

2003

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Recommended Citation

Eric Shapiro, *All Is Not Fair in the Privacy Trade: The Safe Harbor Agreement and the World Trade Organization*, 71 Fordham L. Rev. 2781 (2003).

Available at: <https://ir.lawnet.fordham.edu/flr/vol71/iss6/10>

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ALL IS NOT FAIR IN THE PRIVACY TRADE: THE SAFE HARBOR AGREEMENT AND THE WORLD TRADE ORGANIZATION

*Eric Shapiro**

INTRODUCTION

An American company seeking to transfer data from its European subsidiary back to its headquarters in the United States faces considerably fewer obstacles than an Australian company engaging in the same type of information transfer from its European subsidiary back to its head office in Australia. Both companies are theoretically subject to Directive 95/46/EC of the European Parliament (“European Privacy Directive”),¹ the terms of which provide for the interruption of data transmissions if the receiving country is found to provide protections for the data that are not “adequate.”² In reality, however, because of the Safe Harbor Agreement between the European Union (“EU”) and the U.S.,³ the American company faces far fewer obstacles to the transmission.

This Note considers whether the EU has violated its commitments under the World Trade Organization (“WTO”) by holding American companies to substantially different and lower standards when judging the “adequacy” of the American privacy regime than it does companies from Australia and elsewhere in the world. It concludes that the EU has unfairly favored the U.S. with this different treatment and thereby discriminated against other member states by holding

* J.D. Candidate, 2004, Fordham University, School of Law. I would like to thank Professor Joel R. Reidenberg for his help in selecting the topic and for generously providing a wealth of advice and suggestions. I would also like to thank my family, and most especially my children, Michaela and Nicholas, for their encouragement, love, and patience.

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, 1995 O.J. (L 281) [hereinafter European Privacy Directive], available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31995L0046&model=guichett (last visited Jan. 22, 2003).

2. *Id.* art. 25, ¶ 1.

3. Issuance of Safe Harbor Principles and Transmission to European Commission, 65 Fed. Reg. 45,666 (July 24, 2000) [hereinafter Safe Harbor].

them to much higher standards. Thus, the EU's imbalanced handling of the privacy regimes of different countries violates the WTO rules.

Part I of this Note discusses the European Privacy Directive, its potential for disrupting trade between the EU and the U.S. and the Safe Harbor Agreement through which these trading partners sought to avoid such a result. This part then introduces the WTO and its dispute resolution mechanisms, examines several WTO decisions and synthesizes these decisions to ascertain the current standards for determining whether a country has unfairly favored domestic products or services.

Part II introduces the cases of Hungary and Australia and asks whether these countries have grounds under WTO regulations to challenge the EU's treatment of their privacy regimes as being less favorable than the treatment accorded the U.S. Part III applies the interpretative concepts introduced in Part I to the issue of whether a panel would find that the EU offered different treatment to the U.S., in the form of the Safe Harbor Agreement, than it offered to Hungary and Australia. This part argues that a Panel examining this issue would use the "comparable in effectiveness" standard and that, under this standard, the requirements that the EU demanded of the U.S. under Safe Harbor are different from those that the EU demanded of Hungary and Australia. The Note concludes that the EU's favorable treatment of the U.S., as compared to other countries which the EU has evaluated for adequacy, violates WTO principles.

I. THE EUROPEAN PRIVACY DIRECTIVE, THE SAFE HARBOR AGREEMENT, AND THE POTENTIAL FOR A VIOLATION UNDER WTO PRINCIPLES

The European Privacy Directive provides privacy standards for data communications among member states.⁴ The Directive also prohibits EU member states from transferring data to states which do not have "adequate" protections in place.⁵ This Directive created a particularly acute problem in relation to the United States, a key European trading partner, as the Constitution, common law and statutes of the United States provide no broad right to privacy.⁶

The possibility that the U.S. might be judged to have inadequate standards for protection of privacy, and that this problem would lead to interruptions in data flows from the EU to the U.S., led the two economic powers to seek a compromise.⁷ They achieved accord in the

4. See generally European Privacy Directive, *supra* Note 1.

5. *Id.* art. 25, ¶ 1.

6. Paul M. Schwartz & Joel R. Reidenberg, Data Privacy Law, The Commission of the European Community 6-12 (1996); Barbara Crutchfield George et al., *U.S. Multinational Employers: Navigating Through the "Safe Harbor" Principles to Comply With the EU Data Privacy Directive*, 38 Am. Bus. L.J. 735, 741, 746-48 (2001).

7. See Julia M. Fromholz, *The European Union Data Privacy Directive*, 15

form of the Safe Harbor Agreement, under which companies would self-certify to the U.S. Department of Commerce by promising to meet specific, listed requirements.⁸ The Federal Trade Commission's ("FTC") statutory right to prosecute companies engaging in deceptive trade practices under the Federal Trade Commission Act ("FTCA") provides an enforcement mechanism,⁹ which is required under the European Privacy Directive.¹⁰ This promise of enforcement induced the European Community to adopt Safe Harbor over the protests of a majority in the European Parliament and several individual European governments.¹¹

The difference between the standards for the interruption of data transfer under the Safe Harbor Agreement,¹² and those to which the EU holds other countries, creates the possibility of a violation of the trade liberalizing General Agreement on Tariffs and Trade ("GATT")¹³ and the General Agreement on Trade in Services ("GATS").¹⁴

GATS regulates trade in services; therefore, it has a direct effect on the protection of privacy relating to electronic data communication¹⁵ and thus to the Safe Harbor Agreement. Under GATS, signatories offer other signatories Most Favored Nation ("MFN") status for services.¹⁶ MFN requires that member nations offer "treatment no less favourable" to one member nation than that offered to all member nations, unless the member specifically exempts itself from this requirement according to the GATS rules.¹⁷ If, through the

Berkeley Tech. L.J. 461, 475-76 (2000); Mike Ewing, Comment, *The Perfect Storm: The Safe Harbor and the Directive on Data Protection*, 24 Hous. J. Int'l L. 315, 336-7 (2002).

8. Safe Harbor, *supra* note 3.

9. *Id.* at 45,667, 45,675-76.

10. European Privacy Directive, *supra* note 1, art. 22.

11. Letter from John F. Mogg, European Commission, Internal Market Director General, to Robert LaRussa, Under Secretary for International Trade of the United States Department of Commerce (Jan. 28, 2000), available at <http://www.export.gov/safeharbor/EUletterJulyHeader.htm> (last visited Mar. 21, 2003) [hereinafter European Commission Director General Letter]; Report on the Draft Commission on the Adequacy of the Protection Provided by the Safe Harbour Privacy Principles (C5-0280/2000-2000/2144(COS)) Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (June 22, 2000), available at http://europa.eu.int/comm/internal_market/privacy/docs/adequacy/01177-02_en.pdf (last visited Apr. 8, 2003).

12. See *infra* notes 40-46 and accompanying text.

13. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 188 [hereinafter GATT].

14. General Agreement on Trade in Services, Apr. 15, 1994, Annex 1B, 33 I.L.M. 1167 (1994) [hereinafter GATS].

15. See Stewart A. Baker et al., *E-Commerce E-Products and the WTO*, 35 Int'l Law. 5 (2001) (discussing the application of WTO and GATS principles to e-commerce).

16. GATS, *supra* note 14, art. II:1.

17. *Id.*

agreement, the EU is offering different, and more favorable, treatment to the U.S. than that offered to other countries, then the Safe Harbor Agreement is a violation of GATS by the EU.

A. *The European Privacy Directive and the Safe Harbor Agreement*

The EU passed the European Privacy Directive, which regulates transfers of data, in 1995.¹⁸ The Directive states that “personal data” is data that refers to an “identifiable person” and that the processing of data encompasses any “operation . . . whether or not by automatic means” performed upon such data.¹⁹ Under the Directive, EU member states must assure that data is processed “fairly and lawfully,” and only for “specified, explicit and legitimate purposes.”²⁰ Further processing is permissible only if safeguards assure that the processing is “adequate, relevant and not excessive” for the purposes of collection.²¹ Information must also be accurate and kept no longer than necessary.²² Furthermore, data may be processed only under limited circumstances without the subject’s permission.²³ The Directive also contains protections for individuals, including the right to access data,²⁴ the right to object to the processing of personal data²⁵ and a judicial remedy if these rights are breached.²⁶ Most important for the purposes of this Note, the Directive prohibits transfers to countries without “adequate level[s]” of data protection.²⁷

1. The Potential for Major Disruptions in Transatlantic Commerce Under the European Privacy Directive

Europeans and Americans have widely divergent cultural views about privacy.²⁸ Europeans take a more guarded view of data

18. European Privacy Directive, *supra* note 1.

19. *Id.* ch. I, art. 2(a), (b); see Gregory Shaffer, *Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance Through Mutual Recognition and Safe Harbor Agreements*, 9 Colum. J. Eur. L. 29, 60 (2002) [hereinafter Shaffer, *Reconciling Trade and Regulatory Goals*] (noting that “[e]xcept for public security, criminal law and related exceptions, [the European Privacy Directive] covers all processing of all personal data by whatever means”).

20. European Privacy Directive, *supra* note 1, ch. II, § I, art. 6(a), (b).

21. *Id.* ch. II, § I, art. 6(c).

22. *Id.* ch. II, § I, art. 6(e).

23. *Id.* ch. II, § II, art. 7.

24. *Id.* ch. II, § IV, art. 12.

25. *Id.* ch. II, § VII, art. 14.

26. *Id.* ch. III, art. 22; see Shaffer, *Reconciling Trade and Regulatory Goals*, *supra* note 19, at 60.

27. European Privacy Directive, *supra* note 1, ch. IV, art. 25, § 3; see Shaffer, *Reconciling Trade and Regulatory Goals*, *supra* note 19, at 60; Robert E. Schriver, Note, *You Cheated, You Lied: The Safe Harbor Agreement and its Enforcement by the Federal Trade Commission*, 70 Fordham L. Rev. 2777, 2788-92 (2002).

28. See Joel R. Reidenberg, *E-Commerce and Trans-Atlantic Privacy*, 38 Hous. L. Rev. 717, 719 (2001) [hereinafter Reidenberg, *Trans-Atlantic Privacy*] (arguing that “United States policy lags far behind [that of the EU] and, despite greater public

processing and “generally require the state to take an active role in protecting the fair treatment of personal information.”²⁹ Europeans “are wary of the free transfer of personal information and consider data privacy protection a fundamental human right.”³⁰ This protection of privacy stands in stark contrast to the self-regulatory American approach.³¹ There is no fundamental right to privacy in the U.S. Constitution, but rather “[t]he Constitutional right to privacy in the United States relates solely to government intrusion into private matters.”³² Accordingly, American law places greater emphasis on protecting citizens from the government’s interference with their privacy, than in granting the government powers to protect the privacy of individuals.³³ Rather than announcing broad data protections, as the European Privacy Directive does, American data protection law usually is targeted at specific sectors.³⁴ In contrast to European practice, no U.S. governmental agency has been specifically designated to protect citizens’ rights to privacy from either the government or from the private sector.³⁵

The European Privacy Directive had the potential to cause disruptions in transfers of data from the EU to the U.S.³⁶ One commentator has stated that the effect of applying the Directive to U.S. multinational employers would be “catastrophic.”³⁷ Another

attention, remains relatively stagnant”); Paul M. Schwartz, *European Data Protection Law and Restrictions on International Data Flows*, 80 Iowa L. Rev. 471, 472 (1995) (explaining that the EU’s “efforts aim to create strong European protection for individual privacy”); see also Fromholz, *supra* note 7, at 470.

29. Schwartz & Reidenberg, *supra* note 6, at 12.

30. See George et al., *supra* note 6, at 743.

31. Steven R. Salbu, *The European Union Data Privacy Directive and International Relations*, 35 Vand. J. Transnat’l L. 655, 666 (2002) (noting that “[p]rivacy considerations that may be considered negligible in the United States are taken very seriously by the European Union”).

32. Ewing, *supra* note 7, at 336-37; see George et al., *supra* note 6, at 747.

33. Joel R. Reidenberg, *Setting Standards For Fair Information Practice in the U.S. Private Sector*, 80 Iowa L. Rev. 497, 501-02 (1995) [hereinafter Reidenberg, *Data Protection and the European Privacy Directive*]; see also *id.* at 499 (arguing that “[t]he driving force behind [American] fair information practice standards is the philosophy that government should be limited and that a ‘marketplace of ideas’ allows only minimal restrictions on flows of information, including personal information”); see Fromholz, *supra* note 7, at 470.

34. Schwartz and Reidenberg, *supra* note 6, at 7; see also George et al., *supra* note 6, at 737; Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 Stan. L. Rev. 1315, 1331 (2000) (arguing that, in the United States, “[l]egal rules are relegated to narrowly targeted sectoral protections. For example, the Video Privacy Protection Act prohibits the disclosure of titles of particular films rented by a customer at a video store, while viewing habits on the Internet of streaming video remain unprotected”).

35. Schriver, *supra* note 27 at 2795-2817 (arguing that the FTC can prosecute companies under FTCA § 5, but only those that have self-certified to the Safe Harbor Agreement).

36. George et al., *supra* note 6, at 738.

37. *Id.*

observed that the European Privacy Directive had the potential to “endanger[] the \$350 billion in trade between the U.S. and Europe.”³⁸ The Directive could have affected “the daily use American businesses make of data such as information on resumes, company requests for credit reports, performance evaluations, information on employee training, grievances, and disciplinary measures.”³⁹ If the Directive had been implemented, U.S. companies with EU subsidiaries could have been prevented from moving essential information from one part of the company to another.

2. The Safe Harbor Agreement

In response to this risk, the EU and the U.S. negotiated the Safe Harbor Agreement, which provides a way for American companies to certify to the Federal Trade Commission that they comply with listed requirements.⁴⁰ The purpose of the Safe Harbor Agreement is “[t]o diminish . . . uncertainty and provide a more predictable framework for such data transfers.”⁴¹ To qualify for Safe Harbor, a representative of an organization simply fills out a form on the website of the U.S. Department of Commerce certifying that the following seven requirements will be met:

(1) Notice—Individuals must be informed in “clear and conspicuous language” about the “purposes” and “uses” of the information collected about them and the options and methods available to limit its use and disclosure;

(2) Choice—Data subjects may prevent information from being transmitted to a third party or from being used in a manner inconsistent with the original collection purpose;

(3) Onward Transfer—A party to whom information about a data subject is transferred must either follow the Safe Harbor Principles or be subject to the Directive;

(4) Security— “[R]easonable” actions must be taken to prevent loss or corruption of data;

(5) Data Integrity—Data may only be processed in a way that is “consistent” with the purpose for which it was collected;

(6) Access—Individuals must have the right to verify personal data, without excessive price or delay, and the right to have incorrect data fixed; and

38. Edmund Sanders, *U.S. Firms Abstain from EU Privacy Pact Trade: Companies Aren't Convinced 'Safe-Harbor' Agreement Would Protect Them from Europe's Data-Protection Laws*, L.A. Times, Jan. 5, 2001, at C3.

39. George et al., *supra* note 6, at 753.

40. Safe Harbor, *supra* note 3.

41. *Id.* at 45,667.

(7) Enforcement—The agreement requires measures, including sanctions, which are “sufficiently rigorous to ensure compliance.”⁴²

The decision to qualify for Safe Harbor is completely voluntary.⁴³ The organization has a choice either to join a privacy program that adheres to the Principles of the European Privacy Directive, or to develop its own.⁴⁴ Enforcement authority comes either from the FTCA, section 5, which prohibits “unfair” and “deceptive” acts, or from “another law or regulation.”⁴⁵ The agreement also offers the possibility of qualification for “organizations subject to a statutory, regulatory, administrative or other body of law (or of rules) that effectively protects personal privacy.”⁴⁶

3. Difficulties in Negotiating the Safe Harbor

The Safe Harbor Agreement was difficult to negotiate and faced strenuous resistance from both sides.⁴⁷ The European Parliament expressed grave concerns about many aspects of the draft of the agreement.⁴⁸ Difficult issues included “access rights and enforcement in the United States.”⁴⁹

42. *Id.* at 45,667-68. Safe Harbor Letter from Ambassador Aaron, available at <http://www.ita.doc.gov/td/ecom/aaron419.html> (last visited Feb. 22, 2003); see, e.g., James M. Assey, Jr. & Demetrios A. Eleftheriou, *The EU-U.S. Privacy Safe Harbor: Smooth Sailing Or Troubled Waters?*, 9 CommLaw Conspectus 145, 151-54 (2001); Jordan M. Blanke, “Safe Harbor” and the European Union’s Directive on Data Protection, 11 Alb. L.J. Sci. & Tech. 57, 77-81 (2000); Salbu, *supra* note 31, at 680-81 (describing the process for subscribing to Safe Harbor); Angela Vitale, Note, *The EU Privacy Directive and the Resulting Safe Harbor: The Negative Effects on U.S. Legislation Concerning Privacy on the Internet*, 35 Vand. J. Transnat’l L. 321, 336-40 (2002).

43. Safe Harbor, *supra* note 3, at 45,667; Assey & Eleftheriou, *supra* note 42, at 151 (stating that “U.S. companies are not required to participate in the Safe Harbor”); Blanke, *supra* note 42, at 77-78.

44. Safe Harbor, *supra* note 3, at 45,666-67.

45. *Id.* One of the issues related to Safe Harbor is whether or not the agreement actually provides enforcement mechanisms as required under the Directive. See Schriver, *supra* note 27 (arguing that the FTC’s enforcement powers provide a credible threat of enforcement). *But see The EU Data Protection Directive: Implications for the U.S. Privacy Debate: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce*, 107th Cong., 1st Sess. (Mar. 8, 2001) (Prepared Statement of Joel R. Reidenberg, Professor of Law and Director of the Graduate Program, Fordham University School of Law) § 3(b), [hereinafter Reidenberg Testimony], available at <http://energycommerce.house.gov/107/hearings/03082001Hearing49/print.htm> (last visited March 28, 2003)(arguing that “the underlying legal authority of the FTC to enforce the Safe Harbor is questionable”); Reidenberg, *Trans-Atlantic Privacy*, *supra* note 28, at 745-46.

46. Safe Harbor, *supra* note 3, at 45,667.

47. Reidenberg, *Trans-Atlantic Privacy*, *supra* note 28, at 738 (stating that the negotiations on Safe Harbor were “lengthy and troubled”); Salbu, *supra* note 31, at 679-80 (noting that “[i]mplementation and enforcement were major concerns” expressed by EU countries).

48. European Parliament Report on the Draft Commission Decision on the

The Europeans faced a major political conflict. Although they knew that the U.S. was not likely to pass new legislation to guarantee privacy rights, European regulators did not want to interrupt data flows to and from the U.S.⁵⁰ The true purpose of the Safe Harbor from the European perspective was as “a mechanism to delay facing tough decisions about international privacy.”⁵¹

The Safe Harbor Agreement also contains serious administrative law defects.⁵² First, Safe Harbor did not exist when the European Privacy Directive was passed, making it impossible for Safe Harbor to have been one of the “prevailing rules of law” used to determine adequacy.⁵³ Additionally, under the European Privacy Directive, a remedy can only be negotiated by the European Commission after a finding that a country lacks “adequate” protection⁵⁴—a finding that has never been made in relation to the United States.⁵⁵

4. Problems with the Safe Harbor Agreement

a. *The European Perspective*

The latest European Commission Staff Working Paper, which evaluated the present status of the Safe Harbor Agreement for the European Parliament, listed various faults in the operation of the agreement.⁵⁶ The Paper first noted that many companies that had

Adequacy of the Protection Provided by the Safe Harbour Privacy Principles (June 22, 2000) (C5-0280/2000-2000/2144(COŠ)), available at http://europa.eu.int/comm/internal_market/privacy/docs/adequacy/01177-02.pdf (Apr. 8, 2003) [hereinafter Parliament Report] (presenting concerns about the fact that the agreement is not a “legislative” approach, the two different levels of protection for EU and U.S. citizens, the lack of certainty in relation to obtaining compensation for violation of safe harbor principles, and the fact that only firms under the authority of the FTC and Department of Transportation are covered, thereby excluding banking and telecommunications); see also Salbu, *supra* note 31, at 679.

49. Reidenberg Testimony, *supra* note 45, § 3, ¶ 2; see Reidenberg, *Trans-Atlantic Privacy*, *supra* note 28, at 744-46.

50. Reidenberg Testimony, *supra* note 45, § 3(a), ¶ 1; Reidenberg, *Trans-Atlantic Privacy*, *supra* note 28, at 739.

51. Reidenberg Testimony, *supra* note 45, § 3(a), ¶ 1; Reidenberg, *Trans-Atlantic Privacy*, *supra* note 28, at 739 (stating that “the approval was an important short-term political victory for both the United States and the European Commission”).

52. Reidenberg Testimony, *supra* note 45, at 3(b), ¶ 5.

53. *Id.* (internal quotation omitted); see Reidenberg, *Trans-Atlantic Privacy*, *supra* note 28, at 741-42.

54. Reidenberg Testimony, *supra* note 45, § 3(b), ¶ 5; Reidenberg, *Trans-Atlantic Privacy*, *supra* note 28, at 742.

55. Reidenberg Testimony, *supra* note 45, § 3(b), ¶ 5; Reidenberg, *Trans-Atlantic Privacy*, *supra* note 28, at 742.

56. Commission Staff Working Paper: The Application of Commission Decision 520/2000/EC of 26 July 2000 Pursuant to Directive 95/46 of the European Parliament and of the Council on the Adequate Protection of Personal Data Provided by the Safe Harbour Privacy Principles and Related Frequently Asked Questions Issued by

self-certified to the Department of Commerce had not published a privacy policy as required by the Safe Harbor Principles.⁵⁷ Additionally, fewer than half of the posted privacy statements actually contain all seven of the Safe Harbor Principles.⁵⁸ Also, the Paper pointed out a “lack of clarity” for enforcing rights, because some policies do not state what “sensitive data”⁵⁹ is or how to contact the enforcement agency.⁶⁰ Thus, “individuals may not know what rules apply to the processing [of] their data, or how they can exercise their legitimate rights.”⁶¹ The Commission report also expressed doubts as to “the capacity [of the U.S. government] to apply sanctions rigorous enough to ensure compliance with the Principles.”⁶² The report spoke of the “need to be able to rely on a range of sanctions.”⁶³ Specifically the report stated that “publicity for findings of non-compliance and the requirement to delete data in certain circumstances” must be part of the enforcement arsenal.⁶⁴ The Commission found, however, that “not all such bodies undertake to publicise their findings.”⁶⁵ Although the Report does not state explicitly that the required enforcement mechanisms are lacking, such a conclusion is implied.

Furthermore, the report found that the EU may have weakened its own standards on data protection through the acceptance of the Safe Harbor. First, “[t]he Safe Harbor exempts public record information,” although this information is generally covered under the European Privacy Directive.⁶⁶ The Safe Harbor Agreement also does not mandate access to a remedy of comparable effectiveness to those guaranteed by the European Privacy Directive. The latter assures the victim the right to legal redress, including damages.⁶⁷ While the U.S. Department of Commerce asserts that similar redress

the US Department of Commerce (Feb. 13, 2002), *available at* http://europa.eu.int/comm/internal_market/en/dataprot/adequacy/02-196_en.pdf (last visited Jan. 22, 2003) [hereinafter Safe Harbor Commission Staff Working Paper].

57. *Id.* at 8.

58. *Id.* at 9.

59. The Safe Harbor Agreement states that sensitive data is “personal information specifying medical or health conditions, racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or information specifying the sex life of the individual” and that data subjects “must . . . give[] affirmative or explicit (opt in) choice if the information is to be disclosed to a third party or used for a purpose other than those for which it was originally collected.” Safe Harbor, *supra* note 3, at 45,668.

60. Safe Harbor Commission Staff Working Paper, *supra* note 56, at 9.

61. *Id.*

62. *Id.* at 10.

63. *Id.*

64. *Id.*

65. *Id.*

66. Reidenberg Testimony, *supra* note 45, § 3(d); Reidenberg, *Trans-Atlantic Privacy*, *supra* note 28, at 744.

67. European Privacy Directive, *supra* note 1, ch. III, art. 22.

is available through U.S. common law tort actions, such assertions are not borne out in practice.⁶⁸

As early as February of 2000, Article 29 and Article 31 Working Parties noted the potential for unfair discrimination.⁶⁹ The Working Parties found that third countries were showing “interest . . . in the implementation of Articles 25 and 26 of the Directive and in particular in the effects of findings of ‘adequacy’ under Article 25(6).”⁷⁰ Both entities mentioned that third countries had expressed “concerns” about greater severity of EU enforcement against third countries than against EU data controllers and that there could be “discrimination among the entities from different third countries.”⁷¹

b. *The U.S. Perspective*

On the U.S. side, certain industry pundits have found that “the deal has been largely ignored by U.S. companies.”⁷² That President Bush contemplated withdrawing from the agreement at one point only reinforces this conclusion.⁷³ Furthermore, the U.S. Treasury and Commerce Department reportedly “complained in a letter to the EU that the measure is a threat to transatlantic e-commerce, and could burden website operators with red tape.”⁷⁴ At Congressional hearings on the subject, Members asked whether the “Department of

68. See Reidenberg Testimony, *supra* note 45, § 3(d) (stating that “the applicability of these tort actions to data processing and information privacy has never been established by U.S. courts and is, at present, purely theoretical”); Reidenberg, *Trans-Atlantic Privacy*, *supra* note 28, at 744-45.

69. Text on Non-Discrimination Adopted by the Article 29 Working Party on 3rd of February 2000, *available at* <http://www.export.gov/safeharbor/nondiscrimArt29Feb00.htm> (last visited Jan. 22, 2003) [hereinafter Article 29 Working Party—Feb. 2000]; Text on Non-Discrimination Adopted by the Article 31 Committee on 31st of May 2000, *available at* <http://www.export.gov/safeharbor/nondiscrimArt31May00.htm> (last visited January 22, 2003) [hereinafter Article 29 Working Party—May 2000]. A “Working Party” is a group composed of the national data protection commissioners. The Party gives an opinion as to whether the level of national protection that a third country offers is adequate. Europa-Internal Market—Commission Decisions on the Adequacy of the Protection of Personal Data in Third Countries, *at* http://europa.eu.int/comm/internal_market/privacy/adequacy_en.htm.

70. Article 29 Working Party—Feb. 2000, *supra* note 69, ¶ 1. A “third country” is a country that is not a member of the EU.

71. *Id.*

72. Paul Thibodeau, *U.S. Firms Skipping ‘Safe Harbor’: About 200 Companies Have Signed Up; European Privacy Enforcement Lacking*, Computerworld, June 3, 2002, *available at* 2002 WL 2205393; see *Data Overload*, Fin. Times, May 10, 2002, *available at* 2002 WL 20298970 (noting that Safe Harbor “has had only a limited success”); Cherise M. Valles, *Setting the Course on Data Privacy as U.S. Firms Hesitate, EU Gets Set to Enforce its Rules an Alternative Voice*, Int’l Herald Trib., May 28, 2001, *available at* 2001 WL 4855131 (noting also that many of the U.S. companies registering for Safe Harbor are in the privacy business themselves).

73. Charles Arthur, *Now Bush Wants to Scrap Deal on Internet Privacy*, Indep. (London), Mar. 31, 2001, *available at* 2001 WL 17873019.

74. *Id.*

Commerce [was] duped into supporting the Safe Harbor.”⁷⁵ One leading U.S. privacy expert has said that the agreement is “unworkable for both sides and will not alleviate the issues of weak American privacy protection.”⁷⁶ A *Wall Street Journal* editorial summed up the view of many in business by providing a market-based argument against both the Directive and Safe Harbor.⁷⁷ The editorial argued that “the surrendering of personal data is, initially, a voluntary act between consenting adults.”⁷⁸ The editorial concluded that U.S. industry has begun to show concern over privacy because consumers are concerned, and thus the sites could best attract them by providing a privacy policy.⁷⁹

There are many serious problems with Safe Harbor. Enforcement is a major problem on the U.S. side. Section 5 of the FTCA may not provide the FTC with jurisdiction to enforce Safe Harbor.⁸⁰ Additionally, even if the FTC has jurisdiction, it is not clear that, based upon the agency’s past performance, it would pursue those who commit privacy infractions.⁸¹ Furthermore, there is a question as to whether U.S. tax dollars should be used to provide greater protection to the privacy rights of Europeans than to those of Americans.⁸² Lastly, few companies have joined the Safe Harbor,⁸³ and most of these are not Fortune 500 companies. This fact indicates that the Safe Harbor framework has not been accepted in the U.S.⁸⁴

Nonetheless, the U.S. and the EU have ratified the Safe Harbor Agreement and at least pay lip service to its continued vitality.⁸⁵ The Safe Harbor Agreement, however, may violate the international trading regime now governed by the WTO.⁸⁶ The next section introduces and examines the WTO.

75. Rep. Billy Tauzin (R-LA) Statement on EU Privacy Directive, Mar. 8, 2001 (questioning the “legal status” of Safe Harbor), *available at* <http://www.techlawjournal.com/privacy/20010308tauzin.asp> (last visited Apr. 8, 2003).

76. See Reidenberg Testimony, *supra* note 45, § 3.

77. Editorial, *Review & Outlook: Adequate Protection*, Wall St. J. Europe, Feb. 16, 2001, *available at* 2001 WL-WSJE 2843196.

78. *Id.*

79. *Id.*

80. See Reidenberg Testimony, *supra* note 45, § 3(b) (arguing that “the assertion by the Department of Commerce and the FTC that the Safe Harbor comes within the Section 5 jurisdiction is a radical departure from the stated legislative purposes of the statute and in direct opposition to the Supreme Court’s restrictive interpretation of Section 5 authority”). *But see* Schriver, *supra* note 27 (arguing that Article 5 provides the FTC with the necessary authority to enforce Safe Harbor).

81. Reidenberg Testimony, *supra* note 45, § 3(d).

82. *Id.*

83. There were 316 companies listed on the Safe Harbor website on March 21, 2003. *Safe Harbor Website*, at http://www.export.gov/safeharbor/sh_documents.html.

84. Reidenberg Testimony, *supra* note 45, § 3(d) (noting the “unenthusiastic reception” of Safe Harbor).

85. See Safe Harbor Commission Staff Working Paper, *supra* note 56, at 2 (noting that “[a]ll the elements of the Safe Harbour arrangement are in place”).

86. Gregory Shaffer argues that WTO rules would not have helped the U.S. to

B. *The World Trade Organization*

1. Creation and Dispute Resolution Process

The WTO was created in 1995 as a product of the 1986-1994 Uruguay Round of the General Agreement on Tariffs and Trade.⁸⁷ Among other things, the WTO administers trade agreements, acts as a forum for trade negotiations, and settles trade disputes.⁸⁸ While the GATT agreement covered only trade in goods, the newer GATS agreement covers services including banking, insurance, telecommunications, tourism, and transportation.⁸⁹ Thus, the GATS agreement is relevant to the regulation of privacy regimes, as many of the sectors covered by GATS transmit data across international borders.⁹⁰

defend itself against the European Privacy Directive. Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 *Yale J. Int'l L.* 1, 49-51 (2000) [hereinafter Shaffer, *Globalization*]. He argues that if the EU banned only data transfers to the U.S., but not to other, equally inadequate countries, then the U.S. might have a claim based on a violation of the most-favored nation clause in article II of GATS. *Id.* at 49-50. However, Shaffer argues that the U.S. would not prevail because (1) the EU Directive applies equally to all countries, (2) the EU has a genuine public policy purpose which is specifically provided for in the GATS agreement under Article XIV ("the privacy of individuals") and (3) a WTO Panel would look more to the process by which the EU examines foreign privacy protections than to the balance between privacy and trade. *Id.* at 49-51 (emphasis omitted). As I will argue, the case for a finding of improper or unreasonable discrimination is much stronger under Safe Harbor, as Safe Harbor is an agreement offering special treatment only to the United States. For another discussion of the impact of the WTO on the European Privacy Directive, see Peter P. Swire & Robert E. Litan, *None of Your Business: World Data Flows, Electronic Commerce, and the European Privacy Directive*, 188-96 (1998) (arguing that in the context of the European Privacy Directive, the WTO's involvement in privacy issues will be heavily dependent on the facts of a given case, and that the WTO will have a more useful role in preventing a privacy regime from being used for protectionism); see also Kevin Bloss, Note, *Raising Or Razing the e-Curtain?: The EU Directive on the Protection of Personal Data*, 9 *Minn. J. Global Trade* 645, 655-60 (2000) (arguing that because of the European Privacy Directive, the EU might have violated the EU's Most Favored Nation obligation under GATT or GATS, but that it would be more difficult for the U.S. to win under GATS because this agreement has an exception for privacy).

87. The WTO in Brief: Part I: The Multilateral Trading System—Past, Present and Future, at www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm, (last visited Mar. 21, 2003).

88. The WTO in Brief: Part 2: The Organization, at www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm, (last visited Mar. 21, 2003).

89. The WTO in Brief: Part 3: The WTO Agreements, at www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr03_e.htm, (last visited Mar. 21, 2003).

90. See Shaffer, *Globalization*, *supra* note 86, at 47-48. Shaffer notes that the "threshold issue" is whether data covered by the European Privacy Directive is covered by GATS or GATT. The article states that the key is whether the data transferred refers to sales of goods or services. It argues that since most data transmitted between Europe and the U.S. is transmitted electronically and thus is a non-standard product classified as a service, "[t]o the extent that personal data is a

The purpose of the WTO is to facilitate world trade by removing barriers to the movement of goods and services.⁹¹ Reflecting this purpose, the GATT and GATS agreements include specific provisions that prohibit countries from discriminating against foreign goods and services through outright prohibition, greater tariffs, or differential regulatory treatment. The mechanisms through which the WTO accomplishes this goal include the principle of “most favored nation” status, which requires that the treatment accorded to one country be accorded to all members of the WTO;⁹² “like product,” under which members must give the same treatment to imported goods as they do to domestic goods;⁹³ treatment no less favorable, which means that there must be a “competitive playing field;”⁹⁴ and “comparable in effectiveness”⁹⁵—all of which involve a comparison of the treatment afforded imported products or services to that afforded domestic products or services.

One important function of the WTO is that it provides a forum for countries to settle trade disputes arising under WTO agreements or treaties.⁹⁶ The dispute settlement process provides independent experts who interpret agreements and the commitments made by member countries.⁹⁷ A panel consisting of legal experts hears complaints, evaluates evidence, makes findings of fact, and renders legal judgments.⁹⁸ There is also an appellate level—the Appellate

non-standardized product, its transfer should thus be covered under GATS, and not GATT 1994.” *Id.*

91. The WTO in Brief, at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm (last visited Apr. 2, 2003).

92. GATS, *supra* note 14, art. II; GATT, *supra* note 13, art. I. See Baker et al., *supra* note 15, at 7; Robert J. Girouard, Note, *Water Export Restrictions: A Case Study Of WTO Dispute Settlement Strategies and Outcomes*, 15 *Geo. Int'l. Envtl. L. Rev.* 247, 254 (2003) (stating that under most-favored nation “a WTO member agreeing to a trade concession with another member or non-member extends that concession to all other WTO members”).

93. Won Mog Choi, *Overcoming the “Aim and Effect” Theory: Interpretation of the “Like Product” in GATT Article III*, 8 *U.C. Davis J. Int'l L. & Pol'y* 107, 107 (2002) (“Article III . . . requires WTO members to accord national treatment to imported products.”); Edward S. Tsai, “Like” is a Four-Letter Word—*GATT Article III’s “Like Product” Conundrum*, 17 *Berkeley J. Int'l L.* 26, 28 (1999) (“Article III protects imports from governmental measures which protect domestic goods through the imposition of unfair competitive conditions that favor domestic producers.”).

94. Raj Bhala, *The Bananas War*, 31 *McGeorge L. Rev.* 839, 916 (2000) (noting that the Panel in the *Bananas* case held that treatment no less favorable “meant not just formal equality, but also equality of competitive conditions”).

95. See *infra* notes 136-62 and accompanying text.

96. See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 *Harv. Int'l L. J.* 333, 336-39 (1999) (providing an explanation of the purposes and functioning of the WTO dispute resolution process).

97. See *id.*; Tracy P. Varghese, *The WTO’s Shrimp-Turtle Decisions: The Extraterritorial Enforcement of U.S. Environmental Policy via Unilateral Trade Embargoes*, 8 *Envtl. Law* 421, 426-28 (2002) (explaining the functioning of the WTO Dispute Settlement Understanding and the Dispute Settlement Body).

98. See *Trading into the Future: Introduction to the WTO: Settling Disputes: The*

Body—for appeals on legal grounds.⁹⁹ These dispute-settling bodies provide a potential forum for a country to challenge the EU's treatment of the U.S. privacy regime under Safe Harbor as preferential to the U.S.

Certain provisions in the WTO agreements—GATT and GATS—provide a foundation for a legal challenge to the Safe Harbor Agreement. The concept of “like product” or “like service,” which arises in relation to GATT Article I:1 and GATS Article II:1—on Most Favored Nation—and GATT Article III and GATS Article XVII, provide possible tools for comparing privacy regimes. “Like product” has been interpreted under GATT cases referring to goods, but more recent Panel and Appellate Body reports and decisions have extrapolated the same reasoning to services under GATS.¹⁰⁰ The relevant language for the concept in the GATT and GATS is similar.¹⁰¹

The privacy regimes of the different countries may be analogized to products or services, which may or may not be “like.” In order to analyze how a panel might view this issue, this section next considers the more significant cases in which panels have analyzed the concept of likeness of products under GATT.

WTO's Most Individual Contribution, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Mar. 1, 2003).

99. Varghese, *supra* note 97, at 426-27.

100. See generally European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/USA (May 1997), available at [http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WTüDS*+and+\(R+or+RW\)+and+not+\(AB+or+ARB\)%29+%26+%28@Doc_Date+>=+1997/5/1%29+%26+%28@Doc_Date+<=+1997/5/31%29](http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WTüDS*+and+(R+or+RW)+and+not+(AB+or+ARB)%29+%26+%28@Doc_Date+>=+1997/5/1%29+%26+%28@Doc_Date+<=+1997/5/31%29) [hereinafter Bananas].

101. GATT art. I:1 states that “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” GATT, *supra* note 13, art. I:1. The relevant language in GATS Article II:1 states that “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.” GATS, *supra* note 14, art. II:1.

The term “like-product” is used in GATT Article III:2, which states that “[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to *like products* of national origin.” GATT, *supra* note 13, art. III:2 (emphasis added). The purpose of this article is to prevent countries from using “internal taxes and other internal charges of any kind in excess of those applied directly or indirectly to like products of national origin.” *Id.* art. III:1. This concept is mirrored in GATS Article XVII which holds that “each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.” GATS, *supra* Note 14, art. XVII:1.

Because the issue under consideration has to do with trade in services, this section first discusses the *Bananas* case,¹⁰² which analyzed the relation between GATT and GATS. The *Bananas* panel applied the concept of “treatment no less favourable,” and provided clarification for judging when rules controlling service providers offer unfair protection to domestic providers.¹⁰³ This section then discusses the *Shrimp-Turtle* cases,¹⁰⁴ which detailed and implemented the “comparable in effectiveness” standard, providing information for comparing regulatory systems and for determining when a system meets the requirements for an exception to the prohibition on product embargoes.¹⁰⁵ Finally, this section examines the “like-product” standard, which requires that countries give the same regulatory and tax treatment to foreign and domestic products which are similar or which serve the same purposes.¹⁰⁶ This standard was developed under the *Japan-Taxes*¹⁰⁷ and *Asbestos*¹⁰⁸ cases.

2. The *Bananas* Case: From GATT to GATS and the “Treatment No Less Favorable” Standard

The search for WTO precedents analogous to a comparison of privacy regimes begins with *European Communities—Regime for the Importation, Sale and Distribution of Bananas* (“*Bananas*”),¹⁰⁹ a case which introduces a way to compare government regulatory treatment under GATS.¹¹⁰ *Bananas* was one of the first WTO cases brought—at

102. *Bananas*, *supra* note 100; see Bhala, *supra* note 94 (providing an excellent overview of case).

103. *Bananas*, *supra* note 100, at 7.299-7.304, 7.349.

104. United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia—Report of the Appellate Body, WT/DS58/AB/RW (October 2001), available at [http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WTüDS*+and+AB+and+\(R+or+RW\)%29+%26+%28@Doc_Date+>=+2001/10/1%29+%26+%28@Doc_Date+<=+2001/10/31%29](http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WTüDS*+and+AB+and+(R+or+RW)%29+%26+%28@Doc_Date+>=+2001/10/1%29+%26+%28@Doc_Date+<=+2001/10/31%29) [hereinafter *Shrimp-Turtle II*, Appellate Body].

105. See *infra* notes 160-75 and accompanying text.

106. Japan—Taxes on Alcoholic Beverages—Report of the Appellate Body 15–17, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (October 1996), available at [http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WTüDS*+and+AB+and+\(R+or+RW\)%29+%26+%28@Doc_Date+>=+1996/1/1%29+%26+%28@Doc_Date+<=+1996/12/31%29](http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WTüDS*+and+AB+and+(R+or+RW)%29+%26+%28@Doc_Date+>=+1996/1/1%29+%26+%28@Doc_Date+<=+1996/12/31%29) [hereinafter *Japan-Taxes*]; see Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem For an “Aim and Effects” Test*, 32 Int’l Law. 619, 620 (1998).

107. *Japan-Taxes*, *supra* note 106.

108. *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report and Panel Report, WT/DS 135/AB/R (March 12, 2001), available at [http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WTüDS*+and+AB+and+\(R+or+RW\)%29+%26+%28@Doc_Date+>=+2001/3/1%29+%26+%28@Doc_Date+<=+2001/3/31%29](http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WTüDS*+and+AB+and+(R+or+RW)%29+%26+%28@Doc_Date+>=+2001/3/1%29+%26+%28@Doc_Date+<=+2001/3/31%29) [hereinafter *Asbestos*].

109. *Bananas*, *supra* note 100.

110. *Id.* at 7.189, 7.221, 7.303.

least partially—under GATS.¹¹¹ The *Bananas* case involved a regime implemented by the EU to facilitate a common market for bananas.¹¹² This common regime replaced the bilateral agreements that individual EU countries had utilized for importing bananas.¹¹³ Most of these bananas came from developing countries in Africa and the Caribbean and Pacific regions (“ACP”).¹¹⁴ The EU reorganized these bilateral agreements and set up a system in which different licensing preferences were divided among “operators” that were either importers or distributors.¹¹⁵ The case was brought to the WTO because the system by which distributors were allocated various types of licenses seemed to favor EC or ACP companies over competitors in Latin America and the U.S.¹¹⁶

The Panel first examined the interaction between GATT and GATS.¹¹⁷ The Panel held that GATT and GATS are not mutually exclusive and that even if an issue has a GATT component, GATS may still apply.¹¹⁸

The Panel next looked at the standard of “treatment no less favourable” under GATS II:1, holding that GATSXVII should define the standard.¹¹⁹ Article XVII contains greater elaboration than Article II:1, and, in past analyses by panels examining GATT Article III, had been interpreted as “concerned with conditions of competition between like domestic and imported products on internal markets.”¹²⁰ The issue was whether formal discrimination among foreign service providers was necessary, or simply an “un-level competitive playing field.”¹²¹ The Panel found that Article II should not be interpreted so narrowly as to “require only formally identical treatment.”¹²² The Panel then concluded that the requirement of “treatment no less favourable” meant “no less favourable conditions of competition.”¹²³ Therefore, the Panel interpreted GATS as holding that “formal equality alone” is not enough; what is needed is a level playing field.¹²⁴

111. *Id.* at IV.600.

112. *Id.* at III.1 – III.4.

113. Bhala, *supra* note 94, at 848.

114. *Id.*

115. *Id.* at 858-64.

116. *Bananas*, *supra* note 100, at IV.600.

117. *Id.* at 7.278.

118. *Id.* at 7.282.

119. *Id.* at 7.299.

120. *Id.* at 7.302.

121. Bhala, *supra* note 94, at 916 (stating that the standard was that unfair discrimination occurred if “some service suppliers were in a better competitive position than others”).

122. *Bananas*, *supra* note 100, at 7.303.

123. *Id.* at 7.304.

124. Bhala, *supra* note 94, at 917.

Having established a definition for “treatment no less favourable,” the Panel then stated the requirements for a finding of a breach of Article XVII. The Panel held that the country had to

undertake[] a commitment in a relevant sector and mode of supply; . . . adopt[] or appl[y] a measure affecting the supply of services in that sector and/or mode of supply; and . . . accord[] to service suppliers of any other Member treatment less favourable than that it accords to the EC’s own like service suppliers.¹²⁵

The difficulty in this case was that the operator category rules seemed, on the surface, to offer identical treatment to domestic and foreign companies.¹²⁶ The Panel noted that, under Article XVII, “formally identical treatment may, nevertheless, be considered to be less favourable treatment if it adversely modifies conditions of competition for foreign services or service suppliers.”¹²⁷ Although different operators could buy and sell licenses and thus, theoretically, have equal access, the *Bananas* Panel found unfairness as the regime first allocated licenses and other privileges to the EC operators.¹²⁸ Therefore, the Panel concluded that the operator category rules favored service suppliers from the European Community.¹²⁹

The Panel also rejected the EC’s argument that the market allocation had not changed radically, finding that “a lack of significant change in market share does not demonstrate that there has not been a significant change in the conditions of competition.”¹³⁰ Thus, visible changes in market share are not required for a finding of less favorable treatment.¹³¹ The Panel findings—that GATS applied to a comparison of government regulatory regimes, that “treatment no less favorable” did not require formally identical treatment and that less favorable treatment does not require significant market changes—are relevant to a panel’s determination of whether the EU’s treatment of the U.S. privacy regime under Safe Harbor violates the WTO agreements.

125. *Bananas*, *supra* note 100, at 7.375.

126. *Id.* at 7.322.

127. *Id.* at 7.327.

128. *Id.* The unfairness came from the fact that the EC operators were favored by being given tariff quota rents. *Id.* at 7.336; see Aisha L. Joseph, Comment, *The Banana Split: Has the Stalemate Been Broken in the WTO Banana Dispute? The Global Trade Community’s “A-Peel” for Justice*, 24 *Fordham Int’l L.J.* 744, 775 (2000) (arguing that “that the allocation of quota shares to some Member States having a substantial interest in supplying the EU with bananas was inconsistent with GATT Article XIII obligations”).

129. *Bananas*, *supra* note 100, at 7.335.

130. *Id.* at 7.337.

131. *Id.*

3. *Shrimp-Turtle*: Analyzing a National Regulatory Regime Under the “Comparable in Effectiveness” Standard

While *Bananas* articulated the concept of “treatment no less favorable” and illustrates its importance,¹³² no cases have yet been decided in which a national regulatory regime for services has been evaluated under this standard. The Appellate Body in *Shrimp-Turtle II*, however, undertook this analysis in evaluating a product regulatory regime¹³³ and, therefore, provides the closest analogy to the issue of privacy regimes under Safe Harbor. *Shrimp-Turtle* examines the question of whether different treatment of domestic and foreign service providers by a national regulatory regime constitutes unfair discrimination under the WTO.

The most important contribution of the *Shrimp-Turtle* cases to the analysis of privacy regimes under Safe Harbor and other privacy regimes is its examination of “comparable in effectiveness.”¹³⁴ This case illustrates both the importance of this standard and its application to national regulatory regimes. The case also provides clarification on the exceptions to the WTO prohibitions on disparate treatment in order to protect “human, animal or plant life or health.”¹³⁵ Additionally, *Shrimp-Turtle* helps to analyze the efforts made by the country imposing the restrictions in order to decide whether or not these are applied similarly to all countries affected.

The final decision in the *Shrimp-Turtle* cases used the “comparable in effectiveness” standard to decide whether or not a regulatory regime that offered conditional access to a market based upon a foreign country’s meeting certain requirements, violated WTO standards.¹³⁶ The decision emphasized that, rather than looking first to the effect of the regulatory restrictions on the multilateral trading regime, a panel must look to whether the country’s actions fall into one of the delineated exceptions. The decision also highlighted the importance of negotiation and flexibility. The Appellate Body favored a regulation that allowed qualifying countries to follow rules and procedures with essentially the same regulatory effect, rather than one which forced implementation of rules and procedures identical to those of the regulating country.¹³⁷

The conflict that would lead to the WTO case began when the U.S. passed section 609 of Public Law 101-162,¹³⁸ which called for restrictions on imports of shrimp from countries which were not

132. See *supra* notes 119-32 and accompanying text.

133. *Shrimp-Turtle II*, Appellate Body, *supra* note 104.

134. See *infra* notes 173-81 and accompanying text.

135. GATT, *supra* note 13, art. XX-1(b).

136. *Shrimp-Turtle II*, Appellate Body, *supra* note 104, ¶¶ 135-44.

137. *Id.* ¶¶ 135-50.

138. Pub. L. No. 101-162, 103 Stat 988 (1989).

certified by the U.S. as meeting criteria for the protection of endangered turtles.¹³⁹ To qualify, countries had to implement a program using either turtle excluder devices (“TED”s) approved by the United States National Marine Fisheries Service, or a device that was “comparable in effectiveness.” An enforcement program also had to be put into effect.¹⁴⁰ The U.S. then embargoed shrimp from countries that did not use the newly-required methods for preventing the inadvertent killing of turtles.

Malaysia and other countries brought a complaint against the U.S. under the WTO, alleging both that the U.S. embargo of their shrimp catch violated GATT Article XI and that the embargo did not qualify as an exception under GATT Article XX.¹⁴¹

Shrimp-Turtle encompassed two different phases. In the first, (“*Shrimp I*”), heard in 1998, the Appellate Body found the U.S. system for regulating imports of shrimp to be discriminatory.¹⁴² In the second (“*Shrimp II*”), decided in 2001, the Appellate Body found that the revised American regulatory system for shrimp importation did allow for embargoes without violating WTO principles.¹⁴³

The Panel in *Shrimp I* found that the two sets of countries—those certified and those denied certification—had the same prevailing conditions and thus that the U.S. had discriminated by offering more favorable conditions for certification to some countries than to others.¹⁴⁴ The Panel then looked at whether the discrimination was

139. *Id.* § 609; *Shrimp-Turtle II*, Appellate Body, *supra* note 104, ¶ 5; see Benjamin Simmons, *In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report*, 24 Colum. J. Envtl. L. 413, 422-27 (1999) (providing an explanation of the background of the dispute between Malaysia and the United States over the relationship between protection of turtles and the harvesting of shrimp).

140. *Shrimp-Turtle II*, Appellate Body, *supra* note 104, ¶ 5.

141. United States—Import Prohibition Of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 by Malaysia - Report of the Panel, WT/DS58/R, ¶ 3.1 (15 May 1998), available at [http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WtÜDS*+and+\(R+or+RW\)+and+not+\(AB+or+ARB\)%29+%26+%28@Doc_Date+>=+1998/5/1%29+%26+%28@Doc_Date+<=+1998/5/31%29](http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WtÜDS*+and+(R+or+RW)+and+not+(AB+or+ARB)%29+%26+%28@Doc_Date+>=+1998/5/1%29+%26+%28@Doc_Date+<=+1998/5/31%29) [hereinafter *Shrimp-Turtle I*, Panel Report].

GATT Article XI forbids “prohibitions or restrictions other than duties, taxes or other charges . . . on the importation of any product of the territory of any other contracting party.” GATT, *supra* note 13, art. XI:1. GATT Article XX provides, however, that a measure “necessary to protect human, animal or plant life or health” may be adopted or enforced by a contracting party so long as it is not “a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade.” *Id.* art. XX.

142. United States—Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R, ¶¶ 184-87 (October 12, 1998), available at [http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WtÜDS*+and+AB+and+\(R+or+RW\)%29+%26+%28@Doc_Date+>=+1998/10/1%29+%26+%28@Doc_Date+<=+1998/10/31%29](http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WtÜDS*+and+AB+and+(R+or+RW)%29+%26+%28@Doc_Date+>=+1998/10/1%29+%26+%28@Doc_Date+<=+1998/10/31%29) [hereinafter *Shrimp-Turtle I*, Appellate Body].

143. *Shrimp-Turtle II*, Appellate Body, *supra* note 104, at VII.

144. *Shrimp-Turtle I*, Panel Report, *supra* note 141, ¶ 7.33; see, Joel Trachtman, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, § 3(b)

justified.¹⁴⁵ In examining justification, the Panel interpreted Article XX in terms of the overall purpose of the WTO, which is the “promotion of economic development through trade.”¹⁴⁶ Thus, the Panel found that the most important issue for determining whether or not exceptions from GATT are permitted under Article XX is whether or not contested measures “undermine the WTO multilateral trading system.”¹⁴⁷ Using this standard, it found that the U.S. measure did fall into the category of “unjustifiable discrimination between countries where the same conditions prevail” and, thus, was not covered by the exception in Article XX.¹⁴⁸ The Panel, therefore, found that the U.S. could not embargo the shrimp from non-conforming countries.¹⁴⁹

The Appellate Body in *Shrimp I* rejected the Panel’s reasoning.¹⁵⁰ It held that whether or not a measure maintained the nature of the WTO system should not be used as an interpretive tool for understanding and applying Article XX.¹⁵¹ It further held that the Panel should first have determined whether or not any of the exceptions under Article XX applied before analyzing the possibility that an exception was being abused.¹⁵² The Body then noted that because of the importance of the exception for “natural resources” in Article XX, this exception could not be made less important than the system of international trade, as the Panel had sought to do.¹⁵³

The Appellate Body did, however, find that the application of the law was unjustifiable and arbitrary discrimination.¹⁵⁴ The Appellate Body based this decision on five factors: (1) the United States did not attempt serious negotiations towards a multilateral agreement before implementing sanctions,¹⁵⁵ (2) the U.S. required that countries seeking

(1999), available at <http://www.ejil.org/journal/Vol10/No1/sr4.rtf> (last visited Apr. 8, 2003).

145. *Shrimp-Turtle I*, Panel Report, *supra* note 141, ¶ 7.34; Trachtman, *supra* note 144, § 3(b).

146. *Shrimp-Turtle I*, Panel Report, *supra* note 141, ¶ 7.42; Trachtman, *supra* note 144, § 3(b).

147. *Shrimp-Turtle I*, Panel Report, *supra* note 141, ¶ 7.44; Trachtman, *supra* note 144, § 3(b).

148. *Shrimp-Turtle I*, Panel Report, *supra* note 141, ¶ 7.49; Trachtman, *supra* note 144, § 3(b).

149. *Shrimp-Turtle I*, Panel Report, *supra* note 141, ¶ 7.62; Trachtman, *supra* note 144, § 3(b).

150. *Shrimp-Turtle I*, Appellate Body, *supra* note 142, ¶ 122; Trachtman, *supra* note 144, § 4(a).

151. *Shrimp-Turtle I*, Appellate Body, *supra* note 142, ¶¶ 152-53; Trachtman, *supra* note 144, § 4(a); Simmons, *supra* note 139, at 434-35.

152. *Shrimp-Turtle I*, Appellate Body, *supra* note 142, ¶¶ 118-20.

153. *Shrimp-Turtle I*, Appellate Body, *supra* note 142, ¶¶ 129-31; Trachtman, *supra* note 144, § 4(b).

154. *Shrimp-Turtle I*, Appellate Body, *supra* note 142, ¶¶ 184, 186; see Varghese, *supra* note 97, at 431 (citing *Shrimp-Turtle I*, Panel Report, *supra* note 141, ¶¶ 184, 186).

155. *Shrimp-Turtle I* Appellate Body, *supra* note 142, ¶ 166; Varghese, *supra* note

to meet its guidelines adopt “essentially the same policy,”¹⁵⁶ (3) the ban was overinclusive as it included all shrimp from the country, and thus made no provision for importation of shrimp caught using approved methods,¹⁵⁷ (4) the U.S. unjustifiably discriminated by allowing certain countries a longer phase-in period than others,¹⁵⁸ and (5) the certification process lacked transparency.¹⁵⁹ Thus, although the Appellate Body in *Shrimp I* ruled against the U.S. regulatory system, holding that it did not meet the Article XX exception, the Body left open the possibility that a different regulatory regime could meet GATT standards.¹⁶⁰

After the *Shrimp I* Appellate Body ruling, the U.S. altered its regulations to conform to the decision.¹⁶¹ Malaysia again brought charges that the new regulatory regime violated GATT, but a second WTO Panel, using the criteria which the *Shrimp I* Appellate Body had stated, found that the U.S. scheme met GATT requirements as an exception under Article XX.¹⁶²

The Appellate Body in *Shrimp II* then upheld the second Panel’s decision, finding that by modifying its program to meet the standards set out in *Shrimp I*, the U.S. regulatory system was not discriminatory and did not violate GATT.¹⁶³ The decision focused on the need for the country seeking to prohibit imports under a regulatory scheme to

97, at 431.

156. Shrimp-Turtle I Appellate Body, *supra* note 142, ¶ 161 (emphasis omitted); Varghese, *supra* note 97, at 431-32.

157. Shrimp-Turtle I Appellate Body, *supra* note 142, ¶ 165; Varghese, *supra* note 97, at 432.

158. Shrimp-Turtle I Appellate Body, *supra* note 142, ¶ 174; Varghese, *supra* note 97, at 432.

159. Shrimp-Turtle I Appellate Body, *supra* note 142, ¶ 183; Varghese, *supra* note 97, at 432.

160. Scott C. Owen, Comment, *Might A Future Tuna Embargo Withstand A WTO Challenge In Light Of The Recent Shrimp-Turtle Ruling?*, 23 Hous. J. Int’l L. 123, 137 (2000) (positing, after *Shrimp I*, but before *Shrimp II*, that “[d]espite ruling against the U.S. shrimp embargo, the Appellate Body’s report offers hope that future unilateral actions under environmental trade measures will pass WTO scrutiny” and noting that “[t]he WTO acknowledged that the unilateral requirement of a foreign country’s adoption of environmental policies and practices could fall within the article XX exceptions against trade restrictions if implemented on a more flexible basis than the shrimp embargo” (citations omitted)).

161. Varghese, *supra* note 97, at 433 (citing Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36,946-52 (July 8, 1999)).

162. United States—Import Prohibition Of Certain Shrimp And Shrimp Products - Recourse to Article 21.5 by Malaysia—Report of the Panel, WT/DS58/RW, ¶ 5.136-37 (June 15, 2001), available at [http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WTüDS*+and+\(R+or+RW\)+and+not+\(AB+or+ARB\)%29+%26+%28@Doc_Date+>=+2001/6/1%29+%26+%28@Doc_Date+<=+2001/6/30%29](http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WTüDS*+and+(R+or+RW)+and+not+(AB+or+ARB)%29+%26+%28@Doc_Date+>=+2001/6/1%29+%26+%28@Doc_Date+<=+2001/6/30%29) [hereinafter *Shrimp-Turtle II*, Panel Report].

163. Shrimp-Turtle II, Appellate Body, *supra* note 104, ¶¶ 148, 153-54.

show that it had made a good faith effort to pursue an agreement with the affected country.¹⁶⁴ The Appellate Body emphasized the fact that the United States engaged in negotiations with all potentially affected countries and had a flexible outlook.¹⁶⁵ Thus, the Appellate Body noted the importance of negotiations and emphasized that the important question was whether the U.S. had made “comparable” efforts to secure agreements with the different affected countries.¹⁶⁶ The Body noted that the U.S. had used “import prohibition,” which the court termed its “heaviest ‘weapon’” in terms of trade measures, without first resorting to international mechanisms for negotiating a settlement.¹⁶⁷ The *Shrimp II* Appellate Body, however, made it clear that an agreement need not be concluded; the only requirement is that negotiations proceed in good faith.¹⁶⁸

Malaysia also charged that the U.S. policy resulted in arbitrary discrimination, as it conditioned the import of shrimp on criteria that the U.S. unilaterally imposed.¹⁶⁹ The Panel held that the Appellate Body sought not identical standards, but rather programs “comparable in effectiveness,” which were compatible with the chapeau of Article XX.¹⁷⁰ Malaysia argued that the flexibility of the “comparable in effectiveness” standard did not mitigate the fact that the U.S. was unilaterally imposing its own standards.¹⁷¹ The Appellate Body, however, reminded Malaysia of its holding in *Shrimp I*, which stated that a common aspect of the exceptions listed in Article XX is that they are unilaterally prescribed by the importing member.¹⁷²

Shrimp II is very important for the comparison of privacy regimes. Conditional access to a WTO member’s market under the chapeau of Article XX, a key difference between *Shrimp I* and *Shrimp II*, relates directly to the issue of data privacy regulatory regimes.¹⁷³

In *Shrimp I*, the Panel and Body found that because the U.S. required countries to adopt “essentially the same policies and enforcement practices as those applied to, and enforced on, domestic

164. *Id.* ¶ 123.

165. *Id.* ¶¶ 123, 134, 140, 150.

166. *Id.* ¶ 122.

167. *Id.* ¶ 127 (citing *Shrimp-Turtle I*, Appellate Body, *supra* note 142, ¶ 171).

168. *Id.* ¶ 124.

169. *Id.* ¶ 135.

170. *Id.* The chapeau of Article XX reads:

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

GATT, *supra* note 13, art. XX [hereinafter “Chapeau”]

171. *Shrimp-Turtle II*, Appellate Body, *supra* note 104, ¶ 135.

172. *Id.* ¶ 137.

173. *Id.* ¶ 139; Chapeau, *supra* note 170.

shrimp trawlers in the United States,” the measure did not fit under the exemption in Article XX.¹⁷⁴ The Appellate Body in *Shrimp II*, however, noted the flexibility of both the new measure and its application, and thus found that the United States did not require adoption of “essentially the same” protection as a condition of access to its markets.¹⁷⁵ The Body agreed with the Panel that “comparable in effectiveness” was the correct standard.¹⁷⁶ The Body therefore held that “there is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme *comparable in effectiveness*.”¹⁷⁷ The Body explained that “conditioning market access on the adoption of a programme *comparable in effectiveness*, allows for sufficient flexibility in the application of the measure so as to avoid ‘arbitrary or unjustifiable discrimination.’”¹⁷⁸ The Body found that flexibility in this case is shown by the facts that the “United States authorities [could] take into account the specific conditions of Malaysian shrimp production, and of the Malaysian sea turtle conservation programme,”¹⁷⁹ and that the Department of State may determine that other manners of harvesting, if non-threatening to turtles, may be approved.¹⁸⁰ In conclusion, the Appellate Body emphasized that the law was only good as long as the United States continued good faith negotiations toward a multilateral solution to the problem.¹⁸¹

The *Shrimp-Turtle* cases illuminate how a panel might view the significance of the process by which one country’s regulatory measure—which other countries allege to violate WTO rules against discrimination—is applied. Interference with the WTO’s multilateral aspect is not the primary factor for determining whether a measure falls into an exception. A panel should first consider whether the law in question is related to the purpose offered as an exception. If determined affirmatively, as it was here, the panel next should consider whether the applying country attempted negotiations, although there is no requirement that the negotiations be successfully concluded. Additionally, a panel should look to whether the country applying the measure demands that other countries adopt the same policy, or allows the adoption of policies comparable in effectiveness—a sign of flexibility. Lastly, unilateral imposition of an exception clearly may not be categorically prohibited. This is especially so if the prohibition falls under an exception and the

174. *Shrimp-Turtle II*, Appellate Body, *supra* note 104, ¶ 140.

175. *Id.*

176. *Id.* ¶ 142.

177. *Id.* ¶ 144.

178. *Id.*

179. *Id.* ¶ 146.

180. *Id.* ¶ 146-47.

181. *Id.* ¶ 153(b).

country imposing the regulation is both flexible in applying its regulations and enters into good faith negotiations before embargoing the disputed products.¹⁸²

4. “Like-Product” Analysis and the Comparison of Privacy Regimes

The other candidate for evaluating discrimination among privacy regimes under the WTO is the concept of “like-product.”¹⁸³ Although “like-product” is a GATT standard and thus is designed for products, it seems to be easily adaptable to services. “Like-product” requires that products, whether domestic or imported, serving the same purpose or offered to the same type of consumer, receive the same regulatory and tax treatment.¹⁸⁴ Thus, the treatment of like products under the GATT is analogous to that of the privacy regimes under GATS. This section will examine the leading cases interpreting the “like-product” doctrine to show how this standard is applied.

a. *The Basis For “Like-Product” Analysis—Japan-Taxes*

The most significant Appellate Body decision involving the interpretation of Article III:1 is *Japan—Taxes on Alcoholic Beverages* (“*Japan-Taxes*”).¹⁸⁵ The U.S. and other countries brought a complaint under GATT because Japan had legislated a classification system for tariff purposes under which shochu, a Japanese alcoholic beverage, was taxed at a lower rate than vodka, which was imported.¹⁸⁶ The Panel considered how to determine the “likeness” of products¹⁸⁷—whether, for example the Panel should examine the intent of the government in passing the regulation—i.e., whether it was implemented to favor domestic industry, or whether a more results-oriented analysis should be undertaken.¹⁸⁸

182. See *supra* notes 172-80 and accompanying text.

183. See generally Choi, *supra* note 93; Hudec, *supra* note 106; Tsai, *supra* note 93.

184. *Japan-Taxes*, *supra* note 106, at 15-17; see Hudec, *supra* note 106, at 620.

185. *Japan-Taxes*, *supra* note 106.

186. *Id.* at 1.

187. *Japan-Taxes on Alcoholic Beverages—Report of the Panel*, WT/DS8/R, WT/DS10/R, WT/DS11/R (July 1996), ¶ 6.14-6.23, available at [http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WTüDS*+and+\(R+or+RW\)+and+not+\(AB+or+ARB\)%29+%26+%28@Doc_Date+>=+1996/7/1%29+%26+%28@Doc_Date+<=+1996/7/31%29](http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+WTüDS*+and+(R+or+RW)+and+not+(AB+or+ARB)%29+%26+%28@Doc_Date+>=+1996/7/1%29+%26+%28@Doc_Date+<=+1996/7/31%29) [hereinafter *Japan-Taxes Panel*].

188. *Id.* ¶¶ 6.14-6.19; see generally Tsai, *supra* note 93 (arguing against the “literalist approach” and in favor of a comparison of the regulations defining the compared products rather than looking at tax criteria and the characteristics of the product); see also Choi, *supra* note 93, at 111-15 (explaining the difference between the “border tax adjustment” approach, which considers the end uses of the product, its properties, nature and quality, the tastes and habits of consumers, and the “aim and effect” approach, a more subjective approach which looks to the perspective from which products are compared, thus making the intent and effect of the tax or regulation important).

The Panel decided against using the latter standard, known as the “aims and effects” test, and found that, because this test “conditions likeness on the criterion whether a domestic legislation operates so as to afford protection to domestic production, [the test] is inconsistent with the wording of Article III:2.”¹⁸⁹ The Panel then articulated a more “flexible” test, which hinged upon the products’ “shar[ing], apart from commonality of end-uses, essentially the same physical characteristics.”¹⁹⁰ The Panel then concluded that vodka and shochu are like products.¹⁹¹

Both Japan and the U.S. appealed the Panel decision. Japan argued that the Panel should have considered whether the law creating the tax on vodka had “the aim of affording protection to domestic production.”¹⁹² The U.S. argued to the Appellate Body that the Panel had erred by not considering whether a distinction in a tax system could “afford protection to domestic production.”¹⁹³ The U.S. also argued that the Panel was incorrect when it held that “‘likeness’ can be determined purely on the basis of physical characteristics, consumer uses and tariff classification” without looking to whether the distinction is made to protect domestic production.¹⁹⁴

The Appellate Body agreed with the Panel that vodka and shochu were like products¹⁹⁵ and also agreed that the aims and effects test was not the proper analytical tool.¹⁹⁶ Thus, their physical characteristics, end-uses, and tariff classifications determine whether products are “like.”¹⁹⁷

One commentator has found two differences between the “aims and effects” test analysis and the traditional test.¹⁹⁸ The first is that the former makes “likeness” and the actual definition of the violation less important than the true differences between regulation and protectionism—(1) the actual effect the measure had on trade and (2) the authenticity of the regulatory purpose behind the measure.¹⁹⁹ The second difference is that the “aims and effects” test relaxed the rigor of the traditional analysis because it provided for an examination of

189. Japan-Taxes Panel, *supra* note 187, at 6.18.

190. *Id.* ¶ 6.22.

191. *Id.* ¶ 6.23.

192. Japan-Taxes, *supra* note 106, at 3.

193. *Id.* at 4 (citing GATT *supra* note 13, art. III).

194. *Id.*

195. *Id.* at 32.

196. *Id.* at 19-21.

197. Serena B. Wille, *Decisions of the Appellate Body of the World Trade Organization Recapturing a Lost Opportunity: Article III:2 GATT 1994 Japan-Taxes on Alcoholic Beverages 1996*, 9 *Eur. J. Int'l L.* 182, Part III(A)(3) (1998), at <http://www.ejil.org/journal/Vol9/No1/sr1b.html>.

198. Hudec, *supra* note 106, at 628.

199. *Id.* at 628.

both the “regulatory justification” and the issue of violation at the same time.²⁰⁰

While the Appellate Body in *Japan-Taxes* found that the “aims and effects” test should not be applied,²⁰¹ commentators posit that panels still may apply the criteria of the “aims and effects” test when determining the likeness of products for a national treatment analysis.²⁰² The effect of a rejection of the “aims and effects” test is that “questions of regulatory purpose [are] left . . . to be raised, if at all, as a special justification to be tested under article XX.”²⁰³ This last distinction is important for the issue of privacy, because the argument may be analogized to the exception in GATS Article XIV for protection of privacy in data transmission so long as protections are not adopted for discriminatory purposes.²⁰⁴

b. *An Economic View of “Like-Product” Analysis—The Asbestos Case*

In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* (“*Asbestos*”),²⁰⁵ the Appellate Body provided further illumination on the standard for likeness. In the case, the question was whether France could treat Canadian cement containing asbestos differently from domestic, asbestos-free cement.²⁰⁶ The Appellate Body began its review of the Panel’s finding that the two cements were “like” products with a dictionary definition of “like,” noting that “‘like’ products are products that share a number of identical or similar characteristics or qualities.”²⁰⁷ It noted, however, that this definition did not determine the characteristics which are important in determining “likeness,” clarify the degree or extent to which qualities must be shared to be held “like,” or state the perspective from which “likeness” must be viewed.²⁰⁸

While citing *Japan-Taxes* for the general proposition that the purpose of Article III is to ensure that internal taxes and regulations do not unfairly protect domestic production, the Body held that “a determination of ‘likeness’ under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive

200. *Id.*

201. See Baker, et al., *supra* note 15, at 14 (noting that the Appellate Body in *Japan-Taxes* held “that the term ‘like product’ as used in [GATT] article III:2 should be construed narrowly on a case-by-case basis” and found that while tariff classification could aid in determining whether products were similar, common end uses and identical physical characteristics were also important criteria).

202. Hudec, *supra* note 106, at 634.

203. *Id.* at 636.

204. GATS, *supra* note 14, art. XIV(c)(ii).

205. *Asbestos*, *supra* note 108.

206. *Id.* ¶¶ 33, 192.

207. *Id.* ¶¶ 90-91.

208. *Id.* ¶ 92.

relationship between and among products.”²⁰⁹ It also noted that the concept of “likeness” must be applied on an individual, case-by-case basis.²¹⁰ The four criteria which the Body recognized were: physical properties of the products, end-uses of the products, consumers’ tastes and habits, and tariff classification of the products.²¹¹

The Appellate Body found that the Panel had incorrectly relied on only one of these criteria.²¹² The Body found that the physical properties of the product (such as the presence of a toxic substance such as asbestos) are important to consider and that this analysis cannot be absorbed into the broader analysis of the end uses.²¹³ Additionally, the fact that two products have the same end-use does not mean that they have identical or similar properties.²¹⁴ The Body held that two products which have different health risks are, by definition, not identical in terms of physical properties.²¹⁵ It further commented on the importance of the second and third criteria as aids in determining competitiveness in the market. If products do not compete, a country cannot impose internal regulations to protect domestic production.²¹⁶ The Appellate Body found that the Panel had examined the criterion of end-uses inadequately because it had only looked at a few cases in which the products had similar end-uses and, furthermore, had neglected to analyze cases in which the products had different end-uses.²¹⁷

The Appellate Body also faulted the Panel for ignoring the third criterion: consumer tastes.²¹⁸ While the Panel found that this criterion would not provide clear results, the Appellate Body observed that consumer tastes and preferences are important in a case when physical properties are different. The Body stated that:

[C]onsumers’ tastes and habits regarding fibres, even in the case of commercial parties, such as manufacturers, are very likely to be shaped by the health risks associated with a product which is known to be highly carcinogenic. A manufacturer cannot, for instance, ignore the preferences of the ultimate consumer of its products.²¹⁹

The Appellate Body refused to accept Canada’s contention that where regulatory barriers have disturbed “normal conditions of

209. *Id.* ¶¶ 97-99.

210. *Id.* ¶ 101.

211. *Id.*

212. *Id.* ¶ 109.

213. *Id.* ¶ 111.

214. *Id.* ¶ 112.

215. *Id.* ¶ 114.

216. *Id.* ¶ 117.

217. *Id.* ¶ 119.

218. *Id.* ¶¶ 117, 120-25.

219. *Id.* ¶ 122 (emphasis omitted).

competition,” the tastes and behaviors of consumers are not relevant.²²⁰

The Appellate Body thus reversed the Panel’s decision that the two types of fibers are like products because the Panel had not adequately analyzed the four criteria.²²¹ The Appellate Body in the *Asbestos* case seemed to be calling for an exclusively or fundamentally economic view of like products under Article III:4 of GATT.²²²

II. THE CONFLICT BETWEEN SAFE HARBOR AND THE EUROPEAN PRIVACY DIRECTIVE, AND THE FORM THAT A GATS DISPUTE SETTLEMENT CASE MIGHT TAKE

In a hypothetical situation before the WTO, Hungary or Australia could bring a dispute settlement case against the EU, alleging that the EU had set higher standards for them than for the U.S. These countries represent two different categories of member states that might have a colorable complaint about their treatment by EU regulators. Hungary is an EU-aspirant that successfully received a categorization of adequacy for its privacy regime.²²³ Australia is currently in negotiations with the EU seeking a rating of adequacy.²²⁴ This section will analyze the hypothetical Dispute Settlement Case that these countries might bring.

A. Hungary: Achieving a Rating of “Adequate” Through Strict Compliance with the Requirements of the European Privacy Directive

Hungary had to meet an extensive and rigorous set of procedures in order to receive a rating of adequate from the European Parliament commission which investigates privacy regimes.²²⁵ Hungary would thus have grounds to allege either that its companies were treated unfairly in comparison to similar American companies, which merely had to accede to the Safe Harbor standards, or that the EU’s standards for the U.S. were not comparable in effectiveness to those

220. *Id.* ¶ 123.

221. *Id.* ¶¶ 125-26.

222. *See id.* ¶ 154.

223. The fact that Hungary is an EU aspirant is important as it may be the case that some of the modifications to its laws regarding privacy were made to conform to EU entrance requirements, rather than to requirements of the European Privacy Directive.

224. Article 29 Data Protection Working Party, 3/2001 on the Level of Protection of the Australian Privacy Amendment (Private Sector) Act 2000, 5095/00/EN (2001), available at http://europa.eu.int/comm/internal_market/privacy/docs/wpdocs/2001/wp40en.pdf (last visited Mar. 29, 2003) [hereinafter Working Party on Australian Privacy].

225. Commission Decision, European Parliament and of the Council on the Adequate Protection of Personal Data Provided in Hungary, (2000) available at http://europa.eu.int/comm/internal_market/en/dataprot/adequacy/hu_00-519_en.pdf [hereinafter Commission Decision on Hungary].

imposed on Hungary. Both American and Hungarian companies are service providers seeking to send data from the EU to their respective home country offices.

In the first case, the American company would have signed up for Safe Harbor,²²⁶ thereby meeting the criteria discussed in Part I of this Note.²²⁷ Safe Harbor also would have allowed the American company to disregard some protections required by the European Parliament Report on the Draft Commission Decision.²²⁸

The Hungarian company, however, would not be allowed to disregard these protections. The language of the Commission Decision of 26 July 2000 explicitly states that Hungary must meet the requirements of the European Directive.²²⁹ The Commission Decision also provides that “competent authorities” in member states may suspend flows of data to Hungary if there are “reasonable grounds” to believe that the Hungarian authority is not enforcing its privacy laws adequately.²³⁰ Additionally, the Decision mentions the need for member countries to inform one another if Hungarian agencies responsible for enforcing these rules are unable to secure compliance.²³¹ The Decision even includes the possibility of rescission of the adequacy ruling itself if enforcement is deemed to be inadequate.²³²

Hungarian privacy laws provide for enforcement by judicial remedy, including compensation.²³³ Article 59 of the Hungarian Constitution assures privacy protection for the processing of personal data and provides various sectorial laws that protect this personal data in other areas.²³⁴ Thus, the process which Hungary had to undergo and the requirements to which it acceded are much more rigorous than those for the U.S. under Safe Harbor.

226. Had the American company not signed up for Safe Harbor, it theoretically should not have been allowed to send the data from the EU to the U.S., and the issue might be one of enforcement. European Privacy Directive, *supra* note 1, ch. IV, art. 25 ¶ 1. 2 (requiring that data transfers can be made only to third countries having “adequate level[s] of protection” and that member states prevent data transfers to countries not meeting these adequate standards of protection).

227. *See* Safe Harbor, *supra* note 3 and accompanying text.

228. *See* Parliament Report, *supra* note 48.

229. Commission Decision on Hungary, *supra* note 225.

230. *See id.* art. 3.

231. *Id.* art. 3, ¶ 1(b).

232. *Id.* art. 3, ¶ 4.

233. *Id.* pmb. ¶ 8.

234. *Id.* pmb. ¶ 6.

B. Australia: Still Seeking Approval Despite Higher Levels of Data Protection than the U.S. and Greater Compliance with the European Privacy Directive

The EU also has been evaluating Australia's level of adequacy, but has not yet granted an approval rating.²³⁵ The Article 29 Data Protection Working Party published findings in January of 2001 which included criticisms of Australia's privacy regime.²³⁶ These criticisms included the fact that "some sectors and activities are excluded from the protections of the [Australian Privacy] Act."²³⁷ Among small businesses, only those sectors "deemed to pose a high risk to privacy" must meet the requirements of the Privacy Act.²³⁸ The Working Party noted that this qualification had the potential for causing uncertainty.²³⁹ The Working Party also noted problems with exemptions for both certain types of employee data and publicly available data.²⁴⁰ Additionally, organizations may inform data subjects of collection of data pertaining to them after the collection, as opposed to before, as required by the European Privacy Directive.²⁴¹

The Working Party found other inadequacies. These include: lack of opt-out provisions for individuals facing direct marketing,²⁴² no prohibition on other uses of sensitive data collected for legitimate purposes,²⁴³ no mechanism for preventing interference with the privacy of EU citizens who are not Australian residents,²⁴⁴ and no means to prohibit onward transfers of data imported into Australia from third countries.²⁴⁵ Because of these insufficiencies, the Working Party found that Australia's National Privacy Principles were not adequate.²⁴⁶

The testimony of Peter Ford at the Conference and Report on the Implementation of Directive 95/46/EC made apparent the importance of the EU's treatment of Australia for the issue of comparing data privacy regimes under the WTO.²⁴⁷ Mr. Ford first noted that "the

235. Working Party on Australian Privacy, *supra* note 224.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*; European Privacy Directive, *supra* note 1, ¶ 39.

242. Working Party on Australian Privacy, *supra* note 224.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. Peter Ford, First Assistant Secretary Information and Security Law Division Attorney-General's Department, Australia, Implementing the Data Protection Directive—An Outside Perspective (30 Sep – 1 Oct 2002), *available at*: http://europa.eu.int/comm/internal_market/en/dataprot/lawreport/speeches/ford_en.pdf (last visited, Mar. 13, 2003) [hereinafter Ford Testimony]. Mr. Ford testified that:

[t]he accommodation reached between the United States and Europe in the

Australian approach is to set minimum standards and allow industry, if it so wishes, to develop its own codes which must be approved by the Privacy Commissioner if they are to operate in place of the statutory standards.”²⁴⁸ He stated that Australia was following one of the Working Party’s recommendations by adding a remedy to violations of data privacy of non-Australians, although he testified that the only issue was enforcement as the law already protected the privacy of this group.²⁴⁹

In relation to the Working Party’s disagreement with the exclusion for secondary uses of publicly available information, he noted that “it is difficult to imagine what useful purpose might be served by a requirement for a right of access to a document which is already publicly available.”²⁵⁰ Mr. Ford also stated that “[t]he Australian Government has excluded from the ambit of the legislation only those small businesses that pose no threat or low threat to privacy” in response to the criticisms of the exception for small businesses.²⁵¹

As a way to distinguish between those issues which threaten privacy and those which do not, Mr. Ford emphasized that the legislation “ensure[s] that businesses that *trade* in personal information are denied the benefit of the small business exemption and are covered by the Act.”²⁵² He continued, stating that the Working Party’s objection to allowing direct marketers one chance to reach target customers before these customers had the chance to opt out was a “mere quibble.”²⁵³ Mr. Ford pointed out that “[t]his is an area where the test imposed on Australia also seems to be more restrictive than that imposed on the US.”²⁵⁴ He noted that under Safe Harbor, “information may be collected for the primary purpose of direct marketing without first obtaining consent.”²⁵⁵ He extended this comparison to Safe Harbor in the area of notice, remarking that the Working Party on Australian Privacy had criticized the fact that the

‘US Safe Harbor Principles’ seemed, at first, to indicate a measure of flexibility on the part of the Commission; however, our experience has been that what is acceptable from the US will not necessarily be accepted from other countries The other objectionable feature . . . is an excessively regulatory approach flowing from a tendency to use the Directive as a template for the laws of non-EU countries.

Id. at 1.

248. *Id.* at 5.

249. *Id.*

250. *Id.* at 6.

251. *Id.* at 9 (emphasis omitted) (offering as an example “the local butcher [who] may hold personal information about some of his/her customers solely for the purpose of satisfying customer needs or for billing purposes”).

252. *Id.* at 10.

253. *Id.* at 11 (arguing that “it is legitimate for the EU to say what it requires by way of protection of European data, [but] it is surely a matter for third party countries to say how they will provide such protection”).

254. *Id.* at 11.

255. *Id.*

Australian law allowed notice to be given as soon as practicable after the data collection, if it is not possible to give notice before or concurrent to the collection.²⁵⁶ He argued, however, that the Australian law provides a level of protection equal to that which the EU found sufficient in the Safe Harbor Agreement.²⁵⁷

In his conclusion, Mr. Ford asserted that Australia has “been treated differently from the US [I]t is possible under the ‘Safe Harbor principles’ for US companies to disregard the Directive in relation to generally available publications that contain only US data. No such principle has been recognised for Australia.”²⁵⁸ Australia thus presents a troubling case in which a rating of adequacy has been denied based upon failure to satisfy requirements which the U.S. was not obligated to meet under Safe Harbor.

III. APPLYING THE STANDARD OF “COMPARABLE IN EFFECTIVENESS,” A PANEL WOULD FIND THAT THE EU FAVORED THE UNITED STATES IN VIOLATION OF WTO RULES

This part discusses the concepts and decisions introduced in Part I and applies them to the conflict introduced in Part II. It then concludes that the correct standard for evaluating whether a privacy regulatory regime is discriminatory is that of “comparable in effectiveness,” as elucidated by the Appellate Body in *Shrimp-Turtle II*.

A. *The “Comparable in Effectiveness” Standard from Shrimp-Turtle II Is the Proper Standard for Evaluating Privacy Regulatory Regimes*

Any panel charged with examining allegations that the EU had discriminated against other countries by favoring the U.S. in an evaluation of privacy regimes would make use of the four cases just examined in Part I. From *Bananas*, a panel would note the need to evaluate the case under GATS,²⁵⁹ and the importance of equal levels of competition, rather than formal identity in regimes. It would also have to acknowledge the “like-product” evaluation, used by the Panels and Appellate Bodies in *Japan-Taxes* and *Asbestos*, including the need to look to the formal characteristics and end-uses of the service, rather than to its effect on competition. Nevertheless, a panel would find this standard incomplete, as it does not offer proper evaluative tools for comparing privacy regimes.²⁶⁰

256. *Id.*; see Working Party on Australian Privacy, *supra* note 224.

257. See Ford Testimony, *supra* note 247, at 11 (citing Safe Harbor, *supra* note 3, at FAQ 15).

258. *Id.* at 14.

259. See *supra* notes 117-18 and accompanying text.

260. See *infra* notes 267-71 and accompanying text.

The panel would find that the most relevant standard comes from *Shrimp Turtle II*. Under the “comparable in effectiveness” standard, the Panel must look to whether a regulatory regime under which one country sought to embargo products of another comes within an exception to the GATS prohibition against product/service embargos.²⁶¹ The panel would have to examine whether the restriction is arbitrary or unjustified discrimination, or a disguised restriction on trade.²⁶² The Panel would also need to look to whether the embargoing country sought to impose the exact same regulatory regime or merely one that was equally effective, whether the country applied the same standards to all countries, and whether it had entered into good faith negotiations.²⁶³

1. The “Treatment No Less Favorable” Standard, as Elaborated by the Panel in *Bananas*, Does Not Provide Sufficient Criteria for Evaluating Potentially Discriminatory Treatment of Privacy Regimes

The *Bananas* case is important for the panel in its evaluation as it specifies the relevance of GATS,²⁶⁴ and shows the broad application of GATS to disputes over the supply of services.²⁶⁵ Secondly, the “treatment no less favorable” standard, as developed in *Bananas*, demands a level playing field. As developed in that case, the standard indicates that discrimination might still exist even if the differential treatment offered to Australian companies, vis-à-vis the American companies, caused no change in the Australians’ market share.

This standard draws its significance for the instant case from the fact that it deals directly with a comparison of regulatory regimes. *Bananas* holds that, while a regulatory regime may not formally discriminate between foreign and domestic service providers, discrimination may exist if the former are not given the same

261. See *supra* note 162 and accompanying text.

262. See *supra* notes 169-72 and accompanying text.

263. See *supra* notes 163-66 and accompanying text.

264. *Bananas*, *supra* note 100, at 7.285 (holding that “[t]he scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services”).

265. See *supra* notes 109-18 and accompanying text. Appellate Body decisions have rejected any narrow reading of “affecting” and have found that this term “does not convey any notion of limiting the scope of GATS to certain types of measures or to a certain regulatory domain.” Werner Zdouc, *WTO Dispute Settlement Practice Relating to the GATS*, 2 J. Int’l Econ. L. 295, 318, 320 (1999) (arguing that “no measures are excluded *a priori* from the scope of the GATS, which encompassed any measure of a Member to the extent it affects the supply of a service, regardless of whether such measure directly governs the supply of a service, or whether it regulates other matters but nevertheless affects trade in services”); see Swire & Litan, *supra* note 86, at 190, 194-95 (arguing that in the context of the European Privacy Directive that regulation of a privacy regime would fit under GATS and would depend upon how narrowly or broadly a WTO Panel interpreted the privacy exception in Article XIV).

conditions of competition, even if there was no significant change in market share.

In the end, however, the “treatment no less favorable” standard, as elucidated by the *Bananas* Panel, does not offer a complete framework for comparing the different privacy regulatory regimes. In the hypothetical case under consideration, a panel would need guidance to deal with the question of whether the exception for privacy in GATS XIV²⁶⁶ will affect a ruling on discrimination. The Panel would also need guidance on the role that the different sets of negotiations play in deciding the merits of the different regulatory regimes.

2. The “Like-Product” Standard Involves a Comparison of the End Uses or Characteristics of the Privacy Regimes

The panel might try to apply the standard of “like-product” as developed in *Japan-Taxes* and *Asbestos*. The *Japan-Taxes* Appellate Body interpreted “like-product” to depend on the sharing of similar end uses or characteristics.²⁶⁷ The Body rejected the aims and effects test and the need for examining the regulatory purpose.²⁶⁸ Thus, if a panel were to follow the *Japan-Taxes* decision, it would look only to the explicit characteristics of the privacy regimes, rather than to the purpose of the regulation or whether it was enacted for a discriminatory purpose.

One reason that a WTO Panel would not use the “like-product” standard is the difficulty inherent in analogizing between the items compared in *Japan-Taxes*—distilled liquors—and those being compared in the hypothetical case—privacy regimes. One could try to determine whether or not the different privacy regimes are “like,” based upon whether or not they have similar end uses or physical characteristics. The “like-product” test was developed, however, for more readily measured products or services. In judging whether there has been discrimination against a foreign “like-product” or service, in most cases it is necessary to examine the relevant regulatory measures or tax measures.²⁶⁹ This is true under both the traditional and the “aims or effects” tests.²⁷⁰ “Like-product” could be analogized to a like service—for example, if one were comparing treatment of foreign and domestic insurance providers in the EU. However, neither *Japan-*

266. GATS, *supra* note 14, art. XIV(c)(ii).

267. *See supra* notes 185-97 and accompanying text.

268. *See supra* notes 185-97 and accompanying text.

269. *See supra* notes 165-81 and accompanying text.

270. *See supra* notes 165-81 and accompanying text; *see* Hudec, *supra* note 106, at 635 (arguing that the aims and effects test has been applied to “the WTO’s policing function over domestic regulatory measures” and will continue to be so applied, although WTO panels and appellate bodies do so without admitting what they are doing).

Taxes nor Asbestos offers any insight into the aspects which must be evaluated in order to judge whether a regulatory regime, under which a country seeks to ban imports of a product or a service of another country, is discriminatory.²⁷¹

3. A WTO Dispute Panel Would Use the Standard of “Comparable in Effectiveness” in Evaluating Whether Safe Harbor Violates WTO Principles

A panel examining the issue would use the “comparable in effectiveness” standard because this standard allows an evaluation of whether a regulatory regime may distinguish treatment of products or services from different countries and how it may do so.²⁷²

The Appellate Bodies in *Shrimp-Turtle I* and *Shrimp-Turtle II* created a framework that is applicable to the hypothetical posed here.²⁷³ Under GATT XI, countries cannot impose prohibitions and restrictions except through duties.²⁷⁴ This ban can be analogized to a prohibition or restriction on transfers of data. GATT XI also lists exceptions to the prohibition on quantitative restrictions,²⁷⁵ as does GATS for protection of privacy.²⁷⁶ The imposition of these prohibitions and restrictions is subject to the exceptions given in GATT XX, so long as the exceptions are not used for “arbitrary or unjustifiable discrimination between countries.”²⁷⁷

4. A Panel Would Find Safe Harbor To Be a Violation Under the Appropriate Standard of “Comparable in Effectiveness”

The “comparable in effectiveness” standard, as articulated by the *Shrimp-Turtle II* Appellate Body, provides criteria for deciding whether a country’s regulatory regime arbitrarily or unjustifiably discriminates against the regulatory regime of another country. The different standards and methods used by the EU in certifying regimes for regulating privacy—that of the U.S. as opposed to those of Hungary and Australia—as well as the difference in format and results of the EU-U.S. negotiations on privacy regulatory regimes, would support a finding that the EU discriminated against Hungary and Australia in violation of WTO standards.

271. One other possibility, an examination of which would go beyond the contours of this Note, for the differential treatment given to the U.S. has to do with politics and economic power. The involvement of these other factors would require an evaluatory framework which considers political pressures, among other factors. The “like-product” test is much too limited even to attempt to examine these factors.

272. See *supra* notes 132-81 and accompanying text.

273. See *supra* notes 132-81 and accompanying text.

274. GATT, *supra* note 13, art. XI.

275. *Id.*

276. GATS, *supra* note 14, art. XIV(c)(ii).

277. GATT, *supra* note 13, art. XX.

B. *The Safe Harbor Violates the WTO*

1. The *Shrimp-Turtle II* Elements Favor Finding a Violation of WTO Principles

The *Shrimp-Turtle II* Appellate Body provided certain elements for consideration when determining whether discrimination is allowed or whether it is arbitrary, unjustifiable or a disguised restriction on trade.²⁷⁸ The issue in *Shrimp-Turtle* was analogous to the issue of data transmissions and privacy: the U.S. justified its embargo on allegations that Malaysia did not meet U.S. standards for catching shrimp, just as in the hypothetical the EU threatens to suspend data transmissions because it alleges that protections offered by some countries are inadequate under the EU's own standards.

Applying the *Shrimp-Turtle II* criteria to this hypothetical, a panel should consider whether the EU made comparable efforts to secure agreements, whether the EU used its "heaviest weapon" without negotiating first,²⁷⁹ and whether the EU differentiated among countries in its treatment. The Appellate Body in *Shrimp-Turtle II* also observed that market access cannot be judged completely by the adoption (or non-adoption) of essentially the same program.²⁸⁰

In the hypothetical case, the EU is regulating privacy just as the U.S. regulated the environment in the *Shrimp-Turtle* cases. Both measures have extraterritorial effects. Both ostensibly could violate the GATT article forbidding prohibitions on the importation of products or services.²⁸¹ Both also arguably fall under exceptions.²⁸² In both cases there is a factual question as to the issue of comparable treatment of different countries: U.S. negotiations, or lack thereof, with certain countries on agreements for TED's and EU negotiations, or lack thereof, with certain countries on agreements for certifying privacy protections for data communications.

In *Shrimp-Turtle I*, the Appellate Body held that the U.S. was wrong in applying different standards to different countries.²⁸³ Therefore, it held that the U.S. could not embargo shrimp from countries with systems which were equally effective, but not identical, to its own.²⁸⁴ This situation is similar to that of the EU and its enforcement of the privacy regimes. By analogy, the EU should not

278. See *supra* notes 163-68 and accompanying text.

279. *Shrimp-Turtle II*, Appellate Body, *supra* note 104, ¶ 127 (citing *Shrimp-Turtle I*, Appellate Body, *supra* note 142, at 171).

280. *Id.* ¶ 140.

281. GATT, *supra* note 13, art. XI. GATT only applies to products, but decisions such as those in the *Bananas* case have analogized GATT provisions to services.

282. GATT, *supra* note 13, art. XX (on health); GATS, *supra* note 14, art. XIV(e)(ii) (on privacy).

283. See *Shrimp-Turtle I*, Appellate Body, *supra* note 142, ¶¶ 173-75.

284. See *supra* notes 150-59 and accompanying text.

be allowed to stop transmissions from EU countries to countries with equally effective, identical systems.

Although the EU itself has not prohibited any transmissions or issued a credible threat to cease transmissions immediately, member countries have done so on two different occasions.²⁸⁵ While the EU has entered into negotiations with countries seeking adequacy ratings, there are serious questions as to whether all countries have been treated equally in these negotiations.²⁸⁶ While *Shrimp-Turtle II* does not require successful negotiations, it does require that parties negotiate in good faith.²⁸⁷ There is a credible question as to whether the negotiations with Australia have been conducted under this standard of good faith in that demands were made of Australia that were not required of the United States.²⁸⁸

2. The Differential Treatment of the U.S. as Opposed to Hungary and Australia Argues in Favor of a WTO Violation

In our hypothetical, Hungary and Australia argue that the Safe Harbor regime, adopted by the U.S. in agreement with the EU, is not comparable in effectiveness to that which the EU applies either to its own member states or to other third countries. Both countries' extensive efforts to qualify,²⁸⁹ as well as comparisons between their standards and those of the U.S. under Safe Harbor,²⁹⁰ support this argument. Other considerations include the allegations that U.S. companies (and by extension the U.S.) are not complying with Safe Harbor²⁹¹ or the weaker standards of Safe Harbor,²⁹² and the fact that the EU has taken only a few, very weak actions in response to inadequate enforcement by the U.S.²⁹³ Thus, the fact that the Safe Harbor Agreement required less of the U.S. than the EU required of

285. In 1995, the Swedish Data Inspection Board held that American Airlines could not transfer personal data on Swedish citizens from Sweden to the U.S. Summary of the Decision by the Lower Courts on American Airlines, Inc. v. Swedish Data Inspection Board, at <http://www.privacyexchange.org/legal/swedishcase.html>; see James J. Dillon, et al., *In Practice E-Commerce Minimizes the Risks of Privacy Violations When Operating E-Commerce Websites*, 169 N.J. L.J. 1143 (2002), available at http://www.goodwinprocter.com/publications/dillon_hildebrand_klosek_09_16_02.pdf.

In 1999, "Microsoft paid \$60,000 to settle charges brought by Spain that Microsoft didn't 'clearly and conspicuously' disclose to Spanish consumers what happens to personal data when they register for Windows." Ted Kemp, *Privacy Rules Cross the Pond*, at <http://www.internetweek.com/newslead01/lead071601.htm> (July 16, 2000).

286. See *supra* notes 225-58 and accompanying text.

287. *Shrimp-Turtle II*, Appellate Body, *supra* note 104, ¶ 123.

288. See *supra* notes 235-46 and accompanying text.

289. See *supra* notes 229-46 and accompanying text.

290. See *supra* notes 40-46 and accompanying text.

291. See *supra* notes 56-65 and accompanying text.

292. See *supra* notes 56-71 and accompanying text.

293. See *supra* note 285 and accompanying text.

Hungary and Australia, and that the U.S. has not fully met even these weaker standards, supports a finding that the EU's actions violate the WTO.

3. The Difference in the Format and Results of the EU-U.S. Negotiations Vis-À-Vis Those with Hungary and Australia Is Further Evidence of a Violation

Another key argument in favor of finding a WTO violation is that both the form and the result of the EU's negotiations with the U.S. were different from EU negotiations with other countries.²⁹⁴ A counter-argument, however, would posit that good faith negotiations²⁹⁵ could be interpreted to include a good faith effort to recognize the cultural and political differences of the party with which the EU is negotiating.²⁹⁶ The EU could argue that its approach to the U.S. was based on this idea as it was clear that the U.S. was not going to change its privacy laws to meet the exact wording of the European Privacy Directive.²⁹⁷

This reasoning would, however, overstate the term "flexibility." The idea of flexibility in the case had to do with allowing for different approaches to the regulatory regime,²⁹⁸ not to allowing one country to have its own separate agreement, exempting it from provisions which others were required to follow. Nothing in *Shrimp-Turtle* suggests that flexibility means allowing a country to receive treatment not offered to another based on the fact that without such special treatment the country would not abide by the regulations.

294. See Europa—Internal Market: Data Protection: Commission Decisions on the Adequacy of the Protection of Personal Data in Third Countries, at http://europa.eu.int/comm/internal_market/privacy/adequacy/en.htm (last visited Mar. 26, 2003) (noting that "[t]he Council and the European Parliament have given the Commission the power to determine, on the basis of Article 25.6 of directive 95/46/EC whether a third country ensures an adequate level of protection by reason of its domestic law or of the international commitments it has entered into . . . [and that] [t]he Commission has so far recognised [only] Switzerland, Hungary and the US Department of Commerce's Safe Harbor Privacy Principles as providing adequate protection"). No other country has been offered an individual agreement similar to that offered to the U.S. under Safe Harbor.

295. The Appellate Body held that the U.S. had to negotiate in good faith in order to try to reach an agreement on the TED's before prohibiting shrimp from the country accused of improper shrimp harvesting. *Shrimp-Turtle II*, Appellate Body, *supra* note 104, ¶ 123.

296. This is based on the idea that the *Shrimp-Turtle* Appellate Body decisions allow for flexibility and that countries did not have to adopt the same program as the U.S., only one that was comparable in effectiveness. *Id.* ¶ 144.

297. There was tremendous resistance to the much weaker standards of the Safe Harbor Agreement. See *supra* notes 56-65 and accompanying text.

298. *Shrimp-Turtle II*, Appellate Body, *supra* note 104, ¶¶ 40, 144.

C. *The U.S. Privacy Regime Under Safe Harbor Is Not Comparable in Effectiveness to the Privacy Regimes of Other Countries Which Have Met the Adequacy Standard of the European Privacy Directive*

The only question remaining is whether the privacy regime that the EU accepted was actually comparable in effectiveness. Based upon the Parliament Report on Draft Commission Decision discussing shortcomings of the resulting regime,²⁹⁹ and the testimony of privacy experts,³⁰⁰ the answer seems to be that Safe Harbor is not “comparable in effectiveness,” neither to the European Privacy Directive nor to the standards required of other aspirants to an adequacy rating.³⁰¹ Thus, although the EU has negotiated with all countries, the preferential treatment accorded to the U.S. by the EU constitutes treatment that is not “comparable in effectiveness.”

A final argument in favor of the EU’s position is that the WTO case would be premature, as neither Australia nor Hungary has suffered an interruption of its data transmissions. However, both the willingness of member countries to cut off transmissions to non-complying countries and the fact that they have done so³⁰² make it clear that a country which has neither a rating of adequacy nor a program similar to Safe Harbor is at risk of data interruptions. Thus, both Hungary and Australia can allege that they had no choice but to meet the stricter requirements based on a credible threat.

The strongest argument for finding a violation of the standard of “comparable in effectiveness” is that Safe Harbor simply does not work, either because of a lack of willpower on the part of the U.S. agencies responsible for enforcing it, or because of fundamental flaws in the Agreement itself.³⁰³ The EU offered the U.S. much less rigorous terms and Safe Harbor requires much less of the U.S. than the EU required of Hungary or is requiring of Australia.³⁰⁴ Although there is no requirement that the U.S. adopt the European Privacy Directive word for word, in order to avoid having data transmissions from the EU cut off, it should have been required to develop an equally effective regime.³⁰⁵

In the *Shrimp-Turtle* cases, the U.S. had a regulatory scheme under which it cut off imports to certain countries based upon their failure to meet its standards.³⁰⁶ The Appellate Body in *Shrimp-Turtle II* allowed the U.S. practice because the U.S. negotiated in good faith and made

299. See Parliament Report, *supra* note 48, at 8-10.

300. See Reidenberg Testimony, *supra* note 45.

301. See *supra* notes 4-6, 229-46 and accompanying text.

302. See *supra* note 285 and accompanying text.

303. See *supra* notes 56-84 and accompanying text.

304. See *supra* notes 225-58 and accompanying text.

305. See *supra* notes 18-27 and accompanying text.

306. *Shrimp-Turtle II*, Appellate Body, *supra* note 104, ¶ 5.

allowances for alternative regimes which were equally effective.³⁰⁷ Additionally, in that case, the U.S. did not overtly hold certain countries to higher standards, nor did it reach written agreements which effectively allowed those countries to meet lower standards or to avoid requirements.³⁰⁸

The EU, on the other hand, has manifestly treated the U.S. preferentially, signing a written agreement that holds the U.S. to a lower standard than that required of other countries and exempting it from certain requirements of the European Privacy Directive to which other countries are held.³⁰⁹ These actions cannot be accounted for by stating merely that the EU has been “flexible” in its negotiations. Nothing short of political expediency can account for the fact that the U.S. has been treated so favorably. The EU could not afford the economic damage that blocking transmissions to the U.S. would cause,³¹⁰ nor was it in a position to dominate the U.S. economically the way that it could other countries, such as Australia and Hungary.³¹¹ Finally, the fact that Australia still has not been granted a rating of adequacy, despite passage of its Data Privacy Act, which meets higher restrictions than the U.S. Safe Harbor,³¹² further illustrates the double standard used by the EU.

CONCLUSION

A panel would use the “comparable in effectiveness” standard in evaluating whether or not the EU is violating WTO rules by offering a different standard for the U.S. privacy regime vis-à-vis the privacy regimes of other countries. This standard was used in an analogous situation in the *Shrimp-Turtle* case,³¹³ and the *Bananas* case demonstrates that methodologies developed for products under the GATT can be applied to services under the GATS.³¹⁴ Although “like-product”, as developed in *Japan-Taxes* and *Asbestos*, offers a methodology for comparing treatment of similar foreign and domestic products, this standard is insufficient to compare the treatment of privacy regulatory regimes.³¹⁵

307. *Id.* ¶¶ 123, 134, 140, 150.

308. *See supra* notes 163-68 and accompanying text.

309. *See supra* notes 56-68, 229-46 and accompanying text.

310. *See supra* note 38 and accompanying text (suggesting that the possible economic damage from cutting off data transmissions would be more than \$350 billion).

311. Hungary’s position is even more delicate as it was a candidate for admission to the EU while the adequacy rating negotiations were occurring.

312. *See Ford Testimony, supra* note 247 (noting that the Australian Privacy Act meets the OECD requirements and includes protections not required of the U.S. under Safe Harbor).

313. *See supra* notes 132-81 and accompanying text.

314. *See supra* notes 109-18 and accompanying text.

315. *See supra* notes 269-71 and accompanying text.

When the standards of the *Shrimp-Turtle* cases are applied to a hypothetical complaint brought by Australia and Hungary, a number of important conclusions can be made. First, the EU did not enter into good faith negotiations with all countries that might be candidates for having data transmissions interrupted. Second, the treatment accorded to the United States through the Safe Harbor Agreement is favorable in comparison to the treatment afforded Hungary and Australia. Additionally, the credible threat of interruptions of transmissions, made manifest by the actions of Sweden and Spain, shows that the countries that met the more rigorous standards than those offered to the U.S. did so because of EU pressure, which in itself was discriminatory in nature, because the same pressure was not used against the U.S. Finally, the EU's different approaches to negotiations with the U.S. as compared to Hungary and Australia cannot be summarized accurately as based upon flexibility. A flexible approach would have allowed different solutions to reach the same level of protection without requiring identical privacy laws. As this Note has shown, the privacy regime that the EU rejected from Australia complied at least as closely, and probably more closely, with the European Privacy Directive than did the privacy regime which the EU accepted from the U.S.

One possibility—not discussed by this Note—is that this different treatment stems from political factors, such as the greater political and economic power that the U.S. wields compared to Australia. In any case, this different treatment does not result from an exception which might be legitimate under the WTO, such as respect for cultural and historical differences.³¹⁶ A WTO panel would thus find that the EU had violated its WTO commitments.

316. See *Shrimp-Turtle II*, Appellate Body, *supra* note 104, ¶ 40 (noting that the Appellate Body in *Shrimp-Turtle I* had criticized U.S. law requiring the TED's, because it did not "allow for flexibility in the consideration of different conditions that may exist in different harvesting nations").

Notes & Observations