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Are Data Privacy Laws Trade Barriers?

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Svetlana Yakovleva, *Privacy Protection(ism): The Latest Wave of Trade Constraints on Regulatory Autonomy*, 74 **U. Miami. L. Rev.** 416 (2020).

What distinguishes data protection (that is, legitimate privacy law) from data protectionism (arguably a barrier to trade)? Whether a country can use its domestic privacy laws to either *de jure* or *de facto* require a company to keep citizens' personal data within that country's borders is a significant point of international contention right now, especially between the United States and the European Union. In July, the Court of Justice of the EU invalidated (again) the *sui generis* mechanism for cross-border personal data transfers between the European Union and the United States (the "Privacy Shield"). The Court's "Schrems II" decision makes it all the more likely that the United States will attempt to revisit the matter through strategic free trade agreement negotiations—and makes Svetlana Yakovleva's *Privacy Protection(ism): The Latest Wave of Trade Constraints on Regulatory Autonomy* all the more timely and important.

Yakovleva observes that in recent free trade agreement negotiations, including at the World Trade Organization (WTO), the United States has pushed to characterize restraints on cross-border data flows as a protectionist trade measure, while the European Union, by contrast, has largely advocated for national regulatory autonomy. The outcome of this conflict over purported "digital protectionism" will have practical ramifications for transnational companies that regularly deal in cross-border data flows. It will also have serious theoretical consequences for ongoing and familiar discussions of how transnational law might bridge—or override—deep domestic regulatory divides. Yakovleva nimbly weaves together a history of the term "protectionism," Foucauldian discourse theory, and the minute details of recent free trade agreement negotiations to provide an authoritative account of what exactly is at stake. Her big contribution is to tell us all to watch our language: one person's "digital protectionism" can be another's "fundamental right."

Yakovleva opens with a broad discussion of the history of the term "protectionism" as it has been used in free trade policy and law, noting the term's changing meanings at different times and in different institutions. She starts here in order to make the central point that meanings are not static; they're very much constructed, contested, and chosen. The notion of "free trade" was first developed in direct contrast to the once-dominant theory of mercantilism, a strict form of protectionism which counseled "restricting imports, promoting domestic industries, and maintaining self-sufficiency from other countries." (P. 436.) By contrast, neoclassical free trade theory rested on the concept of comparative advantage: that barriers to trade inefficiently prevent countries from increasing domestic welfare by exchanging goods they can each more efficiently produce.

This history would appear to place protectionism strongly in opposition to fundamental principles of free trade. However, early understandings of protectionism were narrow, focusing on tariffs or quotas on imports, and closely associated with political nationalism. Yakovleva explains that when the General Agreement on Tariffs and Trade (GATT 1947) was signed in 1947, "protectionism" was already a contested term, with the United States blaming trade distortions for the Great Depression and Second World War, and the United Kingdom instead emphasizing "the boundaries that the international trade regime should not cross in relation to domestic policies affecting trade." (P. 439.) The compromise was GATT 1947's "embedded liberalism," which according to Yakovleva made liberalization not a "goal in itself" but "a component of a broader societal goal of maintaining economic stability." (P. 441.) Practically, this meant that only *intentional* protectionism qualified as protectionism under the GATT 1947 regime, and domestic regulations with a *de facto* impact on trade, but not motivated by protectionist intent, largely went unchallenged.

Starting, however, in the 1970s, "new protectionism" was understood to encompass a variety of non-tariff barriers to trade, including domestic policies aimed at quelling growing unemployment. Yakovleva explains that these were precisely the domestic policies that had been deemed legitimate under "embedded liberalism." At the same time, developed countries, including the United States, began advancing a counter-narrative of "fair trade," working towards a goal of using international trade law to harmonize a number of domestic regulatory frameworks and thus eliminate "unfair" advantages held by less-regulated developing countries.

By the time the WTO was established in 1994, neoliberal norms had largely (though not exclusively) prevailed. Yakovleva writes that "[t]he main goal of the international trading system… was no longer 'embedded liberalism,' but the continued, gradual liberalization of trade." (P. 457.) The WTO dispute settlement system was increasingly used to evaluate domestic regulations (say, on health or the environment) that caused *de facto* discrimination against foreign goods. Instead of looking to the regulatory intent of a country, WTO adjudicators looked at the economic impact of a domestic regulation. They did so, too, through the neoliberal lens of the free-trade system, largely without looking to relevant human rights instruments or principles. Practically, Yakovleva claims, this broadened the scope of the term "protectionism," and thus put all the analytical pressure on the GATT and GATS exceptions, in which the burden of proof that a regulation was *not* protectionist fell on the country whose regulations were challenged.

What, then, should we make of the more recent notion of "digital protectionism," or its subset "data protectionism?" "Discourse matters and the discourse is changing," Yakovleva writes. (P. 473.) Digital protectionism is now part of the vocabulary of free trade, used by lobbyists, negotiators, and academics. (Even though, as Chris Kuner has pointed out, some of the policies now being called protectionist have been in place since the 1970s.) The European Union and the United States in fact both use the terms "digital trade" and "digital protectionism" in policy documents and negotiations. But as Yakovleva convincingly argues, the understanding of and values behind these terms differ vastly, as do the provisions on cross-border data flows advanced by each party in free trade negotiations. "Data protectionism" is not a stable term, but hotly contested.

Contrasts between the U.S. and EU approaches to data privacy abound. What Yakovleva does here is clearly link the relevant distinctions to current trade discourse. She explains that one way of framing the regulation of personal data is to look at such data as an economic asset, where any legal "protection is a precondition of data-intensive trade." (P. 510.) The alternative is what Yakovleva calls the "moral value approach," in which data protection law is directed at protecting fundamental human rights. (P. 510.) The EU has in fact historically embraced both frameworks, with an explicit goal of its EU-wide data protection instruments being to free up digital trade between Member States. However, Yakovleva notes that in the EU, the moral value approach will "always prevail" when the two conceptions are in conflict, because of the role the CJEU plays in interpreting EU law in light of the rights to privacy and data protection established in the EU Charter of Fundamental Rights. (P. 506.) The United States, by contrast, emphasizes only the former in trade negotiations, ignoring the possibility that privacy law might not just be economically efficient but can also implicate human rights and flourishing.

This disagreement in discourse has consequences for trade policy. Yakovleva identifies important differences in the current policy approaches to "data protectionism" taken by the U.S. and the EU in trade negotiations—differences every privacy law scholar or policy wonk should learn, if they haven't already. (For more, see Mira Burri's recent work.)

U.S. proposals in recent bilateral free trade agreements and at the WTO create a default that cross-border restrictions on the flow of personal data will not be allowed unless they are deemed objectively necessary—a test that Yakovleva points out in the GATS context is often failed. By contrast, the EU enumerates specific instances of inappropriate cross-border restrictions—conveniently, none restrictions the EU itself places on data flows. In its proposed exception language, the EU takes an approach more similar to the national security exception in WTO agreements, deferring to a country's own subjective assessment of what is necessary. (P. 496.) U.S. proposals characterize data privacy laws as being an aspect of economic regulation, needed in order to encourage consumers to disclose more data. EU proposals, by contrast, explicitly refer to human rights.

If there is anything surprising about this, it is that there is some agreement that at least some privacy protection is necessary for trade, rather than inherently protectionist. The key question, as Yakovleva notes, is not whether there should be domestic data privacy law, but what level of protection is legitimate. (P. 515.) She concludes by calling for "a new multidisciplinary discourse… in order to allow each trading party to strike the right balance between globalization… democratic politics, and domestic autonomy to pursue domestic values such as fundamental rights to privacy and data protection." (P. 513.)

This is an extraordinarily ambitious—and long—article. I remain impressed by its intellectual heft, and the ease with which Yakovleva moves up into discourse theory and then back into the weeds of free trade agreement provisions. Potential readers should also know that although the article clocks in at 104 pages, much of the length comes from footnotes, evidencing Yakovleva's impressively thorough research. I do wish there had been more engagement with related, parallel conversations about the role of trade in international intellectual property law, and the relationship there between human rights and the trade regime—but for that to have been included, this would have had to become a book.

Yakovleva's masterful article will sound in familiar notes for technology law scholars. It resembles recurring conversations about the internet and jurisdiction, differing free speech norms around the world, and the globalization of intellectual property law, including digital copyright law. How does one address gaps between different domestic regulatory goals and regimes, given that the internet (and its users' data) can be everywhere instantaneously? While the notion of addressing transatlantic divides in privacy laws through international trade law is not new (the late, wonderful Joel Reidenberg called for an international privacy treaty housed at the WTO back in 1999), Yakovleva brings clear policy expertise and critical insights to the current conversation. These insights will inform not just privacy law scholars, but those tracking international negotiating strategies and framing games in multiple areas of technology law.

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