

Trade Commitments and Data Flows: The National Security Wildcard

Reconciling Passenger Name Record Transfer Agreements and European GATS Obligations

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Abstract: This paper poses a hypothetical WTO challenge to the Passenger Name Records (PNR) Transfer Agreements the European Union has signed with the United States (as well as Australia and Canada). The focus will be on a possible citation of GATS Article XIV National Security Exception by the EU, and the viability of such a defense. Because of the absence of case law, this paper will also attempt to synthesize an acceptable standard for assessing GATS National Security Exception citations.

1. Introduction

In the aftermath of the 2001 September 11 attacks in the United States, screening arrivals to the United States became a key plank of the security strategy for a new age of terrorism. One measure which arose out of this strategy was the demand by the newly formed Department of Homeland Security (DHS) for the information on passengers arriving by air into the United States. This was the demand for ‘Passenger Name Records’ (PNR), a set of identifying data for each incoming passenger; including each individual’s name, payment details, itinerary, contact details, and baggage information. The European Union (EU), in the spirit of cooperation against terrorism, quickly agreed to an agreement for all airlines carrying passengers from the EU to the United States to transfer PNR data to the DHS (and vice versa to their European equivalent).

This development, however, did not arise in a vacuum. A culture of privacy protection had been flourishing within Europe for decades before the 9/11 attacks. The legal culmination of such developments had been the Data Protection Directive¹ (DPD) issued in 1995 as well as the creation and embrace of the EU Charter of

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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 (hereinafter Data Protection Directive).

Fundamental Rights in more recent years by member states of the EU. Under these stringent protections, a mechanism emerged prohibiting personal data from being transferred from a EU member state to external countries, unless an ‘adequacy opinion’² for that country has been issued. An ‘adequacy opinion’ issued from the commission essentially certifies that the external country’s data protection legal regime is adequate to preserve the privacy of personal data received from the EU. Notably, the United States has yet to receive an ‘adequacy opinion’ from the EU Commission.

Overlaid on top of both the EU privacy protection regime and the PNR transfer regime is General Agreement in Trade of Services (GATS). Coming into force after the Uruguay round in 1994, GATS covers the trade of services, and the appellate body of the WTO has ruled that coverage extends to services rendered electronically.³ One means through which the GATS is empowered is through the Most Favored Nation (MFN) obligation, which requires any measure favoring one WTO member to be applied to all members equally.

Since the issuance of the DPD, there have been questions of the directive’s conformity with the EU’s WTO commitments to GATS. For example, academic literature has posed a realistic challenge to the DPD based on the ‘Safe Harbor’⁴ (and imminent replacement ‘Privacy Shield’) agreement between the United States and the EU.⁵ The underlying idea of this kind of challenge is that selectively allowing data flows between the EU and countries without an ‘adequacy opinion’, based on the existence of a bilateral arrangement, is a violation of the MFN principle.

Traditionally, hypothetical WTO challenges to the DPD preventing corporations from exporting data from EU member states have focused on usage of Article XIV(3):⁶ the general exception for measures designed to protect citizen privacy. PNR transfer Agreements are a different matter. They are EU mandated transfers of data, instead of transfers restricted by EU law. Article XIV(3) is not applicable either, because a vital component of PNR Agreements is to ensure that EU PNR transferred abroad is subject to the same level of stringent protections as it would ‘domestically’. Thus, this paper will explore a different type of challenge and response – the national security exception contained in Article XIV *bis*.⁷

2 See EU Commission explanation for adequacy opinion process at: http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index_en.htm (accessed 17 December 2017).

3 Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII (hereinafter *US–Gambling*).

4 An agreement allowing American Companies to Transfer data of EU citizens back to the United States, under the condition that the American company declare to the FTC their compliance with a privacy protection regime.

5 E. Shapiro, ‘All Is Not Fair In The Privacy Trade: The Safe Harbor Agreement and the World Trade Organisation’, 71 *Fordham Law Review* (2003), 2781.

6 GATS Article XIV(3) (1994).

7 GATS Article XIV *bis* (1994).

This paper examines a hypothetical WTO challenge to the PNR transfer regime, and subsequent justification for the violation using Article XIV.

The structure of this paper is as follows: Section 2 will provide an overview of the current PNR transfer regime. Section 3 will briefly summarize the relevant WTO commitments of the EU stemming from GATS. Section 4 will explore the possible violation of GATS which PNR Agreements may constitute. Section 5 will explore justifications applicable to a hypothetical violation, and conformity of such justifications with the *Chapeau* of Article XIV.

2. Overview of PNR Agreements

For simplicity, this paper will be referring to the PNR Agreement between the United States and the EU specifically. The agreements in force between the EU and Australia⁸ or Canada⁹ are substantially similar, and analysis concerning the United States agreement can be substantially transposed.

The PNR Agreement mandates that airlines report to the DHS and the EU member state equivalent information on travel dates, itineraries, contact details, tickets, baggage, and payment information of passengers entering and leaving the EU. This information set will be collectively referred to as ‘PNR’.

They key features of the agreement are the restrictions on use of information provided to authorities. PNR may only be used relating to law enforcement or anti-terrorism actions.¹⁰ The only individuals who may access the data are DHS officials, law enforcement officials with whom the information is shared, or the individual whose PNR has been collected and sent to the DHS. Public disclosure of any data is prohibited by the agreement. Furthermore, after an initial ‘active period’, PNR data are then transferred to a dormant database for up to ten years before permanent deletion.

In brief, the PNR Agreement creates a framework of storage and use for EU-sourced personal data comparable to the legal regimes present in countries awarded an ‘adequacy opinion’ by the EU commission. Both types of data protection frameworks place heavy emphasis on secure storage of data, limiting onwards transmission, and providing recourse for EU citizens whom have had their personal data misused.

⁸ Agreement between the European Union and Australia on the Processing and Transfer of European Union-Sourced Passenger Name Record (PNR) Data by Air Carriers to the Australian Customs Service, *Official Journal L* 213, 08/08/2008 P. 0049–0057.

⁹ Agreement between the European Community and the Government of Canada on the Processing of Advance Passenger Information and Passenger Name Record Data, *Official Journal L* 082, 21/03/2006 P. 0015–0019.

¹⁰ Agreement between the United States of America and the European Union on the Use and Transfer of Passenger Name Records to the United States Department of Homeland Security, *Official Journal L* 0215, 11/08/2012 P. 5-0014 (hereinafter ‘EU–USA PNR Agreement’).

In the trade context, the main question that arises is whether these restrictive use conditions, justifying a deviation from the DPD, are a violation of GATS.

2.1 *EU and WTO commitments*

The European Union is the only supranational organization in the WTO. It has committed to trade liberalization agreements with GATS among them. In its schedule of exemptions for GATS, provision of information as a service was not included.¹¹ Therefore, the provision of information from the European Union to other WTO member is subject to the general MFN obligation. Under Article II of GATS, members are to extend to services and service suppliers of other members ‘treatment no less favorable than that accorded to services or suppliers of any other country.’¹² This amounts to a prohibition, in principle, of preferential arrangements between groups of members in individual sectors and, crucially, reciprocity provisions confining access benefits to trading partners granting similar treatment. Derogations from MFN will be the main theme of this paper.

2.2 *Other GATS commitments*

The other two specific GATS commitments of market access under Article XVI¹³ and national treatment under Article XVII¹⁴ will not be addressed in this paper. Firstly, the market access principle is not applicable because the PNR Agreement question relates to selective restrictions on the *export* of services from the EU. Secondly, the national treatment principle is not applicable because data transfer restrictions imposed by the DPD apply to any airline operating flights out of the EU; regardless of whether the airline itself is based in the EU or not. Therefore, there is no possibility of domestically based airlines receiving more favorable treatment than foreign based airlines, when all airlines must comply with the DPD restrictions and PNR Agreement induced exceptions are the same. MFN is therefore the only GATS obligation which covers the effect of PNR Agreement.

3. Are PNR transfers a ‘service’?

It must be established that airlines transferring PNR data constitutes a ‘service’ within the definition of GATS, before any hypothetical violations of GATS can be considered. This is a difficult exercise for two reasons. Firstly, the ‘service’ being rendered in this case is directed towards the United States exclusively. Secondly, the service being rendered is mandated by national government

¹¹ EU schedule of exemptions for GATS searchable in database available at: https://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm (accessed 18 December 2017).

¹² GATS Article II (1994).

¹³ GATS Article XVI (1994).

¹⁴ GATS Article XVII (1994).

instructions. Thirdly, private sector actors (the airlines carrying EU–United States journeys) are the providers of this service. On a preliminary note, it is undisputed that if PNR transfer were a service, it would be a Mode 1 service. The PNR Agreement itself stipulates clearly that the supply of information is to be a ‘push’ from the airlines to the DHS (information being affirmatively provided by the airlines).¹⁵

GATS coverage applies in principle to all service sectors, with two exceptions: air transportation services (measures affecting air traffic rights) which are irrelevant to this topic, and ‘services supplied in the exercise of government authority’.¹⁶ These are services supplied neither on a commercial basis nor in competition with other suppliers. Article 1(3) conditions appear to be cumulative. To qualify for the exception, a service sector must *both* be supplied not on a commercial basis and not in competition with other suppliers.¹⁷

The precise scope of Article 1(3) has never been well defined. The absence of disputes arising from this point obscure any real answer. Indeed, the secretariat of the WTO has declared that the absence of such disputes arising out of Article 1(3) shows there is no desire among WTO members to clarify the precise coverage of Article 1(3).¹⁸

The definition provided in Article 1(3) provides only murky contours to where GATS coverage does and does not extend. However, background notes provided by the WTO Secretariat provide some context. Considering legal services,¹⁹ the secretariat noted that the administration of justice (judges, clerks, public prosecutors etc.) is effectively excluded from the scope of GATS, as in most countries it is considered a service supplied in the ‘exercise of government authority’ according to Article 1(3). In some countries certain, notarial activities are also regarded as ‘services supplied in exercise of government authority’. For instance, with legal services related to the administration of justice. On the other hand – unlike judges, clerks, and public prosecutors – notaries often supply their services on a ‘commercial basis’, and thus are subject to the provisions of GATS.

A parallel can be drawn between the role of notaries in the legal system and airlines in supplying PNR. Although the supply of PNR is being performed for an anti-terrorism purpose, the duty to supply PNR is *derivative* on airlines first operating commercial flights in competition with other airlines to operate flights between the United States and EU member states. Therefore, it is arguable that this service is still subject to the provisions of GATS.

15 Article 8 *EU–USA PNR Agreement*.

16 GATS Article 1(3) (1994).

17 Markus Krajewski, *Public Services and the Scope of the General Agreement on Trade in Services (GATS)*, www.ciel.org/Publications/PublicServicesScope.pdf (accessed 4 December 2017).

18 *GATS – Facts and Fiction*, www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf (accessed 12 January 2017).

19 Legal Services, ‘Background Note by the Secretariat’, 6 July 1998, S/C/W/43, p. 4, No. 15.

The boundaries of Article 1(3) are blurred further by a secretariat note that makes it entirely possible for government services to co-exist in the same jurisdiction as private services.²⁰ For instance, that public and private hospitals both exist does not invalidate the government status of the public hospitals. Applied to the present scenario, that governments in the post 9/11 world frequently share private information of citizens with each other²¹ does not necessarily invalidate the ‘service’ status of airlines sharing PNR with foreign governments. In summary, there is at least a plausible case for PNR transfers by airlines to constitute a service under GATS.

3.1 Finding a GATS violation

Airlines are only permitted to transfer PNR to the security authorities (such as the United States DHS) of countries who have signed PNR Agreements with the EU. On the face of it, this seems a clear violation of GATS. For the 133 members of the WTO who have not signed PNR Agreements with the EU, personal data of the kind PNR covers cannot be transferred from the EU to third countries, because of the adequacy requirements imposed by the DPD.

Under GATS, a violation is found if a WTO member enacts measures affecting trade in services which is in violation of one of the GATS principles, for instance a measure which derogates from MFN. The threshold of analysis for determining whether a measure affects trade in services was articulated in *Canada–Autos*,²² A measure affects ‘trade in services’ if, firstly, it can be established that there is ‘trade in services’ in one of the four modes in Article 1(2) and, secondly, if the measure at issue is shown to ‘affect’ trade in services within the meaning of Article 1(1).

For ease of identification, the WTO maintains a service sectoral classification list²³ and the corresponding MFN commitments of its members to each service. The supply of PNR to the DHS would likely fall under ‘data base services’.²⁴ The European Union has agreed to fully liberalize this sector for mode 1 supply, which PNR transfer comes under, without limitations on market access or national treatment. Therefore, it is submitted that MFN analysis of the impact of PNR can be done.

20 WTO Secretariat, ‘Market Access: Unfinished Business, Post-Uruguay Round Inventory and Special Study No. 6’, Geneva, April 2001, www.wto.org/english/res_e/booksp_e/special_study_6_e.pdf (accessed 2 December 2017).

21 For instance, the ‘Five Eyes’ intelligence sharing scheme consisting of the United States, Canada, United Kingdom, New Zealand, and Australia, see <https://www.privacyend.com/five-eyes-intelligence-alliance/> (accessed 30 November 2017).

22 Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS/XIV2/AB/R, AB-2000-2 (31 May 2000) [155] (*Canada–Autos*).

23 GATS Service Sectoral Classification List (‘W/120’) and the UN Provisional Central Product Classification (‘CPC’) for categorizing activities as goods or services.

24 European Union schedule of commitments under GATS, <http://i-tip.wto.org/services/default.aspx> (accessed 15 November 2017).

Challenging a measure for violating the MFN obligation is a twostep process. Firstly, the challenger must demonstrate the likeness of the service being affected by the measure. Secondly, the challenger would have to show the EU afforded services and service suppliers of one country less favorably than another.²⁵ In *EC–Bananas III*,²⁶ it was held that a key factor for finding ‘likeness’ would be if the service allegedly discriminated against fell under the same CPC classification as the service which allegedly was not. The argument that two services were ‘like’ would be particularly strong if legislation applied uniformly to services of that type, instead of entity specific application of provisions. For instance, the DPD applies uniformly to all social media services attempting to export individualized data from the EU. It does not discriminate between Facebook, an American based company, and WeChat, a China based company.

Here, the DPD applies to all airlines flying from a EU member state who would transfer PNR to foreign government agencies. Airlines cannot transfer PNR unless a PNR Agreement was signed between the EU commission and the foreign national government. Therefore, there is prima facie a violation of the MFN principle caused by the existence of PNR Agreements. In principle, the DPD would prohibit PNR transfers to any WTO member, absent an adequacy opinion issued by the EU Commission. However, the existence of PNR Agreements seems to carve out preferential exceptions for the United States, Canada, and Australia. Thus, PNR Agreements appear to be measures which provide more favorable treatment for services and service suppliers of some WTO members than others – a violation of the MFN obligation.

4. National security justifications and the Article XIV *Chapeau*

Exceptions to commitments have been a major component of the GATS framework. It was recognized from the drafting stage that WTO members wished to maintain their ability to regulate important domestic social interests, concurrent to the drive to liberalize trade in services. Article XIV exceptions are the primary tool for maintaining such a compromise.

Suppose that the national security exception²⁷ is invoked to justify the present hypothetical violation of the MFN obligation. Suppose the EU justifies the prohibition of PNR transfer to countries which have not signed a PNR Agreement so as to prevent the ‘furnish [of] any information, the disclosure of which may affect its essential security interests’.²⁸ Article XIV(1)(a) would be a superficially potent

²⁵ Further explanation of MFN Principle at: www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed 17 December 2017).

²⁶ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 25 September 1997, DSR 1997:II, p. 591.

²⁷ GATS Article XIV(1)(a) *bis* (1994).

²⁸ *Ibid.*

tool to defang any GATS claim relating to PNR transfer measures. However, analysis of a hypothetical Article XIV *bis* citation runs into a problem: it has never been challenged before a WTO dispute resolution body. It has been suggested that a case has never arisen out of this article because WTO members wish to leave ambiguities in the contours of its coverage.²⁹ Thus, analysis of a challenge to the national security justification for PNR Agreements will instead be guided by *US–Gambling*, the only GATS Article XIV dispute, as well as by national security jurisprudence arising from the GATT.

4.1 Article XXI GATT

Article XXI (of which Article XIV *bis* of GATS shares the same language) is unique compared to other trade agreement exceptions in that it is self-declaratory³⁰. Unlike other exceptions commonly found in trade agreements, Article XXI lacks objectivity, and allows WTO members to subjectively judge and define what would be in its own ‘essential security interests’ and to take measures considered necessary to protect such interests with minimal scrutiny. Therefore, the power of review of use by another body, such as a WTO panel, is limited.

The history of Article XXI usage demonstrates a trend for flirtation with protectionist behavior. For example, in 1975 Sweden invoked Art XXI to justify a global import restriction on certain footwear. Sweden stated that a decrease in domestic production of footwear had reached the threshold of becoming a ‘critical threat to the emergency planning of its economic defense’.³¹ This broad application of Article XXI was especially problematic in light of the restrictions on use of such exceptions in Article XX of GATT (and mirrored in GATS as the Article XIV *Chapeau*). In another instance, the United States cited Article XXI in 1985 to justify measures prohibiting all imports of goods of Nicaraguan origin. Here, the United States argued that Article XXI was designed to let each WTO member judge what action was necessary for the protection of their own security interests. During the subsequent GATT panel resolution for the dispute, the United States successfully argued to preclude the issue of whether Article XXI was invoked validly from the terms of reference, because a GATT panel could, but did not have the jurisdiction to, review a WTO member’s decision to cite Article XXI.

The lesson from GATT disputes regarding national security justifications is that the coverage of the security justification is broad and WTO panel jurisdiction to address validity of its invocation is limited. The potential for abuse of GATT

²⁹ Views of Adam Golodner, Senior Counsel at law firm Arnold Porter Kaye Scholer.

³⁰ M. Woods, *GATT Article XXI’s National Security Exception – The Ultimate Trade Policy Conundrum*, www.wl-tradelaw.com/gatt-article-xxis-national-security-exception-the-ultimate-trade-policy-conundrum/ (accessed 24 November 2017).

³¹ *Ibid.*

Article XXI appears to be high, and it is seemingly reliant on political pressures to limit inappropriate use.

4.2 Requirements for GATS Article XIV Usage and Restrictions on Use

Thus far, this paper has explored the usage of security-based exceptions in the non-GATS context. Now, a standard for invoking general exceptions in the GATS context will be examined.

There has only ever been one GATS dispute where an appellate body decision was made with reference to the usage and restrictions on use of Article XIV general exceptions. In *US–Gambling*, the appellate body, somewhat surprisingly, imported the test for validity of exceptions from a GATT case: *Korea–Beef*.³² The standard for invoking exceptions essentially requires that there be no reasonably available alternative to the measure affecting trade in services pursuant to the objective. This is an objective standard. Therefore, there must first be a policy objective identified, which a WTO panel can then correlate with the measures taken.

The first PNR Agreement was created in direct response to the September 11 terrorist attacks in the United States. There was particular concern over future ‘airliner plots’ of the September 2001 type.³³ Michael Chertoff, then Secretary of the DHS emphasized that data sharing was a crucial tool in preventing terrorists from boarding planes. The pressure to create such an agreement heightened after 24 British terror suspects were arrested in 2006.³⁴ This culminated in a desire by the United States to prescreen passengers entering its borders. After a series of negotiations³⁵ and revisions, the current PNR Agreement entered into force.

Considering the general discretion afforded to citations of the national security exception in GATT,³⁶ it is likely that the first requirement of a WTO member with a national security objective is for it to be fulfilled. Objectively speaking, a brief factual analysis shows there is ‘no reasonably available alternative’³⁷ available either. The security interest of preventing further terrorist plots was diagnosed to be confrontable by prescreening passengers flying into the United States. PNR Agreements, the solution decided on, only require airlines to transmit designated categories of PNR to the United States DHS. Once received, use of the data is

32 C. L. Reyes, ‘WTO – Compliant Protection of Fundamental Rights: Lessons From the Privacy Directive’, *Melbourne Journal of International Law*, 12(1) (2001).

33 M. Chertoff, Secretary of Homeland Security, Editorial, ‘A Tool We Need to Stop the Next Airliner Plot’, *Washington Post*, 29 August 2006, at A15.

34 E. Lipton and S. Shane, ‘US Officials Say Plot Shows Need for More Sharing of Passenger Data’, *New York Times*, 15 August 2006, at A13.

35 See *EU–USA PNR Agreement* Negotiation Documents, http://ec.europa.eu/justice/data-protection/international-transfers/pnr-tftp/pnr-and-tftp_en.htm (accessed 17 December 2017).

36 GATT Article XXI Security Exceptions, www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf (accessed 17 December 2017)

37 See, *US–Gambling*.

strictly restricted by the PNR Agreement to use related to law and anti-terrorism enforcement, with a set timeline for data deletion of ten years if no threats are identified. In short, it is difficult to imagine any other reasonable alternative for screening passengers entering and exiting the United States, other than the presently chosen solution of having airlines forward the information of its passengers to their destination authorities under extremely restrictive use conditions. Such is the utility of the original United States–European Union PNR Agreement that identical agreements between the EU and Australia and Canada have also entered into force since. Furthermore, the utility of transatlantic data transfers for antiterrorism purposes has also led to enactments of other transfer programs such as the US–Data Terrorist Financing Tracking Program (TFTP),³⁸ which analyses terrorist payment messaging data to track terrorism across the globe.

Considering the wide latitude afforded to WTO members when defining security interests and protective measures in GATT, there appears to be a strong argument that an Article XIV citation was for a legitimate purpose in the present scenario. Only one obstacle remains for the EU in this hypothetical WTO challenge: conformity with Article XIV *Chapeau*.

4.3 Article XIV *Chapeau*: justification use restrictions

The *Chapeau* of Article XIV aims to ensure that exceptions invoked to justify measures affecting trade in services are not a disguised method of achieving protectionist objectives. In *US–Gambling*, the *Chapeau* was explained by the appellate body to consist of three prohibitions: firstly, arbitrary discrimination between countries where the same conditions prevail; secondly, unjustifiable discrimination between countries where the same conditions prevail; thirdly, use of a justification as a disguised restriction on international trade. These standards are cumulative in nature. In seeking to justify a measure under the *Chapeau*, a respondent would have to demonstrate both that the measure is not discriminatory on its face and that it is applied consistently as between domestic and foreign suppliers.³⁹ It was held that these facts could be established with evidence regarding the overall number of service suppliers and the patterns of enforcement.

In other words, first, a WTO panel would look for the existence of discrimination in applying the measure. Secondly, such discrimination would be examined to see if it was arbitrary or unjustifiable. Thirdly, it would be considered whether such unjustifiable or arbitrary discrimination was only occurring where ‘like conditions prevail’.⁴⁰ This three-step process for analyzing a measure has been criticized for giving WTO adjudicating bodies too much discretion when applying elements,

³⁸ EU–USA Terrorist Finance Tracing Program Agreement, http://eur-lex.europa.eu/resource.html?uri=cellar:84c098b4-275c-49d7-bbf8-73e978be1818.0016.01/DOC_2&format=PDF.

³⁹ See, *US–Gambling*.

⁴⁰ *Ibid*.

due to the lack of ‘generally applicable and abstract rules’.⁴¹ Nevertheless, as the only Article XIV dispute on record, they will be the standards applicable in the present analysis.

4.4 *Justifying Article XIV Chapeau Application to Article XIV bis*

Interestingly, it appears ambiguous within GATS whether the *Chapeau* would be applicable to Article XIV *bis*. The proviso that ‘measures are not applied in a manner which constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on trade in services’⁴² only appears above Article XIV and not XIV *bis*. Without case law for guidance, it is submitted that the rationale for the non-discriminatory requirement on measures was for it to act as a backstop to the MFN obligation. Logically, a measure cannot be ‘necessary’ to attain Article XIV objectives unless it is applied in a non-discriminatory manner against all WTO members. Hence, it is hypothesized that the reason why Article XIV *bis* did not have a *Chapeau* attached was because of the low possibility that two WTO members would simultaneously present one WTO member with an identical national security threat. Therefore, there was no pressing need in Article XIV *bis* to codify the requirement of treating all threats in an equal manner.

On the other hand, a purposeful approach to interpreting GATS would suggest that the Article XIV *Chapeau* should be applicable in the context of an Article XIV *bis* citation to defend PNR Agreements. This is because regarding terrorism and law enforcement, *all* nations in the world could potentially constitute a threat to the EU. The country of arrival or of departure of terrorists is highly variable and difficult to predict. Therefore, the *Chapeau* should be applicable in this instance because the terrorism threat that the EU is countering is theoretically universal in national origin. A measure defending against this threat would hence not be discriminatory only if it was also applied universally. On this basis, it is submitted that the Article XIV *Chapeau* can be transplanted to Article XIV *bis* analysis.

4.5 *Chapeau analysis in a claim involving Article XIV bis*

Supposing Russia, a large developed economy,⁴³ desires to bring a WTO claim against the European Union for refusing to allow PNR transfer for flights landing in Russia and originating from the EU. Russia has an evidently strong

41 T. Cottier, P. Delimatsis, and N. F. Diebold, ‘Article XIV GATS: General Exceptions’, *Max Planck Commentaries on World Trade Law, WTO – Trade In Services*, R. Wolfrum, P.-T. Stoll, and C. Feinäugle (eds.), Vol. 6, pp. 287–328, Leiden/Boston: Martinus Nijhoff Publishers (2008), SSRN: <https://ssrn.com/abstract=1280215>.

42 GATS Article XIV *Chapeau* (1994).

43 Russia is the 11th largest economy in the world. Statistics sourced from: <http://statisticstimes.com/economy/countries-by-projected-gdp.php> (accessed 30 November 2017).

interest in anti-terrorism measures, coming 10th for terrorist incidents worldwide between 2000 and 2014.⁴⁴ Russia has not signed a PNR Agreement with the EU.

Taking the first step, the PNR Agreement creates discrimination between WTO members because it limits derogations from the DPD to only those countries that have signed a PNR Agreement with the EU, thereby creating two classes of treatment (dependent on destination of airline flights) for exporting personal data out of the EU.

On to the second step, a plausible case could be made that there is unjustifiable discrimination between countries who have signed PNR Agreements with the EU and those such as Russia who have not. By enacting the DPD, the EU unilaterally applied restrictions affecting trade in services on all WTO members. Negotiations to create PNR Agreements, which partially evade these restrictions, were initially only launched with the United States, and subsequently Canada, Australia, and now Mexico.⁴⁵ This kind of discrimination resembles the type found in GATT case *US–Shrimp*,⁴⁶ where the United States also applied a unilateral restriction on trade of shrimp on all WTO members based on their compliance with environmental protection standards. There the appellate body found that giving some countries longer times than others to comply with the newly applied standards amounted to unjustifiable discrimination.⁴⁷ Similarly in the present case, favorable conditions are being granted by the EU to a select group of WTO members, through the negotiation of PNR Agreements.

Moving to the third and final requirement that ‘like conditions prevail’ where discrimination occurs, a plausible argument can also be made for a hypothetical claimant. Like the United States, Russia also has a plausibly high terrorism threat risk. Furthermore, like the United States, Russia has not been deemed to have an adequate privacy protection legal framework, having not yet been awarded an ‘adequacy opinion’ from the EU Commission. Nevertheless, despite these like conditions, the EU has not approached Russia for the creation of a PNR transfer framework. Not offering to create a PNR Agreement with Russia, or any other WTO member appears to be unjustifiable discrimination by the European Union.

In sum, an examination of the facts would show that PNR Agreements do not comply with Article XIV *Chapeau* requirements. Thus, the Article XIV justification theoretically fails when measured against existing standards, and there exists an indefensible MFN obligation violation.

⁴⁴ Database containing terrorist incidents per country, www.start.umd.edu/gtd/contact/ (accessed 30 November 2017).

⁴⁵ *Joint Statement: Beginning of Negotiations between Mexico and the European Union on PNR Data Transmission*, http://europa.eu/rapid/press-release_STATEMENT-15-5374_en.htm (accessed 17 December 2017).

⁴⁶ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 November 1998, DSR 1998:VII, p. 2755.

⁴⁷ Cottier *et al.*, ‘Article XIV GATS: General Exceptions’, *supra* n. 41.

4.6 *Rebuttal to the finding of Chapeau incompatibility*

Despite the potential incompatibility of an Article XIV *bis* justification with the Article XIV *Chapeau*, an actual finding by a WTO panel is still not necessarily guaranteed. This is for the two reasons: the unpredictability of which WTO panels have interpreted GATS exceptions, and the wide latitude afforded to these panels.

For instance, in *US–Gambling*, the appellate body imported the ‘necessity’ test from *Korea–Beef*, despite a WTO working party on domestic regulation warning against this. It is difficult to predict, especially with the dearth of Article XIV disputes, how future interpretations of the *Chapeau* could result in tightening or loosening the requirements of compliance. Moreover, national security related jurisprudence from GATT has shown that outcomes are especially unpredictable when essential security interests are involved – usually resolving in favor of the respondent.

Secondly, by not creating a general applicable standard in *US–Gambling* and insisting on a case-by-case analysis,⁴⁸ the appellate body has provided itself a wide margin of discretion in ruling Article XIV justifications incompatible. One outcome of this is an increased ability of panels to compromise between the twin aims of GATS. On one hand, there is an objective of WTO members undertaking to liberalize trade in services. On the other hand, there is also an understanding that WTO members wish to retain the ability to regulate important social interests.⁴⁹

In a hypothetical analysis of the DPD in general and its relationship with GATS, Reyes has noted it was likely that a WTO panel would exercise its discretion to not apply the *Chapeau* because doing so would force abandonment of an elaborate regulatory scheme the EU had created to protect the fundamental right of privacy.⁵⁰ A similar line of reasoning could apply to the case of PNR Agreements. Despite being technically incompatible with the *Chapeau*, the intricately constructed bilateral PNR regime should not be vulnerable to legal attack just because it technically violated GATS. This argument is further strengthened by contextual considerations. For instance, the purpose of PNR Agreements is primarily law enforcement and anti-terrorism, and the provision of ‘services’ intertwined provides negligible income to all parties involved; mandated collection and delivery of passenger data are more likely to be a burden to airlines rather than a boost.

WTO jurisprudence suggests PNR Agreements may constitute a technical violation of the EU’s MFN obligation. Jurisprudence and custom also suggest any Article XIV(1)(a) justification could possibly be incompatible with the *Chapeau*. Nevertheless, if a dispute was ever brought before a WTO or any arbitral panel, it is uncertain whether an unfavorable ruling against the EU would be made.

48 *US–Gambling*, at 122.

49 Reyes, ‘WTO – Compliant Protection of Fundamental Rights’, *supra* n. 32.

50 *Ibid.*

5. Conclusion

The DPD was a landmark construct for data protection globally. The United States–EU PNR Agreement was a first of its kind for inter-governmental sharing of data for anti-terrorism and law enforcement purposes. Combined, the two legal constructions demonstrate that the intersection of trade law and national security is likelier than ever as trade liberalization in services continues. Intuitively, the intersection of the two legal constructions also seems to produce a GATS violation due to the exclusive bilateral nature of PNR Agreements.

After all, the EU as a signatory to GATS committed to the MFN treatment of services contained within its commitments schedule. If providing passenger data sets to foreign security authorities can credibly be defined as a ‘service’ covered by GATS, then the PNR Agreement is a method of creating more favorable conditions for a WTO member than others. Article XIV *bis* may be invoked to justify the measure, yet WTO jurisprudence suggests PNR Agreements may be incompatible with the Article XIV *Chapeau*. Nevertheless, considerations of national security interest, legitimacy of the WTO system, and wider commercial insignificance of PNR Agreements mean that it is far from certain whether a panel would ever rule in favor of finding a GATS violation.

It is suggested that instead of attempting to procure a PNR Agreement from the EU by wielding a WTO shaped gun, a country should approach the matter with motivations in line with PNR Agreements’ actual purpose: law enforcement and anti-terrorism. For example, Mexico has recently begun its own negotiations for a PNR Agreement with the EU with the primary motivation stated as aiding law enforcement⁵¹ between both parties. This demonstrates the evolution of the PNR Agreement from a bespoke creation between the United States and European Union designed to be part of the package of responses to the September 11 attacks, to its current state as a model ‘off the shelf’ agreement facilitating data transfers between governments.

It is submitted that PNR Agreements are not rare because of protectionist motivations (that the GATS and the WTO are designed to remedy), but due to the difficulty in navigating the political dimensions of sharing security data between nations (which the WTO is not designed to remedy). Ultimately, PNR Agreements straddle international diplomacy and the WTO, and international diplomacy appears to be a better fit. Various non-trade based intergovernmental information sharing schemes such as the Five Eyes Intelligence Sharing Agreement⁵² and Interpol⁵³ already exist, and PNR Agreements would seem like a type of legal arrangement which comfortably falls into that basket.

⁵¹ *Joint Statement: Beginning of Negotiations between Mexico and the European Union on PNR Data Transmission*, *supra* n. 45.

⁵² *What is the Five Eyes Intelligence Pact?*, www.cnn.com/2017/05/25/world/uk-us-five-eyes-intelligence-explainer/index.html (accessed 17 December 2017).

⁵³ An international organization that serves as an administrative and information facilitating function between national police forces.