How intrusive a system of governance is the WTO?

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I. Introduction

An analytical inquiry into how WTO law impacts policies pursuing non-trade values is relevant if one is interested in the democratic quality of the WTO. Based on different normative models of democracy, this paper first discusses some problems with measuring impacts of WTO law under each model and suggests that a segmented political order would be preferable from the point of view of democracy (II). However, because WTO law is less coherent and determinate than national legal systems and lacks their enforcement mechanisms the question about the impact of WTO law is less straightforward to answer. This paper therefore proposes a conceptual framework that would be a useful first step for analysing the impact of the WTO (III). It then applies the analytical framework in an exemplary fashion to the impact of the General Agreement on Trade in Services (GATS) on social regulatory and distributive policies (IV). The analysis suggests that the GATS is more than a process of negotiation in which states decide autonomously whether to liberalise trade in services. While some of the legal rules in the GATS can be interpreted so as to reflect an allocation of jurisdiction between levels of governance that is consistent with the preferred model of democracy and not intrusive, the openness of the GATS towards cosmopolitan democratic governance in the form of international standards is less clear and recent interpretations of the GATS have also led to a greater intrusion into national and international democratic governance.

II. Why is the impact of WTO law on national laws, policies and politics relevant from the perspective of democratic theory?

If one is interested in evaluating the democratic quality of the WTO an empirical analysis of the impact of WTO law on national and general international policies and politics is highly relevant. Depending on the strand of democratic theory one endorses, impacts of WTO law will be evaluated differently.

Some strands of democratic theory view national parliaments or national public spheres as the hallmark of democracy because they are sites of meaningful deliberation and debate and/or mechanisms of interest aggregation based on representation and fair and equal elections.[1] Nation states and not international organizations or governance mechanisms are seen as the important sites of democracy because they have functioning public spheres, a *demos* with shared democratic and other values or meaningful political cultures based on party allegiance. These scholars may differ, however, with respect to their assessment whether the WTO can be democratised through an increased involvement of parliaments or national publics in the negotiation and ratification of the WTO agreements.

[1] Bacchus, James, 'A Few Thoughts on Legitimacy, Democracy and the WTO', in Petersmann, Ernst-Ulrich (ed.), *Preparing the Doha Development Round,* Florence: European University Institute, 2004, 112. ; Hudec, Robert E., 'Comment' in Porter, Roger B./Sauvé, Pierre/Subramanian, Arvind/Zampetti, Amercico Beviglia, (eds.) *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium*, Washington: Brookings Institution Press, 2001, 295.

Some are quite optimistic in this respect. To them, parliaments and notably the US congress can effectively control governments in the negotiation of WTO agreements by giving negotiators a clear *ex ante* mandate.[2] At least domestically, this mandate can be controlled through the courts and the parliamentary principals can therefore control the executive agents. To adherents of this view, impacts of WTO law on national laws, policies and politics are unproblematic as long as they were endorsed by parliaments in the negotiating mandate.

Other things equal, precise, unambiguous and enforceable WTO law should be preferred by national proceduralists. It ensures that third-party adjudicators faithfully interpret and apply WTO law and that other WTO members can be held to the legal obligations that were agreed to. However, the picture becomes more complicated if one considers that internationally, there is not just one law-making forum but a multiplicity of treaties and international organisations with segmented but overlapping competences.

The problem this raises is that trade-offs involving new issues or overlapping but separate competences between different international organisations or treaties (e.g. the GATT and an MEA) may not have been subject to express parliamentary consideration. In this case, precise, unambiguous treaty rules may prove to result in an unwarranted incursion into democratically legitimated national or international balancing processes of conflicting values. More indeterminate legal rules would undoubtedly facilitate a balancing of conflicting values but do not sufficiently constrain extraterritorial effects of national balancing processes nor the WTO dispute settlement organs in their balancing of conflicting values.

Commentators who are less sanguine about the potential for democratizing the WTO through an enhanced role for national parliaments or publics in negotiation and ratification processes point to empirical difficulties with involving parliaments or the public in a meaningful way in international negotiations and the associated risks of delays and failures of the negotiation process.[3] On this view, international negotiations strengthen national executives at the expense of parliamentary or participatory deliberative democracy and impacts of WTO law on national or international policies and politics are *per se* problematic.

Even if one views the nation state as the principal arena for democracy, the democratic contribution to the WTO of greater involvement of national parliaments can be doubted. Thorsten Hüller and I have identified several reasons why this might be so.[4] Amongst them, the limited potential for modifying the WTO agreements is perhaps the most problematic. Parliaments or national publics may simply change their mind about what they had once consented to. Moreover, new members of a national polity – and for that matter any new member that accedes to the WTO – do not have an opportunity to re-examine and if necessary re-negotiate the WTO agreements. In addition, national proceduralism hinges on the ability of every WTO member to veto the negotiated drafts if necessary. This introduces an imbalance in two respects: the veto of a single member weighs more heavily than the positive endorsements of all the other members. It also becomes easier to reject proposals than to take positive action.

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[2] Bacchus, James, n. 1.

[3] Krajewski, Markus, *Verfassungsperspektiven und Legitimation des Rechts der Welthandelsordnung,* Berlin: Duncker & Humblot, 2001, 244-246, 272.

[4] Herwig, Alexia/Hüller, Thorsten, 'On the Normative Legitimacy of the World Trade Order', Arena Report, forthcoming.

If one is sceptical about national proceduralism as an appropriate model for democratic governance at the WTO, precise and determinate WTO law produces undesirable impacts on national democracies because it is more easily enforceable than ambiguous, indeterminate law and because inconsistencies with WTO law will be readily apparent. Ambiguous, indeterminate law has an ambivalent status. While legal uncertainty about potential "judicial" interpretations of WTO law may result in potential complainants shying away from starting a dispute settlement proceeding and generally raises the bar towards applying WTO law to novel contexts, ambiguous, indeterminate law can turn out to be a problem once a WTO dispute is initiated. Panels or the Appellate Body will be less constrained by legal text and may develop purposive-political solutions to legal disputes that are even worse from the perspective of a WTO member party to a dispute.

Some authors maintain that it is possible to democratise the WTO directly rather than doing so via nation states.[5] Creating a parliamentary element in the WTO through the establishment of a WTO-level parliamentary assembly or giving more direct and indirect participation rights to civil society organisations are both discussed as measures to democratise the WTO. Similarly, allowing individuals and civil society organisations to make *amicus curiae* submissions in disputes before WTO panels and the Appellate Body are viewed as positive steps towards inclusiveness and democratic participation in WTO norm-application and norm-generation processes.

Taking the WTO in isolation, precise, unambiguous rules that are legally enforceable would again be preferable from the perspective of cosmopolitan democracy because they ensure that the rules that were collectively agreed will be effectively applied. However, much the same problems plague approaches of cosmopolitan democracy as national proceduralism. The limited reversibility of WTO rules may unduly constrain policies or politics if opinion has shifted and a balancing of conflicting values in the competence sphere of different international organisations is generally difficult. Both are considerations against precise, inflexible WTO rules.

Moreover, as Thorsten Hüller and I have argued elsewhere, certain structural problems of the international order call into question the desirability of national or cosmopolitan proceduralism as a blueprint for democratic governance at the WTO.[6] In the present international order, the preconditions for a fair proceduralism hardly exist. WTO members and their constituents differ greatly in their capacity for influencing the outcomes of negotiations, regardless of whether one applies a model of national proceduralism or cosmopolitan proceduralism. We have therefore suggested that there is a need to supplement procedures with substantive standards.

Furthermore, it is unconvincing to argue that either cosmopolitan or national proceduralism produce the best outcome in every case. For some policies, such as cultural policies or the

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[5] Charnovitz, Steve, „Participation of Nongovernmental Organizations in the World Trade Organization", *University of Pennsylvania Journal of International Economic Law* 17 (1996), 331; Charnovitz, Steve, „WTO Cosmopolitics", *New York University Journal of International Law and Politics* 34 (2002), 299: 329-344; Held, David, *Democracy and the Global Order,* Cambridge: Cambridge University Press, 1995, 40f., 219ff, 272ff..; Nanz, Patrizia, „Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory", in: Joerges, Christian/Petersmann, Ernst-Ulrich (Hg.), *Constitutionalism, Multilevel Trade Governance and Social Regulation,* Oxford: Hart, 2006, 59; Shell, Richard, „Trade Legalism and International Relations Theory – An Analysis of the World Trade Organization", *Duke Law Journal* 44 (1995), 829: 915; Shell, Richard., „The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization", *University of Pennsylvania Journal of International Economic Law* 17 (1996), 359.

[6] Herwig, Alexia/Hüller, Thorsten, n. 4.

ideal model of democracy for a polity, there may be good reasons for differing approaches and for preserving the ability of nation states to regulate these matters.[7] On other matters, such as global environmental problems there are good reasons in favour of cosmopolitan solutions.

Finally, many nation states offer conditions favourable to the realisation of democracy that do not yet equally exist at the international level. For instance, Western nation states have developed public spheres with civil society organisations and ties of solidarity and culture amongst its members that are beneficial to democratic governance. We have therefore suggested that a segmented order with nation-state and international competences constitutes the ideal model of normative legitimacy for the WTO.

Other commentators have also argued in favour of a mixing of cosmopolitan and nation-state elements of democracy.[8] Christian Joerges for instance submits that the purpose of WTO law is to remedy deficits of national democracies.[9] These arise from the fact that national democracies systematically fail to take the transboundary effects of their actions into account. Robert Howse and Christian Joerges also emphasize that WTO law can enlighten national democratic decision-making.[10] In the area of food safety they view the requirement to base regulatory measures on a risk assessment as a mechanism that ensures that information will be comprehensively considered and justified in terms of the universally accessible language of science instead of national peculiarities.

For Howse, the SPS Agreement also respects national democracies because it perceives scientific evidence merely as one source of information that WTO members are also free not to use as the basis for their risk regulation if there are other important reasons.[11] To Joerges, the SPS Agreement should use scientific evidence as a minimum justificatory threshold for risk regulation but leave members free to decide whether or not they want to tolerate a risk.[12] To both, some impacts of WTO law on national politics, i.e. on the way decisions are reached are not a problem from the perspective of democratic theory but WTO law must on the whole respect national democratic governance.

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[7] Id.

[8] Attik, Jeffrey, 'Democratizing the WTO', *George Washington International Law Review* 33 (2001), 451; von Bogdandy, Armin, 'Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship' in Frowein/Wolfrum (ed.), *Max Planck Yearbook of United Nations Law,* The Hague, London and New York: Kluwer Law International, 2001, 609: 632, 658, 666; von Bogandy, Armin, 'Legitimacy of International Economic Governance: Interpretative Approaches to WTO law and the Prospects of its Proceduralization', in: Griller, Stefan, (ed.), *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order,* Wien, New York: Springer, 2003**,** 103: 126ff; Howse, Robert/Nicolaïdis, Kalypso, „Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity? ", *Governance: An International Journal of Policy, Administration and Institutions* 16 (2003); Joerges, Christian, 'Free Trade with Hazardous Products? The Emergence of Transnational Governance with Eroding State Government', *European Foreign Affairs Review* 10 (2005), 553; Joerges, Christian, 'Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO', in: Joerges, Christian/Petersmann, Ernst-Ulrich, (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford: Hart, 2006; Joerges, Christian., 'Freier Handel mit riskanten Produkten? Die Erosion nationalstaatlichen und die Emergenz transnationalen Regierens', in: Zürn, Michael/Leibfried, Stephan, (eds.), *Transformationen des Staates*, Frankfurt a.M.: Suhrkamp, 2006; Joerges, Christian/Godt, Christine, 'Free Trade: The Erosion of National and Birth of Transnational Governance', in: Zürn, Michael/Leibfried, Stephan, (eds.), *Transformation of the State,* Cambridge: Cambridge University Press, 2005, 93; Krajewski, Markus, n. 3, 261ff., 272f..

[9] See literature cited at n. 8.

[10] Id. and Howse, Robert, 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization', (2000) 98 *Mich. L. Rev*. 2329, at 2330, 2334-8, 2341-4.

[11] Howse, Robert 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization', (2000) 98 *Mich. L. Rev*. 2329, at 2330, 2334-8, 2341-4.

[12] See literature cited at n. 8.

III. A conceptual framework for analysing the intrusiveness of WTO norms on democratic governance

To summarise the discussion in the preceding discussion, precise WTO norms have the advantage that they constrain panels and the Appellate Body in their interpretation and application of WTO norms. This makes is less likely that judicial interpretation or the interaction of WTO norms will produce outcomes that were unintended by the constituents who gave democratic endorsement to the norms when they were agreed. However, precise, formalistic WTO norms reduce the potential for taking into account other legal norms that were generated outside the WTO framework. Conversely, the advantages and disadvantages of more ambiguous, flexible WTO norms are that it will be easier to take into account non-WTO norms but more likely that panels or the Appellate Body develop legal interpretations that would not have been endorsed by the constituents who legitimised the WTO Agreements in the first place. The considerations about the drawbacks of precise, formalistic WTO norms and more ambiguous, flexible norms suggest that from the perspective of certain strands of democratic theory, both types of obligations can be considered to unduly intrude upon democratic decision-making. They also suggest that intrusiveness of lack of intrusiveness is best measured by a different yardstick.

Mechanisms which make WTO reversible and open it to non-trade values while not giving unfettered discretion to panels or the Appellate Body to balance conflicting values are crucial from the perspective of democratic theory. It is suggested that the opening of WTO law to standards developed by international standardisation organisations can constitute such a mechanism. In the area of trade in goods, the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade recognise health, food naming and other technical standards of the Codex Alimentarius Commission, the International Plant Protection Convention and the Office of Epizootics as reference standards for judging the WTO conformity of national regulation. The mandate of these standardisation organisations generally involves the balancing of conflicting objectives. For instance, the mandate of the Codex Alimentarius Commission is to ensure fair practices in the food trade and safe foods for the consumer. The standards are developed through a political process and as they apply to single food substances, residues or types of risk, they are very precise.

Although the WTO members were unable to agree on a precise balancing of the conflicting values of trade liberalisation and protection against risk when they negotiated the agreements, the international standardisation organisations offer an on-going political process in which these values can be balanced in a manner that is adequate for the individual case. The recognition of international standards provides a way to reconcile the need for precise legal norms with the need for flexibility. The extent to which WTO Agreements do or do not recognise international standards can therefore be an indicator for the intrusion of WTO law into democratic governance.

A second indicator for the intrusiveness of WTO governance are cases where the judicial application of WTO norms results in an allocation of jurisdiction between levels of governance and between WTO members that is wrong from the perspective of a segmented democratic order. It has been suggested that respect for democratic governance calls for preserving it at the level of nation states and militates against transferring too many competences to the international level. As regards the substance of decisions, joint international solutions are required if the dimensions of the problem are similar globally.

The preservation of free international trade represents such a common problem because states may not consider the impact of their regulatory policies on foreign trading partners and the self-interest of states would lead them to adopt protectionist policies that undermine free trade. However, the great diversity of WTO members often prevents joint solutions. One example given above are cultural policies, others may be the freedom of speech and religion or public morals. The range of issues that require only a WTO solution is limited. It is suggested that it includes policies of a predominantly economic nature such as tariff increases in response to dumping or the regulation of quotas. In both cases, there are usually no good reasons for maintaining them as they hurt the importing and exporting country and are often unsuitable instruments for regulatory policy.

Non-discrimination in WTO law will often raise issues of a mixed nature, that is, involve questions about free trade and the justification of social regulatory policy and require a mixed approach where WTO law controls the economic motives and spill-overs of regulation without interfering unduly with democratic choices about appropriate regulation. One way by which WTO law can achieve this is by examining whether the justification for regulatory policies is not specious while leaving members free to balance conflicting values. In the SPS Agreement, this is done by requiring members to provide some minimal evidence of plausible confirmed or unconfirmed hazard but granting them the autonomy to set levels of protection as they see fit as long as this is done consistently.

A third, if somewhat obvious indicator for the intrusiveness of WTO governance is the existence of the rule of law in international economic relations, i.e. the extent to which WTO law effectively constrains the behaviour of WTO members due to its enforceability. Of course, there is no direct effect and no supremacy of WTO law. Private parties cannot invoke WTO law before national courts and WTO law does not supersede national laws in domestic legal orders. Since home governments must espouse the claims of affected firms in order for a WTO dispute settlement proceeding to be started, a significant element of diplomatic-political discretion continues to persist. If the diplomatic costs of bringing a claim would be too high, a home government may prefer a negotiated solution or raise the matter only in bilateral diplomatic talks. The WTO Dispute Settlement Understanding even encourages negotiated mutually solutions to disputes. A government that had acted inconsistently with its WTO obligations may therefore not be sanctioned and continue its inconsistent conduct.

However, even if WTO dispute settlement is weaker compared to national or the EC legal order, the more or less automatic adoption of dispute settlement reports has strengthened the influence of WTO law over laws, policies or politics affecting trade. The possibility of raising specific trade complaints in many of the WTO committees also provides a way to persuade or pressure WTO members to remedy their inconsistencies with WTO law. WTO law is also used outside the context of the WTO and its dispute settlement system in bilateral relations between member governments or firms and a member government without ever reaching the WTO dispute settlement mechanism. Finally, WTO law can also interact with other dispute settlement fora and legal systems and produce impacts on national laws, policies and politics in this manner. For instance, the strong similarity of the GATS with bilateral investment treaties, which are enforceable by private investors against host governments, may lead to a diffusion of WTO jurisprudence into investor-state arbitration and would then effectively provide investors with the opportunity to enforce GATS obligations. As will be seen below, the interaction of WTO law with national constitutions or statutes can also strengthen the impact of WTO law.

IV. Application of the conceptual framework to the GATS

At first blush, the GATS may be considered a bad case for analysing the intrusiveness of WTO law on democratic decision-making. It looks very much like a reflection of national proceduralism where WTO members are presumed to have the capacity to shape the content of WTO law and decide autonomously whether they want to accept the bargain or not.

The GATS leaves WTO members free to decide in which service sector and in which mode of supply they want to make liberalisation commitments. The GATS knows four such modes: foreign direct investment (called commercial presence in the GATS), the cross-border supply of services, the movement of service consumers and the movement of natural persons supplying services.

Liberalisation of services trade is differentiated into two concepts broadly similar to a familiar distinction in the GATT: treatment at the border and treatment behind the border. Treatment at the border is encapsulated by the concept of market access and refers for example to ceilings of foreign shareholding, quotas or nationality requirement. Treatment behind the border by is reflected in the national treatment concept familiar from the GATT and the GATS disciplines on domestic regulation.

WTO members can decide on the extent to which they want to grant market access and national treatment. For instance, they can decide to limit foreign shareholdings to 5% or even 0% of the capital of firms or to apply stricter regulatory requirements to foreign service providers than to domestic ones. The only caveat for members is that if they allow market access or national treatment, any offending measures must be expressly listed as an exception to market access and national treatment. Otherwise, there is a presumption that members fully liberalised the service sector. The GATS therefore allows the grandfathering of discrimination and market access restrictions.

Even if the GATS enables members to fine-tune their liberalisation commitments, the GATS is also a system or rules that may constrain democratic choices reflected in national or international policies or politics. Even if one were to endorse national proceduralism as the appropriate model for democratic governance at the WTO, there would therefore be a need to analyse the interference of the GATS with national democratic decision-making.

First of all, the GATS only allows for the grandfathering of existing market access and national treatment restrictions. New measures, whether embodied in national laws or regulations or trade-restricting international treaties may be inconsistent with the GATS. Second, the GATS is very complex and fragmented. The interaction of the different GATS disciplines with each other may therefore lead to outcomes that members had not anticipated at the time when they negotiated the GATS. Third, members can make mistakes when scheduling their GATS commitments and end up having liberalised sectors that they wanted to close to foreign competition.

As the *US – Gambling* report shows, even a WTO-savvy country like the US can make the mistake of considering a particular type of service to fall under the wrong sector heading. The case turned on the issue of whether the US had made a market access commitment for the cross-border supply of gambling services. The US schedule included commitments for other recreational services except sporting and the US claimed that sporting covered gambling and

betting services.[13] The panel found that "other recreational services" included gambling and betting services.[14] It found that sporting did not include gambling services and that the US had, consequently, committed to liberalise the cross-border supply of gambling services.[15] The Appellate Body obtained the same interpretative result but modified the panel's interpretative approach.[16]

As argued in the preceding section, a segmented democratic political order is the appropriate model for WTO democratic governance. The following sub-sections will therefore apply the corresponding conceptual framework developed above to the GATS with a view to analysing its intrusiveness into democratic decision-making.

i) International standards and minimum requirements of justification of national measures in the GATS

Like the SPS Agreement and the TBT Agreement, the GATS contains language that suggests that it integrates international standards and requires some minimum justification of national regulations. The presence of both indicate that the GATS is open towards reversibility mechanisms carrying out a new balancing of trade liberalisation and non-trade values and attempts to correct deficits of national democratic decision-making. This, it has been suggested above, would not be unduly intrusive of democratic decision-making in a segmented political order. However, close legal analysis of the relevant provisions in the GATS is required and the interpretation suggested is only one among other possible interpretations. Moreover, recent WTO dispute settlement decisions have actually heightened the potential for conflict between the GATS and international standards.

The relevant provision to consider is Article VI of the GATS which applies to technical standards, licensing and qualification requirements and licensing procedures. A member has to ensure that these are not more burdensome than necessary to ensure the quality of the service and are based on objective, transparent criteria.[17] The GATS thereby requires members to consider the impact of their national regulations on foreign service suppliers and to provide justifications in universal terms, similar to obligations in the WTO SPS and TBT Agreement. The obligation in Article VI:5(a) is temporary, pending the entry into force of regulatory disciplines developed by the Council for Trade in Services and subject to the commitments a member has scheduled.[18] As the only regulatory disciplines that have so far been developed required lengthy and protracted negotiation and future work on regulatory disciplines seems stalled by deadlock,[19] it is unlikely that Article VI:5(a) will cease to be of relevance.

[13] Appellate Body Report, US – Gambling, para. 162.
[14] Panel Report, US – Gambling, para. 7.2(a).
[15] Panel Report, US – Gambling, para. 6.93.
[16] Appellate Body Report, US – Gambling, para. 213.
[17] GATS, Article VI:4.
[18] GATS, Article VI:5. So far, regulatory disciplines in the accountancy sector have been developed. These are more in the nature of framework principles than detailed international standards. See Disciplines on Domestic Regulation in the Accountancy Sector, S/L/64.
[19] Wouters, Jan/Coppens, Dominik 'Domestic Regulation within the Framework of GATS', Working Paper – K.U. Leuven Institute for International Law, No. 93, (Leuven: 2006), 18 [with further references]. Wouters and Coppens point out that some WTO members want to await further liberalisation of service sectors as a condition for agreeing to disciplines on additional sectors, while other members prefer to establish regulatory disciplines as a condition for agreeing to the further liberalisation of trade in services.

In assessing whether members comply with the necessity, transparency and objectivity test, Article VI:5(b) requires that account be taken of the international standards applied by that member.[20] The GATS might therefore take cognizance of international standards developed, for instance, by the International Telecommunications Union or the International Accounting Standards Board. Article VI:5(b) could suggest that compliance with international standards on these matters automatically affords a safe harbour to members under the GATS, while non-compliance creates a justificatory burden for members, similar to provision in the SPS and perhaps TBT Agreement.

On the one hand, Article VI:5(b) does not indicate whether the application of international standards by a member is to be considered as a factor in favour of, against, or neutral with respect to finding compliance with Article VI:5(a). The crucial textual difference between Article VI:5(b) and the SPS Agreement is that Article VI:5(b) does not contain language according to which compliance with international standards leads to national regulations being deemed consistent with Article VI:5(a) nor a requirement to base national regulations on international standards.[21]

On the other hand, the text of Article VI:5(b) does not support the interpretation that international standards should be assessed for conformity with Article VI:5(a). Had this been the intention, drafters could have used much clearer language to express it. The provision also refers to 'international standards…applied by that Member.' WTO adjudicatory bodies can draw on this term as context for the interpretation of the words 'in conformity with', suggesting that what 'in conformity with' means is influenced by whether or not a member applies international standards. WTO adjudicatory bodies can also opt for is a pragmatic solution whereby they consider that use of international standards is one positive indicator amongst a list of several other ones for compliance with Article VI:5(a) while leaving open the issue of which indicator is decisive.

In short, Article VI can be interpreted in ways so that the law of the GATS can make use of the regulatory capacity developed through international standardisation organisations. On this interpretation, members would not be required to use international technical, licensing or qualification standards but non-use would entail the need to show necessity, transparency and objectivity.[22]

Two further considerations suggest that the status of international standards in the GATS is somewhat more precarious in the case of the GATS compared to the SPS and TBT Agreement. First, members can choose to avoid the obligations of Article VI by not opening a sector to foreign competition. In other words, the GATS allows free-riding because members that have not made GATS commitments for the sector concerned can use the GATS to try and hold other countries to international standards in respect of services supplied by their suppliers to these countries without having to apply these standards themselves.

It could be speculated whether the possibility of free-riding on international standards will not chill international standardisation activities in the long run. This view assumes that trade balance is always the most important consideration in international standardisation. However, often factors pushing in favour of common international standards, such as technical reasons

[20] GATS, Article VI.5(b).
[21] SPS Agreement, Article 3.1.
[22] Article VI :4 probably requires the complaining party to make a prima facie case that the national measures are not in conformity with its requirements but once such a case is made, the full burden of explanation is always borne by the defending member.

or the potential for gaining widespread market access may be equally if, not more, important and it can be expected that international standardisation will continue to work.

This notwithstanding, the present uncertainty over Article VI:5(a) and (b) could itself be an impediment to the development of social regulatory governance since countries desiring greater legal 'bite' for international standards through the WTO dispute settlement system might be unwilling to commit to international standards that will be unenforceable while countries preferring optional international standards could refuse to sign on to them for fear that they will become amplified through the WTO dispute settlement system.[23]

Second, the WTO dispute settlement report in *US – Gambling* has created some conflicts between GATS law and international standardisation. The *US – Gambling* case concerned various pieces of US federal and state legislation prohibiting the remote supply of gambling and betting services for reasons of public morals.[24] The panel and Appellate Body decided that this domestic regulation constituted a quantitative market access restriction since it limited the number of cross-border service suppliers to zero.[25] Both focused on the effects of the US ban, despite clear wording of Article XIV that only measures in the form of quantitative restrictions are covered by it.[26]

The decision has been criticised because the language about effects seems to blur the distinction between domestic regulation and market access restrictions. [27] Pauwelyn points out that any domestic regulation can produce quantitative effects.[28] He gives the example of requiring aspiring taxi drivers to pass a driving test.[29] This requirement will preclude market access for all those who do not pass the test.[30] This change in the scope and relationship of various GATS provisions to each other is important because market access restrictions that are not scheduled are *per se* violations that can only be justified on the limited grounds of Article XIV, XIV bis, and XII.[31] In contrast, Article VI on domestic regulation puts the burden of proof on the complaining member and has an open-ended list of regulatory objectives that could justify introducing domestic regulation.[32] Some measures based on international standards that have effects of quantitative restrictions might also now have to be justifiable under the limited general exceptions. The GATS would then in fact regulate these non-law governance mechanisms and require that the objectives pursued by international standards conform to the general exceptions. This would precisely mean that the potential for reversibility offered by international standards would be lost since measures with new regulatory objectives not contained in the general exceptions of the GATS could no longer be justified as GATS-consistent if they created effects similar to that of numerical quotas. For the

[23] Wouters, Jan/Coppens, Dominik, 'Domestic Regulation within the Framework of GATS', Working Paper – K.U. Leuven Institute for International Law, No. 93, (Leuven: 2006), 18.
[24] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/R (hereafter referred to as *US – Gambling*). para. 6.221; Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/AB/R, para. 43.
[25] Panel Report, *US – Gambling,* para. 6.355; Appellate Body Report, *US – Gambling,* paras. 238, 251.
[26] Panel Report, *US – Gambling,* paras. 6.330, 6.332, 6.338, 6.347; Appellate Body Report, *US – Gambling,* paras. 231-237. For a critique of the interpretative approach, see Pauwelyn, Joost; 'Rien Ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS', 4 *World Trade Review* (2005), 131, *passim.* and Ortino, Federico, 'Treaty Interpretation and the WTO Appellate Body Report in *US – Gambling: A Critique',* 9 *Journal of International Economic Law* (2006), 117, *passim*.
[27] Pauwelyn, Joost, n. 26, 132, 162-168.
[28] Id., at 166.
[29] Id.
[30] Id.
[31] Id., at 136, 138.
[32] Id., at 138.

reasons discussed further below, the actual scope of the *US – Gambling* decision is likely to be smaller than feared by Pauwelyn and the encroachment of the GATS on the activities of international standardisation organisations limited.

ii) The allocation of jurisdiction between levels of governance in the GATS

The text of the GATS reflects in part an allocation of jurisdiction that is consistent with the division outlined above: the determination of when quotas are present falls within the competence of panels or the Appellate Body and the rules are relatively formalistic and precise. Article XVI defines several types of quantitative restrictions members cannot maintain in sectors and modes of supply for which they have made commitments unless they have scheduled them as exceptions.[33] If they are not scheduled, a quantitative restriction must be justifiable as a legitimate public policy under Articles XIV, XIV bis, and XII.

In contrast, regulatory measures fall under the concept of national treatment or under the necessity test of Article VI if they are technical regulations, licensing or qualification requirements. In both cases, regulatory measures must pass a precise test (there must be a difference in treatment or the measure must be a technical regulation, licensing or qualification requirement) and an additional, less precise test.

In the case of national treatment, there must be either like service or like service providers and the measure must treat foreign services or service providers less favourably than domestic ones. As the *EC – Asbestos* dispute shows, there are ample opportunities for respecting national regulatory autonomy in the application of these tests. In this dispute, the Appellate Body found that the clearly demonstrated risk of asbestos meant that asbestos fibres were not like crysotile replacement fibres because consumers could be expected to differentiate between these products on the basis of their risk. Applied to the GATS, this means that clearly dangerous services are not necessarily like non-dangerous counterparts and members enjoy exclusive regulatory competence over these former services.

An open question is whether attributes other than dangerousness can also confer the status of unlikeness upon services and whether panels or the Appellate Body will determine consumer preferences in reference to the preferences as they actually exist in a given market. If this were the case, services that might be in a competitive relationship in one market would not necessarily be so in a different market. For instance, stem cell research with specifically created human embryos might not be like stem cell research with embryos remaining after assisted reproductive technology if consumers of health services differentiate on the basis of strong ethical reasons. Similarly, surrogate motherhood might not be like other reproductive technologies in Germany but could well be in the US, where surrogate motherhood is allowed.

As already discussed above, a necessity test is at the heart of Article VI:5. Members that have made specific commitments for a sector must not apply measures that nullify or impair the value of their commitments and that are more burdensome than necessary to ensure the quality of the service and are not based on objective and transparent criteria.[34] The applicability of Article VI:5 does not hinge on a finding of likeness and discrimination. However, it is contingent on the nullification and impairment of specific commitments and on its unexpected nature for other members at the time schedules were drawn up. This suggests that a WTO adjudicating body would first have to ascertain the precise ambit of the member's

[33] GATS, Article XVI :2.
[34] GATS, Article VI:4, 5.

commitments. If it finds that discrimination is foreseen through the application of a technical standard, there would be no issue of nullification or impairment of the commitment since the member engages in conduct consistent with its commitment. Moreover, if there is legislation in the pipeline at the time commitments were negotiated, a member might not have a reasonable expectation that a member will engage in reasonable regulation. The above considerations suggest that Article VI is not an instrument for domestic regulatory reform per se but rather remains concerned with safeguarding the commitments made.

The necessity test is also a flexible legal obligation as the Appellate Body has told us in *Korea – Beef*. When the regulatory objective pursued is important, necessity will be interpreted less strictly and a panel or the Appellate Body might, for instance, accept measures that are not indispensable. The fact that it is for the panel or the Appellate Body to judge the importance of the regulatory objective could suggest a considerable – and unacceptable – incursion into democratic decision-making about technical regulations, licensing and qualification requirements. However, what the Appellate Body did not tell us was whether the importance of the regulatory objective would have to be judged in the context of the market the panel or Appellate Body actually deals with. The result of such an approach would be considerable deference to the regulatory objectives of WTO members because every democracy might evaluate the importance of regulatory objectives differently and these choices would be accepted by the GATS.

Very similar considerations apply in respect of the general exceptions in Articles XIV, XIV bis, and XII. These legitimate public policies include public morals, pubic order, human, animal or plant life or health, the prevention of fraud and deception, contractual liability in cases of default on service contracts, data privacy, safety, the equitable or effective imposition or collection of direct taxes, the avoidance of double taxation, national security and the maintenance of balance of payments. Members generally have to show that their measures are necessary for the achievement of the regulatory objective. However, this list of public policies is considered to be finite.[35] In respect of discriminatory regulation, members can only justify a limited range of policies. It is suggested that such a finite list represents an encroachment upon democratic decision-making since new regulatory objectives might emerge in the future.

The *US – Shrimp* dispute is a successful attempt by the Appellate Body to interpret Article XX(g) of the GATT in an emergent manner to be able to fit environmental protection of animal species under it. The rules on interpreting international treaties like the GATS of the Vienna Convention favour a contextual interpretation in the light of other international law but the extent to which this is possible still depends on the text of the provision to be interpreted. This intrusiveness is counterbalanced by the possibility to take into account regulatory objectives in the application of the national treatment provision but it is suggested that it would still be preferable to use an open-ended list of regulatory objectives.

To summarise the preceding discussion, the text of the GATS suggests an allocation of jurisdiction between the WTO and nation state level of governance in which the WTO enjoys clear jurisdiction over measures of a predominantly economic nature that are quantitative restrictions while the legal norms covering regulatory policies are less formalistic and can be interpreted in a way that the WTO would largely defer to democratic choices concerning regulatory policies. Unfortunately, the panel and Appellate Body's interpretation of Article XVI in *US – Gambling* failed to respect this allocation of regulatory jurisdiction.

[35] Pauwelyn, Joost, n. 26, 131.

The US – Gambling case concerned various pieces of US federal and state legislation prohibiting the remote supply of gambling and betting services.[36] Under the US prohibition on the remote supply of gambling services, the provision of gambling services over the internet or the telephone was prohibited in interstate commerce and from abroad into the US.[37] In other words, the qualitative regulation prohibited the cross-border mode of supplying the service altogether and produced the effect of limiting the number of cross-border foreign and domestic service suppliers to zero. The US alleged that the rationale for prohibiting the remote supply was to protect against underage gambling, compulsive gambling and fraud.[38] The case was brought by Antigua and Barbuda (Antigua) on behalf of a US citizen and provider of remote gambling services established in Antigua who was jailed in the US for violating US laws.[39]

The unique feature of the *US – Gambling* case in terms of GATS provisions was the issue whether the US prohibition on the cross-border supply of gambling services was a market access restriction, a national treatment violation or an instance of domestic regulation. Pauwelyn has aptly characterised this as the question of whether and when ostensibly qualitative regulation constitutes a qualitative restriction on trade.[40]

Article XVI sets out six types of quantitative restrictions. The ones that were relevant in US – Gambling were (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test, and (c) limitations on the total number of service operations or on the total number of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test. The panel found that the list of the six types of measures listed under Article XVI was exhaustive and that the definition of each of the six types of measures a - f was also exhaustive.[41] For Article XVI to apply to the US prohibition therefore had to fall under one of the six types of restrictions.

The panel found that the US prohibition was a limitation on the number of service suppliers in the form of a numerical quota and a limitation on the total number of service operations.[42] For the panel, it was decisive that the US prohibited the cross-border mode of supply altogether.[43] To the panel, a prohibition on using a mode of supply effectively limits the number of service suppliers and service operations using that mode of supply to zero.[44] In essence, the panel thus found that the effects of the US ban on remote gambling were enough to consider the ban a limitation in the form of a quota, even though the US laws never expressly set forth numerical limitations on the number of service suppliers.[45]

The Appellate Body upheld the panel finding and also attached decisive weight to the effects of the US prohibition. It considered that Article XVI:2(a) includes limitations that are in form

[36] Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R (hereafter referred to as US – Gambling).
[37] Panel Report, *US – Gambling,* para. 6.221, Appellate Body Report, *US – Gambling,* para. 43.
[38] United States' first written submission to the Panel, paras. 10-11, 12-13, 14-15, 16-18, 19-21; United States' second written submission to the Panel, paras. 46-49, 50, 51-56, 111 and 114.
[39] Pauwelyn, Joost, n. 26.
[40] Pauwelyn, Joost, n. 26.
[41] Panel Report, *US – Gambling,* para. 6.298.
[42] Panel Report, *US – Gambling,* para. 6330.
[43] Panel Report, *US – Gambling,* para. 6.330.
[44] Panel Report, *US – Gambling,* para. 6.355.
[45] See also Pauwelyn, Joost, n. 26.

or effect quotas, monopolies or exclusive service suppliers.[46] In order to justify its expansive reading of Article XVI:2(a), the Appellate Body first looked to the definition of exclusive service suppliers in Article VIII:5, which includes instances where a member, "formally or in effect, authorises or establishes a small number of service suppliers…."[47]

The Appellate Body then turned to the actual wording of Article XVI:2 and in a tour de force concluded that it was not clear that Article XVI:2 required the limitations to take a particular form.[48] To the Appellate Body, Article XVI:2 is not primarily about the form of measures but rather about their numerical or quantitative nature.[49] Based on this, the Appellate Body considered that the Article XVI:2(a) should be read to include measures that have the effect of the listed limitations.[50] Concerning the US prohibition, the Appellate Body in essence agreed with the panel that limitations amounting to a zero quota are quantitative limitations and fall within the scope of Article XVI:2(a).[51]

The potential legal consequences for WTO members flowing from the report in US – Gambling merit further discussion. At the outset, it is important to be as clear as possible about the scope of the finding. Several commentators are wary that almost all qualitative regulations could now be considered as limitations in the sense of Article XVI:2 since they will produce quantitative effects.[52] Pauwelyn provides a graphic example of this when he queries whether regulations that require taxi drivers to pass driving tests will be considered to be limitations because aspiring taxi drivers who did not pass the test are excluded from the market.[53]

Admittedly, the language about measures producing the effect of a limitation leaves it unclear whether "effect" refers to the trade effect on individual suppliers so as to catch nearly all mandatory qualitative regulation or the economic effects of quotas to fix supply to the importing country. It is submitted that the language of Article XVI:2 provides some guidance on this issue. Article XVI:2(a) refers to limitations on the number of service suppliers. Only regulations that actually impose a definitive limit on the number of service suppliers are thus caught by Article XVI:2(a). Under the taxi driver example, the number of service suppliers is not definitively limited since new taxi drivers that have passed the test can always enter the market and compete with existing suppliers.[54] It is therefore unlikely that the finding about the quota-like effects extends as far as to capture regulatory measures that make market entry subject to certain conditions but do not impose a number. This observation notwithstanding, qualitative regulations may be considered to be quantitative restrictions in certain circumstances that will be expounded just below but members will face considerable uncertainty over when this will be the case.

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[46] Appellate Body Report, *US – Gambling,* para. 230.
[47] Appellate Body Report, *US – Gambling,* para. 229.
[48] Appellate Body Report, *US – Gambling* paras. 226, 231.
[49] Appellate Body Report, *US – Gambling,* paras. 227, 232.
[50] Appellate Body Report, *US – Gambling,* para. 230.
[51] Appellate Body Report, *US – Gambling,* paras. 234, 237-239.
[52] Pauwelyn, Joost, n. 26; Trachtman, Joel, 'Decisions of the Appellate Body of the World Trade Organization', *European Journal of International Law* 16 (2005)801. 2005, 801. Markus Krajewski considers that the ruling leaves uncertainty whether other measures that effectively limit market access but are not prohibitions will be included in Article XVI. Krajewski, Markus, 'Playing by the Rules of the Game? Specific Commitments after US – Gambling and Betting and the Current GATS Negotiations', *Legal Issues of Economic Integration* 32 (2005) 417.
437.
[53] Pauwelyn, Joost, n. 26.
54 Regan, Donald H., 'A Gambling Paradox: Why an Origin-Neutral "Zero-Quota" in Not a Quota Under GATS Article XVI', 41 *Journal of World Trade* (2007) 129: 1302.

Several aspects of concern regarding the finding in US – Gambling persist. The panel seems to hold that even a prohibition on one of several ways of delivering services remotely will be considered to be a quota.[55] Don Regan argues that this finding is correct.[56] Consider the remote selling of insurance services as an example. A member might in principle allow the remote selling of insurances but only through the mail and not over the telephone or internet on the grounds that consumers need to be protected against making hasty and wrong decisions on insurances. According to the panel – and also Don Regan – this type of regulation would need to be scheduled as a market access restriction. It is submitted that this result is not warranted by the usual understanding of a quota – as fixing a definite number of suppliers. In the example given, foreign and domestic distant-selling insurance companies can still fully compete in the market and are in no way limited by numerical quotas. They merely cannot use certain selling techniques but that is a regulation and not a quota. It is also readily apparent from the example given that such an interpretation of Article XVI would constrain regulatory autonomy to a significant extent.

Commentators have also criticised the panel and Appellate Body finding for ignoring differences between zero and non-zero quotas and origin-neutral and origin-specific measures. Regan argues convincingly in my view that an origin-neutral quota should not be considered a quota at all on the grounds that when a member prohibits a service or mode of supply, it prohibits competition entirely and there is therefore no question of the member reserving market shares to domestic suppliers.[57] Under such an interpretation of Article XVI, WTO members would obviously enjoy much leeway in prohibiting economic activities on regulatory grounds.

The bottom line of the finding in US – Gambling is therefore that origin-neutral prohibitions will be considered as quantitative restrictions under Article XVI. Most qualitative regulations that make market access more difficult for some suppliers still fall outside of Article XVI. However, some qualitative regulations that work to limit supply to a number may well also be quantitative restrictions in the sense of Article XVI. However, this "effects" test in respect of qualitative regulations has created considerable uncertainty. What, for instance, about a qualitative regulation that imposes such demanding capital adequacy standards that only a handful of international financial service suppliers besides the domestic ones and maybe two other international suppliers are able to meet them? Would such a regulation not in effect operate like a quota? The economic quota-like effects of demanding qualitative regulations will also differ depending on the characteristics of the relevant market. Where entry costs for new suppliers in a particular service market are relatively low, even demanding standards that initially restrict the number of suppliers will not fix the number of service suppliers. The same could not be said about other service markets where the costs for new entrants are very high.

The economic effects of prohibiting a mode of supply also vary depending on whether competing modes of supplying the service remain allowed (through commercial presence, for instance). To the extent that supply through commercial presence remains a viable alternative, a prohibition on the cross-border mode of supply would not necessarily produce the effects of a quota within the importing market since the number of established service suppliers remains in principle unlimited. In comparison to domestic suppliers, it might, however, make it more difficult for foreign service suppliers to provide their services since commercial presence generally requires greater initial investments and will often subject the service supplier to host

[55] Panel Report, *US – Gambling,* para. 6.338.
[56] Regan, Donald, n. 54, 1304.
[57] Id., 1306, 1308-1309.

rather than home country regulation. Regan thus argues that such a situation is case of a national treatment violation but not a quantitative restriction.58 At first sight, this argument seems intuitive. However, consider the case where market entry for commercially present service suppliers is extremely difficult because of other regulatory requirements. Here, the regulatory regime of the member might indeed produce the effect of protecting the position of incumbents on the market and excluding any possibility for competition.

These considerations highlight that the "effects approach" of the Appellate Body in US – Gambling calls for a fairly detailed economic analysis and ultimately leads to considerable uncertainty for WTO members contemplating what to schedule since it amounts to a case-by-case analysis. From the point of view of safeguarding democratic choices, this uncertainty over which legal rules apply to domestic regulation is unacceptable. It would seem that the sole way of creating certainty is to return to a formal criterion for distinguishing between quantitative restrictions and qualitative regulation and possible national treatment violations.

Finally, it has already been pointed out that the interaction between Articles VI and XVI could become problematic as a result of *US – Gambling.* As the regulatory objectives contained in Article XIV are limited, a broad application of Article XVI to qualitative regulations precludes a fully GATS-consistent justification of technical regulations and licensing and qualification requirements through the more open list of regulatory objectives in Article VI:4, 5. Another ironic result of *US – Gambling* will be that any regulatory disciplines that the Working Group on Domestic Regulation develops will not provide a safe haven of GATS consistency in respect of any regulations with quota-like effect since Article VI provides no defence for measures that violate the market access commitments.

In the final analysis, the interpretation by the panel and the Appellate Body in *US – Gambling* has intruded into democratic governance in three ways: (i) regulatory measures that produce the economic effect of definitely limiting the number of service suppliers to zero or a number above zero now fall under the *per se* prohibition of Article XVI; (ii) measures with such quantitative effects that are also technical regulations, licensing or qualification requirements, whether or not embodied in national or international standards now have to be justifiable under the limited list of public policies under the general exceptions rather than under the open-ended list of Article VI; and (iii) the uncertainty that the "effects" test under Article XVI has created might interfere with democratic decision-making about regulations in member states or international standardisation organisations.

iii) The interaction of the GATS with domestic and other international legal orders and judicial enforcement mechanisms

The *US – Gambling* case is also telling concerning the interaction of the GATS with other legal orders and judicial tribunals, which could amplify the impact of the GATS and lead to domestic or international courts and tribunals interfering with democratic governance if they follow intrusive WTO dispute settlement decisions.

For the US, the gambling dispute comes with a further twist as its remote gambling ban might even violate the US constitution. In two US domestic criminal cases, defendants seek to dismiss criminal charges against them under the US Wire Act, which prohibits remote gambling. The lawyers argue that pursuant to the Charming Betsy Supreme Court decision, the US Act would have to be interpreted so that it does not conflict with the WTO GATS and

[58] Id., 1308-1309.

DSU.[59] They also invite the court to find that the final decision in US – Gambling is self-executing, i.e. has direct effect, in the US legal order.[60]

In the Utah case, the District court failed to grant the motion to dismiss and found that the Charming Betsy doctrine only applies where the statute in question is ambiguous.[61] The court also found that the plain language of the Wire Act contemplates prosecution and that in such cases, the US Uruguay Round Agreements Act (URAA) which implements the WTO Agreements contemplates that US domestic law takes precedence over the WTO Agreements.[62] Finally, the court found that WTO dispute settlement decisions are not binding on the US and that the provisions of the GATS cannot be relied on by defendants pursuant to the URAA.[63]

In another US domestic case, a US provider of on-line poker games has brought a claim in a Washington state court alleging that the US ban on remote gambling in interstate commerce and the permission of intrastate remote gambling violates the US commerce clause, as interpreted in light of US treaty obligations, because it favours established casinos and online horseracing bookmakers vis-à-vis providers of online poker games.[64] In an EC context, similar claims could be brought under the free movement provisions of the EC treaty. In addition, foreign investors could bring claims against the US under bilateral investment treaties. This shows that the GATS may also produce effects on national democratic governance through an interaction with domestic and other international law if only because of a potential chilling effect of impending suits on draft legislative proposals.

V. Conclusion

Notwithstanding some limited uncertainty over the status of international standards, the GATS can be interpreted in ways that avoid undue intrusion into democratic governance. The main problems have arisen in connection with dispute settlement decisions. As the GATS lacks supremacy and direct effect in national legal orders, members could take their chances and ignore dispute settlement reports for similar issues to which they might apply. They can also choose not to implement a dispute settlement report and pay compensation or suffer retaliation instead. On much the same lines, the GATS offers the possibility of withdrawing commitments after a dispute settlement report has been issued, and the US has taken this step. However, from the perspective of democratic theory, these mechanisms are imperfect as they might not be realistic options for developing country members, or, if used by a developed country, impose transboundary trade effects on developing countries.

It has also been suggested that the provisions of the GATS may become amplified through the interaction of the GATS with other legal orders and domestic courts. Overall, the effects of this interaction should not be overstated. If the domestic court applies simple statutory provisions in its findings, these could easily be modified by parliaments in order to set aside

[59] Motion to Dismiss in Case No. 4:06CR00337CEJ (MLM), *United States of America v. Gary Stephen Kaplan,* United States District Court, Eastern District of Missouri, Eastern Division, available via http://www.majorwager.com/articles/gk/7.pdf, 14-20, 22, Case No. 2:07-CR-286 TS, *United States of America v. Baron Lombardo et. al.* United States District Court, District of Utah, Central Division, p.23-26.
[60] Motion to Dismiss, *USA v. Gary Stephen Kaplan,* n. 59, 29-32; *United States of America v. Baron Lombardo et. al.,* p.23-26.
[61] *United States of America v. Baron Lombardo et. al.,* p 26f.
[62] *United States of America v. Baron Lombardo et. al.,* p. 28f.
[63] *United States of America v. Baron Lombardo et. al.*, p. 29f.
[64] Complaint *Lee H. Rousso v. State of Washington,* Superior Court of Washington County of King, available via http://pokerplayersalliance.files.wordpress.com/2007/07/lee_rousso_complaint.pdf, 6-8.

the judgment. However, when constitutional provisions or other international treaties like the EC treaties or multilateral environmental treaties are concerned, the high consensus requirements could prevent their modification in response to problematic judicial decisions. At least in these latter cases, there may be a need to create a mechanism whereby WTO panel or Appellate Body decisions can be reviewed as corrected, if necessary out or respect for democratic governance.