

Policy Space Conflict under GATS Art XIV: Limitation, Dilemma, and Challenge for Data Ethics in International Data Service Trade

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Abstract: This article interrogates the contested policy space under Article XIV of the General Agreement on Trade in Services (GATS) in the governance of cross-border data services. It demonstrates how the indeterminacy of the public morals and national security exceptions (Articles XIV and XIV bis) enables states to justify trade-restrictive measures that contravene the multilateral disciplines of Most-Favoured-Nation (MFN) treatment, National Treatment (NT), Domestic Regulation, and the participation rights of developing countries. Considering the RESTRICT Act and recent social media sanctions as focal examples, the article argues that ethical concerns—ranging from privacy protection to algorithmic bias and moral dilemmas in automated decision-making—are increasingly instrumentalized as neo-protectionist tools. This juridical ambiguity not only expands domestic regulatory discretion but also entrenches structural asymmetries in the digital economy, particularly between the Global North and South. Against the backdrop of a paralyzed WTO Appellate Body, the article calls for recalibrating exception clauses through clearer necessity and proportionality tests, embedding technology-neutral standards, and reinvigorating multilateral negotiations to mitigate regulatory fragmentation in the data services trade.

Keywords: GATS Article XIV; Data service trade; Policy space conflict; Neo-protectionism

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1. Introduction

This article explores the limitations and dilemmas of Article XIV of the General Agreement on Trade in Services (GATS), with which the issue of data ethics interacts^[1]. Restrictive policies will undoubtedly violate MFN, NT, Domestic Regulation and Developing Countries' Participation obligations under WTO treaties, but governments can claim to rationalize their trade-restrictive behavior and legitimize their policy by claiming to have protected the public interest under the GATS exceptions^[2]. However, the public morals and national security exceptions in GATS Article XIV and XIV bis are plagued with varying degrees of dilemmas. This, in turn, makes it difficult for

the WTO legal framework to function. It also does not allow for an effective response to the policy space challenge of the RESTRICT Act. This brings more neo-protectionism and global trade order challenges to the global trade of data services.

2. Data ethics with multiple social values and dilemmas under WTO rules

In the previous article, the author discussed the impact of ethical issues of data services on international trade and the complexity of such ethical issues mixed with politics in the case of social media sanctions. Trade-restrictive policies and laws may violate many obligations under WTO law ^[3]. Restrictions on the content of social media services lack “objective and transparent criteria” on “UNDUE or UNACCEPTABLE RISK” and violate domestic regulation in GATS Article VI (4). The provision in the RESTRICT Act that lists other countries and data service trade companies as foreign adversaries violates the trade principles of MFN in Article II, and NT in Article XVII. The sanctions that restrict other countries’ participation in the services industry chain as a developing country violate the GATS Article IV.

But governments can argue that these policies are in line with the general exceptions set out in GATS Article XIV (a) and the Security Exception in GATS Article XIV bis, further justifying the legitimacy of trade sanctions and restrictions as protecting public interests. Regarding the data protected by privacy laws, which are also provided for in Article XIV(c), there are still ethical issues arising from imported data in cross-border data flow services. There needs to be a border between legitimate public policy measures and illegitimate trade barriers. Trade law needs to be technology-neutral to avoid getting into a dilemma.

While there are positive proposals and solutions to privacy issues in national data laws and the WTO Joint Statement Initiative on Electronic Commerce (JSI) under negotiation, not much more attention has been paid to public morality and national security issues in the trade of data services ^[2]. Although there are general exception provisions in the GATS framework, it is clear that the agreements of the last century are lagging and insufficient in addressing the new issues that have arisen from the explosive growth of data technologies in recent years. Meanwhile, the standstill of the appellate body is magnifying this limitation ^[3].

3. Multiple value dilemma with GATS Article XIV(a): Is there a standard for people’s minds in the whole world?

When policies addressing data ethics involve impacts on human society, they may undermine the protected objects in GATS XIV(a). GATS Article XIV(a) divides such protected objects into two categories: public moral and public order. The two concepts do not, by definition, protect the same range of morals. Public order can be interpreted as a “fundamental interest of society.” Invoking the public order exception requires proof of a “real and sufficiently serious threat” to one of the fundamental interests of society ^[3]. Public moral, on the other hand, is an undefined term that is much broader in scope than public order. The WTO panel in US-Gambling held that “public moral and public order protect “similar values” and therefore overlap in scope ^[4]. The terminology used here reflects the fact that what is termed “public moral” protects a set of values, which mainly concern about consumer community ^[4]. In practice, the WTO has favored interpreting the meaning of public morals as a domestic value when a conflict between universal values and domestic values. In the US-Gambling tribunal decision, public morals in Article XIV(a) was “a standard judgment of what is right or wrong maintained by society or the State” ^[3]. In the trade of data services, the ethical issues raised by data services output by algorithms need to be considered as part of the

scope of “public morality”, as this falls under the protection of the values of consumers, the social order, the youth, and many other groups ^[4].

Public morality certainly needs to be protected, and the problem is that the scope of government policy space cannot be constrained. Governments have much autonomy in deciding how to define and interpret public morality and public policy. In EC-Seals, the panel identified a two-step process for assessing the public morals exception: first, whether the problem that the policy addresses actually exists in society; and second, whether it falls within the scope of “public morals” ^[5]. In many WTO tribunal cases, the resolution of the issue itself is in line with universal values, such as online gambling in the US, animal welfare in EC-Seals, and combating money laundering in Colombia-Textiles ^[5]. The problems with data ethics are even more ambiguous. In both steps themselves, it is subject to problems arising from differences in the values of its members. For example, in the case of the social media sanction, if the algorithms pushed certain content to teenagers based on user preferences, conservative parents would see this as a significant undermining of public morality. While pushing anti-abortion content to Catholic husbands would be seen by wives as oppressive to feminism ^[6]. Data ethics may also confront questions for which there are no optimal right answers to human values. In the trade market of data services, automated machines, and driverless car systems (ADS), which are already worth billions of dollars, the “collision and avoidance algorithms” of the ADS system have different conflicting values on the level of algorithmic ethics. This is because of the still-debated “Trolley Dilemma” ^[7]: should ADSs prioritize the protection of passengers in the car or innocent pedestrians on the road when faced with an emergency? Should the gender, age, status, and contribution to society influence this automatic decision? ^[8]. In a survey published in *Nature*, “The Moral Machine Experiment”, 40 million responses from 233 countries and territories revealed significant regional differences in moral judgments. In North America, young people are generally considered to have more survival value than old people, while the opposite is true in East Asia. Significant cross-cultural moral differences exist across the three country clusters ^[9].

Reflecting this in the output data, it is entirely possible that the algorithm’s decisions and influences could have resulted in the correct answers for the two opposite values. Such a judgment is highly subjective to values and too vague in scope. If all public moral dilemmas can be interpreted as “UNDUE RISK” in the RESTRICT Act, then the right to decision and ultimate interpretation will be completely reserved in the policy space of the U.S. government. Any protectionism and trade restrictions can be interpreted as countering “UNDUE RISK” in the processing of data services, thus becoming an exception to the WTO rules. Any protectionism and trade restrictions can be interpreted as “UNDUE RISK” in the processing of data services, thus becoming an exception to the WTO rules, as is often the case with modern digital trade barriers ^[10].

Returning to the discussion of the scope of public morality, previous panel rulings have favored domestic values, which are certainly conducive to the protection of domestic public morals. However, in this ambiguous issue of algorithmic ethics, state policies favoring conservatism and trade protection can also expand the scope of interpretation of public morality without limit and further expand its policy space ^[10]. In turn, this can create restrictions and sanctions on data service providers, shaping and exploiting structural pressures through expansive interpretations of policy space to create trade hegemony in data services. This is more strongly expressed in the political dimension of national security.

4. Severity dilemma with GATS XIV bis and national security: Is it essential enough for security interests or just an excuse?

In light of the cases and practice relating to Article XXI of the GATT, the application of the security exception

will not be limited to military activities, since other “periods of urgency in international relations” may also apply. The “essential security interests” in such cases are protected by Article XIV bis of GATS ^[11]. In its decision in *Russia-Traffic in Transit*, the Panel emphasized the limits of such a finding of international tension by excluding political or economic conflicts in normal circumstances unless they give rise to “Maintenance of law and public order interests” ^[12]. In practice, the terms “exigency”, “essential security interest”, and “necessary action” are the policy boundaries for the application of security exceptions. Restrictive policies for the protection of national security must satisfy a reasonable interpretation of these terms as well. These terms reflect the fact that “national security” in the context of data services can be interpreted as the protection of the national order, political situation, and policy. It is noteworthy that the panel refers to the principle of uniformity in treaty interpretation, so that “emergency in international relations” is placed under “essential security interests” along with “military service” and “war.” They are all regarded as having a significant impact on national order and policy ^[12]. In other words, the “emergency” should be of comparable gravity to the other two. In *US-Gambling*, the panel mentioned that the security exception could be interpreted by the balancing test established in the *Republic of Korea—Various Measures on Beef* and *EC-Asbestos*, whether the degree of protection and the trade effects of the policy outweigh the importance of the social interest to be protected ^[3, 13].

The problem, however, is that the seriousness of this type of “emergency” is the same as that of a state of war, but there is a lack of objective criteria for evaluating it, and the same problem applies to public order under Article XIV(a). While on the one hand, this does not present an obstacle to WTO members invoking the Article in their defense, on the other hand, countries subject to restrictive and sanctioning policies lack the means to confront them, and thus may lose further regulatory power in trade wars. This is particularly true in the case of trade in data services. It is entirely possible that national security exceptions can be turned into weapons of protectionism under a subjective test. The “which it considers” invocation requirement is too broad and vague and can be easily abused ^[13].

These situations are not enough to threaten US national security or public crisis, as the initiating organizers and influencers of these movements are American political forces, and no foreign powers have intervened through the social media algorithm, which is simply telling the people what is going on. This does not match the description of “serious harm” and “undue or unacceptable risk” in the *RESTRICT Act* ^[4]. However, the U.S. government can also directly restrict data service trade companies and other countries under the “FOREIGN ADVERSARY” and “HOLDING” (viii) catch-all clause provisions of the Act. Under the *RESTRICT ACT*, data service products from other countries can be placed under sanctions at any time, which is a serious violation of WTO trade rules (MFN&NT). However, the U.S. government can still rely on the Act to judge the degree of severity through a unilateral subjective test. Even the country’s name can be determined to be “an unacceptable and emergency risk to national security”, and argued that it was a security exception under WTO regulations to avoid free and fair trade obligations. This dissertation argues that this is a kind of new protectionism that uses the expansion of policy space as a means ^[14]. This subjective speculation and the subsequent attempt to force the sale of the social media business to Oracle are manifestations of protectionist behavior, but the broadness and vagueness of the WTO legal framework mask and justify the irrationality of such policies.

Although Article XIV of GATS has a premise that it must not constitute “arbitrary or unjustifiable discrimination or a disguised restriction on trade in services”, the vague boundaries of public morality and national security, and the subjective test can still enable the recipient of data services to form a policy space that is completely favorable to itself and protect its trade advantage and dominance ^[8]. This policy clash and expansion has been going on since 2018, with tariff wars on the pretext of intellectual property and corporate reforms ^[14]. And

now, when it comes to international trade in data services, this suppression continues, and resolving issues through the WTO platform is even more difficult. The suspension of the Appellate Body (AB) reduces the corresponding role of the dispute resolution mechanism for such issues.

5. WTO, policy space conflict, and North-South structures: Issues and challenges of neo-protectionism

Ambiguous boundaries of the rules can lead to an unfettered expansion of discretion in national policy. The WTO's multilateral trade agreements provide for the reduction of trade barriers by prescribing rules that member countries must follow to protect the principles of free trade and non-discrimination. The exceptions and flexibility are part of the principles, but would constitute the trade restriction and protection policies of member countries^[8]. There is an inherent contradiction between the WTO goal of promoting free trade and the member states' goal of obtaining more domestic benefits through policy space.

In view of the previous literature, WTO restrictions have always been seen as hindering a country's ability to implement policies tailored to its unique circumstances, particularly the expanded policy space for subsidies and tariff protection for firms by developing country governments^[13]. However, an interesting phenomenon in social media's trade restriction policy can be found. The developed country governments, such as the US and Australia, have hindered the development of other countries' trade in data services by enlarging the policy space for data ethics. But in this, national policy can always be used as a tool for profit-making and restricting free trade, especially in the parts where international rules are ambiguous. Policy space is determined by the institutionalization of the global economy and is influenced by political factors in trade relations. As a result, member states will tend to enable international rules by enabling policies that favor their interests and give them more advantages in trade. This is not a case of oppression from the global South or North to the other side of the world, but rather a structural policy space conflict between the two^[14]. The hazards of ethical issues cannot be left to the policies of one country to interpret its boundaries. It requires more objective and impartial testing, and meeting WTO non-discrimination obligations.

Looking back at the spatial conflict of policies that began in 2017 with the trade war between other countries and the United States, from the traditional forms of tariffs and subsidies on goods to the ethical constraints on data services of today, the spatial conflict of trade policies and forms of protectionism has taken on a new dimension. This category of protection policies, based on values or international issues other than trade itself, has become a form of neo-protectionism^[15]. The regulation of data (especially AI data) algorithms themselves is challenging. Transparency and accountability of algorithms that confront ethical issues lack standards. Additionally, in the abuse of domestic standards and the lack of international objective interpretations, the algorithms themselves cannot be properly addressed in the context of international data services, and protectionist policies in trade can be further exploited^[15]. The stability and prospects of trade in data services are greatly challenged by ethical issues under the influence of such trade. As trade discourse and geopolitics are contested, trade between advanced countries can further amplify irreconcilable regulatory conflicts and form preference-like conglomerates or reformist coalitions^[16].

The global trade order and the global governance of data services are also challenged by the combination of the two. If conflicting policy spaces contribute to a clear de-convergence of regional regulatory policies, the consensus on global trade governance will break down, and key players will be divided into opposing camps based on the standard of regulatory legitimacy^[17]. In this circumstance, the issue of global governance will be broken

up with the global fragmentation of the data service industry chain. Strategic interests and geopolitics will become the determining factors in the regulation of algorithms and further amplify the division between countries in the global North and South ^[18]. This will depart from the original intent of the WTO and move towards a reverse tide of globalization, and the normative foundations of the multilateral trading system will inevitably be undermined ^[13]. Indeed, the governance of ethical issues seems to have moved towards an era of separated and regional systems.

6. WTO and multilateral initiatives: A future that needs more consensus

The Joint Statement Initiative on Electronic Commerce (JSI) is seen as a positive attempt by the WTO system to address digital trade issues. While different participating countries have different preferences in terms of PTA choices and regional policies, a weak agreement is better than a deep disagreement. As the convener of the JSI has argued, leaving policy space that can accommodate the different circumstances of participating members is important to ensure the adoption of such a provision ^[19]. Such exceptions may lead to exemptions from unilateral self-judgment and trigger legal uncertainty. As in the previous critique of Article XIV of GATS, the elements of the legal test and the objective test cannot be clearly demonstrated in the WTO jurisprudence.

In the preamble of the Marrakesh Agreement, one of the objectives of the WTO is to ensure the development of the share of developing countries in international trade and to reduce various types of trade barriers ^[1]. As the era is coming, the WTO should still fulfil these roles in trade in services and better respond to the global governance and regulatory challenges. The WTO law should provide a platform that is more suitable for countries with different cultures and ideologies to communicate with each other, rather than making this governance issue more fragmented and regionalized ^[20]. If the WTO wants to play a sustained role as an international trade platform, it needs to reduce regulatory conflicts. Regulatory conflicts in policy space and neo-protectionist barriers to trade need to be countered through continuous consultation and negotiation. Ultimately, a consensus is reached in the new multilateral decision-making on data trade governance ^[19]. A new round of multilateral negotiations or ministerial meetings is needed to consider standards and space for exceptions on ethics in international trade. Reconciling this type of economic interests and values dilemma, which is deeply intertwined with politics, also requires consideration of the WTO's DSM role in conjunction with multilateral initiatives. There is a need for greater regulation and cooperation in efforts to improve trade law in data services, but there must also be sufficient safeguards to protect non-economic interests and ethical values issues ^[20].

7. Conclusion

Analysis indicates that the framework established under Articles XIV and XIV bis of the current GATS struggles to strike a balance between legitimate public interests and the necessity for non-discriminatory trade in data services. Whilst public morality, national security, and privacy protection remain core policy objectives, their ambiguous definitions and subjective review standards have created fertile ground for new protectionism and structural policy conflicts, particularly manifesting in the polarization between global North and South nations. The Restrictive Bill exemplifies how expansive interpretations of “undue risk” and “essential security interests” can serve as pretexts for trade restrictions that undermine core WTO values such as most-favored-nation treatment and non-discrimination. This not only erodes the global digital trade order but may also consolidate hegemonic influence over data flows, algorithms, and emerging technologies. A sustainable development pathway requires establishing clearer legal boundaries, enhancing transparency in national measures, and strengthening multilateral

cooperation. Though imperfect, the Joint Statement on E-commerce offers a platform for reconciling divergent values and establishing more predictable data services governance mechanisms. Failure to advance reforms balancing regulatory flexibility with accountability risks further eroding the WTO's normative authority. The ultimate challenge lies in reconciling ethics, security, and trade liberalization within a rules system compatible with diverse cultural and political contexts.

Disclosure statement

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