing structure of a measure."[65] This review of the design, the architecture, and revealing structure of a measure to determine whether its actual or expected application would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail would involve "a consideration of 'both substantive and procedural requirements' under the measure at issue."[66]

The Panel of *Argentina — Financial Services* adopted such a review. The Panel found that some of the measures at issue could not be justified under the Chapeau of Article XIV of the GATS as they constituted arbitrary and unjustifiable discrimination.[67] Under the measures at issue, jurisdictions

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> Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure . . . is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade . . . .

For similar provisions, see also Article 19.11.2(a) of the USMCA, USMCA, *supra* note 56, art. 19.11.2(a), and Article 4.3.3 of the DEPA, DEPA, *supra* note 58, art. 4.3.3.

[64] Shin-yi Peng & Han-wei Liu, *The Legality of Data Residency Requirements: How Can the Trans-Pacific Partnership Help?*, 51(2) J. WORLD TRADE 183, 196 (2017).

[65] Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.302, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014).

[66] *Id.*

[67] *Argentina — Financial Services* Panel Report, *supra* note 34, ¶ 7.762.

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in similar situations, as regards the regulatory regime's stated objectives, are placed in different categories.[68] Such application of the exception could be effective in ensuring a non-discriminatory data protection regime associated with the concerns of adequacy decisions.

Due to the limitation of the traditional approach focused on the comparison between specific services and service suppliers, this paper argues that, in order to ensure non-discriminatory obligations are observed by personal data protection regulatory regimes, rules should be developed to include a requirement on the design, structure, and the process of the personal data protection regime with regard to its conformity with the MFN obligation. It could be an exception to a cross-border data flow requirement discussed above. The WTO electronic commerce negotiations under JSI[69] that are currently underway should include this new focus on the data protection regime, which would lead to improvement over the current GATS. This paper argues that the JSI outcome includes a requirement that could ensure such regimes that would be consistent with the MFN principle.

There have been some views from JSI negotiators that dispute the need to include a commitment to ensuring cross-border data flows to facilitate trade in the digital economy. Scholars have also called for modesty in regulating data and restraint from foreclosing regulatory space in the governance of data.[70] There is therefore reason to explore options other than an agreement on an obligation to ensure cross-border data flow. This paper argues that if the negotiators cannot agree on a general commitment to cross-border data flow, a standalone MFN obligation for the personal data protection regime should be included. Here it would be an obligation and not an exception if there is no consensus on the inclusion of a general commitment to cross-border flow. When a Party to the outcome of the JSI negotiations adopts a measure that provides favorable treatment to some of the foreign services or service suppliers, and the availability of the favorable treatment is inextricably linked to the regulatory regime adopted by the origin of the services and service suppliers at issue, the measure should be at the heart of the MFN inquiry. On the one hand, if the claimant could establish that the design, structure, and process of the regulatory scheme constitutes discrimination, there should be a violation of the MFN

[68] *Id.* ¶ 7.761. The Appellate Body has held that discrimination is arbitrary or unjustifiable if "it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX [of the GATT], or goes against that objective." Appellate Body Report, *Brazil — Measures Affecting Imports of Retreated Tyres*, ¶ 232, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007). In adopting the Appellate Body's approach in *Brazil — Retreated Tyres* to the GATS, the panel considered that the application of the measure at issue is "counterproductive with regard to the objective" Argentina itself declared in order to justify the distinction. *Argentina — Financial Services* Panel Report, *supra* note 34, ¶ 7.761.

[69] Joint Statement on Electronic Commerce, *supra* note 60.

[70] Gregory Shaffer, *Trade Law in a Data-Driven Economy: The Need for Modesty and Resilience*, 20 WORLD TRADE REV. 259, 280 (2021).

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obligation, and no traditional likeness analysis is required. On the other hand, if the importing Party could ensure that the design, structure, and process of the regulatory scheme satisfies the requirement of non-discrimination, there should be no violation of the MFN principle.

Under this obligation, a judicial review focusing on the regulatory design, structure, and process of the adequacy decision could be developed. For a regulatory regime to be non-discriminatory, identical treatment should be available to all similarly-situated WTO Members, according to the rules provided by the Appellate Body in *EC — Tariff Preferences*. As long as all Parties that meet the requirements of the regulatory objectives receive the same treatment, non-discriminatory requirements should be considered satisfied. Under this approach, for the adequacy decision under the GDPR to satisfy the non-discriminatory requirement, it should ensure that adequacy status should be available to all WTO Members that achieve the level of protection under the GDPR. If the services or service suppliers are located in a country that can achieve the GDPR requirement, but cannot receive the adequacy status, the regulatory classification is not meaningfully different from a distinction solely based on origin, and it should lead to the same result as the presumption approach under GATS, as this would create discrimination between Parties who could achieve the required level of protection under the GDPR. In addition, the regulatory process should also ensure that Parties that do not meet the required level of protection should not receive preferential treatment. Otherwise, it could similarly create discrimination between the Parties who do not meet the required level of protection under the GDPR.

This paper does not argue that the EU's practice of adequacy decisions would be inconsistent with the rules proposed by this paper. As discussed earlier in the paper, the Commission may take into account considerations other than the strict level of data protection in its adequacy determinations. Political considerations could also be taken into account when making the adequacy decisions. These do not necessarily mean that the regulatory regime would violate the proposed rules. EU, however, should ensure that the design, structure, and process of its regulatory scheme of adequacy determinations satisfies the requirement of non-discrimination. It also means that similarly situated Members in terms of the level of protection for personal data should be able to receive the same treatment under the GDPR.

VII. CONCLUDING REMARKS

Under the GDPR, cross-border transfer of personal data would in large part depend on whether the personal data protection regime in the destination country is considered to ensure an adequate level of protection. The adequacy status of a country would have a strong impact on the competitive

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position of its service providers supplying digital services to consumers in the EU. The process for the adequacy determination is therefore critical in determining the EU's consistency with non-discrimination obligations under the GATS.

The traditional likeness analysis is a difficult tool for a panel reviewing the consistency of the GDPR with the MFN obligation. A panel would need to ascertain the level of protection of personal data of the exporting countries at issue and to determine whether the difference is so significant that would render the services or service suppliers unlike from the perspective of consumer preferences. A panel tasked to compare services and service suppliers based on their respective levels of protection cannot rely on adequacy decisions made by the importing Member but may need to conduct its own process of adequacy decisions. However, WTO panels are not well suited to make such determinations.

Recent FTAs adopted a different approach that may solve some of these major problems under the GATS, i.e., the costs and uncertainties associated with the issues regarding whether non-discrimination obligations and necessity tests even apply to data protection measures. Under such FTAs, evaluations of data personal measures go straight to the non-discrimination test. It is more straightforward and cost-effective and future trade negotiations should consider this approach. Instead of focusing on the relationships between the services or service suppliers, this approach focuses on the non-discrimination obligation of the data protection regimes. However, the approach raises the issue of how to determine the inconsistency with the obligation. Considering the jurisprudence of the WTO, this paper argues that the JSI negotiations should adopt an MFN obligation that focuses on the design, structure, and process of the personal data protection regime.

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