



GATS and the Social Regulation of Services

Alexia Herwig

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ABSTRACT

Many service transactions are highly complex, and their quality is difficult to ascertain for consumers. In order to have properly functioning service markets, the services thus often require regulation. However, with the advent of the WTO, international trade in services has become increasingly rule-bound. GATS has considerable, intricate effects on social regulation due to the characteristics of services. The allocation of regulatory jurisdiction between home and host country, for example, is rendered difficult by the process-based nature of a lot of services. The WTO *US - Gambling* dispute settlement report is the first to address GATS disciplines on social regulation in a detailed manner. This working paper submits that the *US - Gambling* report has increased interference with domestic social regulation and created regulatory uncertainty for WTO members. However, it is also argued that the real impact of the GATS on social regulation can only be understood by looking beyond the text of the GATS. GATS disciplines may become amplified through their interaction with domestic and other international law. The GATS also contains some “political” counterbalancing mechanisms that allow members to renegotiate their commitments. It is argued that these political mechanisms strengthen subsidiarity in the GATS, and make WTO dispute settlement bodies accountable to WTO members.

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1 INTRODUCTION*

This paper assesses the impact of the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) on social regulation. The assessment takes place through the market access disciplines of GATS, contained in Article XVI of the Agreement and as interpreted by the WTO DS Panel in *US - Gambling*. The Panel report is the first one to address GATS disciplines on market access and domestic regulation in a detailed manner.¹ The report also sheds light on the interaction of key GATS disciplines relating to market access (elimination of quantitative restrictions), national treatment (non-discrimination), domestic regulation (technical regulations, licensing and qualification requirements), the scope of the general exceptions (public policy objectives) and technological neutrality.² The paper therefore also analyzes these interactions.

The Panel report is relevant beyond gambling to cases where a WTO member regulates the means of delivering or of marketing a service. Examples that come to mind are the provision of telemedicine services, the provision of digital entertainment over the Internet, or insurance sales over the phone or via the mail. Sometimes, the remoteness of delivery may be inextricably linked to the content of a service, other times it may simply be one amongst several ways of providing, consuming or selling a service. The impact of regulating the modes of delivery or selling on the service itself will be particularly high where the content and means of delivery are closely linked. Where this is not the case, the impact of regulating the modes depends very much on market structures.

This paper proceeds in four main parts. Section 2 explores arguments for and against involving the GATS in the social regulation of services. Section 3 outlines the key GATS obligations relevant to social regulation. Section 4 analyses how the GATS, as interpreted in *US - Gambling*, affects national social regulatory autonomy through the interpretation of the concept of quantitative restrictions. The analysis in Section 5 suggests that the interpretation and hence the effect of the GATS can be modified through political governance mechanisms, but that GATS norms can also impact on national legal orders through interaction with domestic and other international law. The concluding section evaluates this complex pattern of legal and political governance mechanisms, present in the GATS.

* This article has benefitted from very detailed and insightful comments by Lothar Ehring, which are gratefully acknowledged. Many thanks are equally due to Annedore Leidl and Sonja Kaufmann for excellent research and editing assistance.

¹ The first GATS dispute concerned the EC distribution arrangements for imported bananas but the legal analysis focused primarily on the GATT. The *Mexico - Telecommunications* dispute concerned Mexico's liberalisation commitments for the cross-border supply of telecommunications services and its obligations under the Reference Paper, while the *US - Gambling* dispute concerned the provision of gambling services via the Internet.

² Sacha Wunsch-Vincent generally applauds the ruling in *US - Gambling* for affirming the principle of technical neutrality, i.e. that the means through which services are delivered should normally not make a difference. He also concludes that the ruling is unlikely to have a chilling effect on the ongoing service negotiations. See Wunsch-Vincent 2006, 319.

2 NORMATIVE CONSIDERATIONS -- SHOULD THE GATS HAVE AN IMPACT ON NATIONAL SOCIAL REGULATIONS?

The liberalisation of trade in services proceeds differently from the removal of barriers to trade in goods. Services are not usually subject to tariffs, leaving quantitative restrictions and domestic regulation of service providers as the trade barriers that have to be removed first. Domestic regulations are, however, the most common instrument of social regulation. This gives rise to the difficult task of distinguishing between unnecessary or discriminatory regulation and legitimate regulatory protection.³

According to many international economic law scholars, the primary purpose of WTO law is to address a domestic public choice problem of national democracies: governments will be captured by domestic industries and develop protectionist regulatory policies that prevent cheaper imports from being marketed. The result is higher domestic prices to the disadvantage of diffuse consumer interests.⁴ The problem with national social regulatory policies is that they can be *de iure* discriminatory or, even if facially neutral, are motivated by economic protectionism and produce disparate impacts on foreign exporters. These scholars therefore see a role for WTO law in promoting the export interests of foreign companies and protecting unorganised consumer interests against strong domestic business lobbies.

Others consider WTO law as a substitute for transnational democracy. These scholars argue that national democracies are incomplete because their regulatory policies produce extraterritorial impacts that these democracies fail to consider.³ In other words, national democracies are procedurally deficient because their policies affect unrepresented foreigners. The inclusion or representation of all foreign affected interests in national democratic decision-making is nevertheless neither theoretically desirable nor practically feasible. WTO law offers a substitute, mechanism for defending foreign interests, because it requires the importing WTO member to justify its regulations in terms of commonly accepted standards to other affected WTO members.

WTO law is also sometimes seen as an instrument for more informed national decision-making and for mutual learning among WTO members.⁴ Information deficits or the populist swaying of national regulators are perceived to be the main problem. WTO law is claimed to rectify these deficits through multiple mechanisms. For instance, it requires that members support their safety regulation with scientific evidence, without however prescribing what level of risk to tolerate. Under the general exceptions of the GATS and the GATT, members are called on not to apply regulations in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. The Appellate Body of the WTO Dispute Settlement System has interpreted this so called "chapeau" as requiring the importing member to examine whether different risk mitigation methods are in fact effective in achieving the importing member's level of

³ On the GATS' impact on social regulation, see Delimatsis 2007; Krajewski 2003, xviii, 191-196; Sauvé 1995, 125; Mattoo 1997, 107; Mattoo and Sauvé 2003, 2; Trachtman 2003, 57, 76-78; Pauwelyn 2005, 131; Djordjevic 2002; Karmakar 2007, 127; Wouters and Coppens 2006.

⁴ Petersmann 1993, 3.

³ Joerges 2005, 553; von Bogdandy 2001, 609.

⁴ Howse 2000, 2329.

protection.⁵ It, thereby, has created an implicit obligation on WTO members to be well informed before making regulatory prescriptions.

On all these accounts, some impact of WTO law on national social regulations is perceived as desirable. However, the desirable guidance and constraining effect of WTO norms on social regulation has to be counterbalanced with due respect for national regulatory autonomy. There are several general reasons why WTO law needs to respect national regulatory autonomy: strong negative integration raises concerns of excessive judicial governance and lack of democracy, since there are few functioning global political mechanism that could correct erroneous judicial decisions.⁶ As long as the nation state is the key supplier of procedurally legitimate decision-making procedures, some degree of national autonomy needs to be respected. Sometimes local knowledge and the variability between countries might also put states or regions in a better position to decide on the substantive standards for regulating economic activity.

In addition, trade in services has some unique features that complicate the task of balancing trade liberalisation with regulatory autonomy. Because services are intangible and complex, more important information asymmetries often exist between consumers and providers of a service than between purchasers and vendors of goods. This makes social regulation all the more necessary in creating functioning service markets. Service regulation also often takes place at the same moment as the services are provided. In the context of trade in goods, the regulation of production processes is sometimes perceived to be an unjustified assertion of extraterritorial jurisdiction that raises suspicions of protectionism. While the distinction between production processes and methods (PPMs) and quality characteristics is already unclear for goods, there are several reasons for why it works even less well for trade in services.

First of all, the complexity of and variability between service transactions can make it impossible to develop detailed quality standards. Consider the example of legal services. Due to the myriad of legal problems that clients encounter it would be impossible to specify content requirements. Instead, quality is ensured through requiring certain professional qualifications of the service provider, through regulating the manner in which the service is produced (e.g. conflict of interest rules), and through remedial justice (malpractice suits). For other services, it might be more appropriate to regulate the consumer of services rather than the provider. For example, insurance companies do not reimburse certain medical treatments because, although helpful, they fail to produce consistent results in all patients. The limitations on reimbursement indirectly regulate the provision of medical services because they push doctors and patients to rely on other treatments with greater effectiveness and consistency of result.

Furthermore, the allocation of regulatory jurisdiction between the home and the host country is more complicated in the case of services. Verifying the quality of services is difficult because services (often) cannot be stored and controlled after they are produced. The verification of compliance with regulatory standards has to occur at the moment when the service is produced. When such a service is provided across borders or with the temporary presence of the service provider in the host country, the home country - which might even have equally effective regulation - cannot adequately control compliance with its regulatory standards or might have little incentive to do so. In these cases, the host country could possibly be entrusted with the task of controlling the quality of services and

⁵ Appellate Body Report, *US - Shrimp*, paras. 161-165.

⁶ von Bogdandy 2001, 609; Ehlermann and Ehring, 2005.

enforcing foreign laws on its territory, yet it might do so with an administrative apparatus or testing method that is not adapted to the home country's regulation. For other services, the home country might be able to control service provision in a cross-border context effectively. This still requires significant regulatory trust on the part of the host country in the capacity of the home country, and willingness on the part of the home country to use its own resources for economic activities that occur outside its borders.

3 THE KEY GATS DISCIPLINES ON MARKET ACCESS, NATIONAL TREATMENT AND DOMESTIC REGULATION

Unlike the GATT, the GATS foresees no across-the-board liberalisation of services. Instead, it uses a combined positive-negative list approach to structure the liberalisation that leaves significant regulatory autonomy to WTO members. Members are free to narrow down the definition of service sectors and therefore the scope within which liberalisation commitments apply. They are also free to decide to what extent they want to grant market access, if at all, for example by limiting foreign shareholding. In addition, they are free to decide whether they want to grant national treatment to foreign service providers or to maintain discriminatory regulations. However, if they do commit to market access and/or national treatment, they must specifically inscribe any limitations on market access or discrimination that they nevertheless want to apply. Failing that, a member can still 'save' market access or national treatment restrictions, but only if they can be justified under the general exceptions of the GATS.

Despite the considerable autonomy the GATS leaves to WTO members to enact social regulations of services, its rules also constrain members' ability to regulate. First, the grandfathering of discriminatory regulation that the GATS allows pertains only to regulations existing at the time the schedules were negotiated. All future regulation with a discriminatory impact on foreign service providers needs to be justified under the general exceptions of the GATS. As the list of exceptions is limited, there is a potentially serious impact on the GATS on regulatory autonomy since some policies of WTO members might be incapable of justification. Furthermore, if members inscribe limitations on national treatment or market access for the wrong service sector, their attempt to safeguard regulatory autonomy fails. 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 as falling under the wrong sector heading.

Because of these impacts on social regulation, how the key GATS disciplines on social regulation are defined and interpreted becomes important. In principle, the GATS affects social regulation through the concept of quantitative restriction in Article XVI, the national treatment obligation in Article XVII, the disciplines on domestic regulation in Article VI and the general exceptions and chapeau in Article XIV and the security exceptions in Article XIV *bis*.

Article XVI defines several types of quantitative restrictions that members cannot maintain in sectors and modes of supply for which they have made commitments, unless they have scheduled them as exceptions.⁷ If they are not scheduled, a quantitative restriction must be justifiable as a legitimate public policy under Articles XIV, XIV *bis*, and XII. These legitimate public policies include public morals, public 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. The list of public policies is considered to be finite.⁸

⁷ GATS, Article XVI:2.

⁸ Pauwelyn 2005, 131.

The GATS national treatment obligation prohibits members from discriminating against like services and like service suppliers of the service sector and mode of supply inscribed in its schedule, but subject to the express reservations made therein.⁹ Measures that are inconsistent with the national treatment obligation can nevertheless be saved under the exceptions relating to legitimate public policies.

Unlike Article XVI, which establishes a *per se* prohibition on quantitative restrictions, the prohibition of Article XVII on discrimination only comes into play in case of likeness of services and service suppliers, and treatment that is less favourable. Pauwelyn argues that the different normative content is probably due to the fact that the WTO members considered domestic regulation to be so important and sensitive that they subjected it to softer GATS disciplines.¹⁰ Weiler explains the stricter scrutiny given to market access restrictions with the fact that market access is more important than national treatment, whose violation merely entails competitive disadvantages; market access exposes consumers to new or different services, creating the possibility for tastes to change.¹¹

It is noteworthy that Article XVII, unlike Article XVI, does not mention modes of supply. This entails that the use of a different mode of supply does not, *per se*, render services and suppliers unlike. If services that are supplied remotely and through a commercial presence and the respective service suppliers are alike, discrimination between suppliers using different modes of supply will be inconsistent with Article XVII. This is so unless an exception has been entered for the mode of supply concerned. Conversely, the use of a different mode of supply could also motivate a finding that no national treatment violation exists, if a service supplied through a commercial presence and a service supplied remotely are themselves alike but their suppliers are not.¹² Consumers might, for instance, prefer the face-to-face interaction that only commercially present suppliers can provide. Modes of supply and market structures must also be considered in order to determine an instance of less favourable treatment. Modes of delivery and market structure can also be relevant to a finding of less favourable treatment. For instance, a regulation that is *de iure* indistinctly applicable to domestic and foreign service suppliers across modes of supply could still treat foreign suppliers less favourably. This would be the case where the foreign service suppliers primarily supply remotely and the regulation produces disparate impacts on the remote supply of the service, yet the difference in treatment is solely explained by the remoteness or foreignness of the service supplier. It is obvious that the possibility of cross-modal likeness or less favourable cross-modal treatment considerably complicates the scheduling task of WTO members. Whether or not a national measure should have been scheduled as an exception to national treatment can sometimes depend on changes in consumer tastes or market structure that no-one could foresee at the time the schedules were negotiated.

Concerning non-discriminatory domestic regulation, Article VI imposes several procedural obligations on the availability of judicial review, procedures to verify professional competence and prompt decision-making on authorisation requests.¹³ It also requires that all measures of general application that affect trade in services are administered in a reasonable, objective and impartial manner.¹⁴ The Council for Trade in Services is called upon to develop further disciplines on qualification requirements and procedures, technical

⁹ GATS, Articles XVII:1.

¹⁰ Pauwelyn 2005.

¹¹ Irwin and Weiler 2008.

¹² Pauwelyn calls this the permissive effect on social regulation linked to the reference to service suppliers. Pauwelyn, 2008, 359.

¹³ GATS, Article VI:2(a), 3, 6.

¹⁴ GATS, Article VI:1.

standards and licensing procedures.¹⁵ Pending the entry into force of these disciplines, members that have made specific commitments for a sector must not apply measures that nullify or impair the value of their commitments. The measures cannot be more burdensome than necessary to ensure the quality of the service and they must be based on objective and transparent criteria.¹⁶ Licensing procedures must not constitute a restriction on the supply of the service.¹⁷

Article VI is odd, because it seems to contain a temporary necessity test, which will be superseded by the development of regulatory disciplines. This raises several questions. What is the legal effect of the development of regulatory disciplines? Do they extinguish the right of members to adopt standards of protection higher than those in the disciplines unless they can be brought under the general exceptions of the GATS? This would sometimes make the disciplines binding on members. Or rather, is it that they only abolish the necessity test, leaving members - effectively - free to do what they want in the area of licensing and qualification requirements as well as technical regulations, as long as they do not violate national treatment? It seems unlikely that Article VI:5 could sustain the latter interpretation, if one uses the desire to prevent the unnecessary obstacles to trade expressed in paragraph 4 as context for interpreting paragraph 5. The former interpretation has stronger textual support, but is problematic from a policy perspective, because it restricts the policy objectives that members' regulations can pursue to the closed list of Article XIV.

Related to this, a further issue is whether regulatory disciplines supersede the necessity test for the entire sector, or only for the specific matter, mode or subsector immediately dealt with by the disciplines. The latter would curtail the room for manoeuvre of WTO members to a considerable extent. Article VI:4 can be interpreted to avoid this latter result. It states that the Council for Trade in Services shall develop any disciplines necessary to ensure that unnecessary barriers to trade are removed. An argument could be made that the Council for Trade in Services has failed to discharge the obligation of developing any necessary disciplines if the disciplines have insufficient regulatory coverage. Article VI:5 goes on to state that the necessity test exists 'pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4.' This language refers back to the obligation of the Council for Trade in Services to develop *any* necessary disciplines. It could be argued that the failure of the Council for Trade in Services to develop disciplines meeting the requirements of paragraph 4 'resuscitates' the necessity test. The question remains whether the necessity test is 'resuscitated' only partially to cover the lacunae of the Council's regulatory disciplines, or whether the lacunae entail that no binding effect whatsoever of the disciplines kicks in. This 'fallback' regulatory capacity of the nation state, *nota bene*, is very similar to the situation under the SPS and TBT Agreements. It seems, at any rate, to be the best policy outcome, given the limited expertise and decision-making capacity of the Council for Trade in Services.

A related issue is whether regulatory disciplines of the Council for Trade in Services can also be attacked for being more burdensome than necessary, or for their failure to be based on transparent and objective criteria as required by paragraph 4.¹⁸ Since the suspension of the necessity test can be interpreted as being contingent on the Council's disciplines being necessary to ensure the removal of unnecessary obstacles to trade

¹⁵ GATS, Article VI:4.

¹⁶ GATS, Article VI:4,5.

¹⁷ GATS, Article VI:4.

¹⁸ Ehring (2008).

pursuant to paragraph 4, WTO members would retain the right to adopt other necessary technical regulations and licensing and qualification requirements if the disciplines are too burdensome, untransparent or lack objectivity.

It is unlikely that future disciplines would lay down substantive technical standards or harmonise qualification requirements, if the Accountancy Disciplines are anything to judge by. Rather, they are likely to continue to leave broad regulatory discretion to WTO members, focusing instead on procedural requirements pertaining to domestic regulation. For the foreseeable future, regulatory harmonization with the WTO seems an unlikely scenario.

As Article VI and its necessity test currently stands, an important question for social regulation is whether a member has to engage in reasonable regulation pursuant to Article VI:5 notwithstanding the fact that it has made a national treatment exception in respect to the same regulation--presumably precisely in order to engage in a conduct that favours domestic suppliers either *de iure* or *de facto*. Unlike Article XVII:1, Article VI:5 does not explicitly make a member's obligations subject to the conditions and qualifications set out in the schedule. Would Article VI:5 then, in effect, nullify discriminatory parts of a member's schedule that relate to technical standards, qualification requirements and procedures and licensing requirements?

Although Article VI:5 does not track the language of Article XVII:1, its obligation is contingent on the nullification or impairment of specific commitments, which could not have reasonably been excepted by the member at the time the schedules were drawn up. This suggests that a WTO adjudicating body would first have to ascertain the precise ambit of the member's commitments. If it finds that the schedule foresees discrimination 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, an adjudicating body would probably have to find that the member exporting the service could not have a reasonable expectation that a member will engage in reasonable regulation since the entire purpose of the national treatment exception will be to discriminate. 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.

4 THE GAMBLING CASE

4.1 Background information on the case

The *US - Gambling* case concerned various pieces of US federal and state legislation that prohibited the remote supply of gambling and betting services¹⁹. The US alleged that the rationale for prohibiting the remote supply was to protect against underage gambling, compulsive gambling and fraud.²⁰ 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.²¹

The case involved three key legal issues. The first was 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 than sporting, and the US claimed that sporting covered gambling and betting services.²² The panel found that “other recreational services” included gambling and betting services.²³ 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.²⁴ The Appellate Body obtained the same result, but modified the panel’s interpretative approach.²⁵

The next legal issue concerned the question of whether the various pieces of US legislation amounting to a prohibition on the cross-border supply of gambling and betting services should have been scheduled as a market access restriction. This aspect of the case will be discussed in greater detail below. The panel report, which was upheld by the Appellate Body, found that the US prohibition was a market access restriction that had to be scheduled.²⁶

As a result of this finding, the final legality determination of the case and third issues hinged on whether the US prohibition could be justified under the general exceptions clause of the GATS. The US invoked the exception relating to the prevention of fraud and deceptive practices and the public morals exception in respect to the objective of underage and obsessive gambling.²⁷ Under both exceptions, the US was required to show that its ban was necessary to achieve the noted policy objectives.²⁸ In order to be fully compliant with Article XIV, the US also had to show that it did not apply its ban on remote gambling in a way that would constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade.²⁹

¹⁹ 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*).

²⁰ 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.

²¹ Pauwelyn 2005.

²² Appellate Body Report, *US - Gambling*, para. 162.

²³ Panel Report, *US - Gambling*, para. 7.2(a).

²⁴ Panel Report, *US - Gambling*, para. 6.93.

²⁵ Appellate Body Report, *US - Gambling*, para. 213.

²⁶ Panel Report, *US - Gambling*, paras. 6.285, 6.286, Appellate Body Report, *US - Gambling*, para. 239.

²⁷ See n. 20.

²⁸ GATS, Article XIV(a), (c).

²⁹ GATS, Article XIV.

Antigua argued that the US prohibition was unnecessary and thus inconsistent with the GATS because the US had failed to consult and negotiate with Antigua with a view to finding less restrictive means of achieving the protection objective.³⁰ The panel agreed with Antigua.³¹ In addition, the panel found that the prohibition did not meet the requirements of the chapeau because the US enforced its prohibition more strictly against foreigners than against domestic suppliers. The US also had failed to demonstrate that the Interstate Horseracing Act did not decriminalise remote bets in interstate commerce relating to horseracing.³²

On appeal, the Appellate Body overturned the panel finding that the prohibition was not necessary on the grounds that the panel had falsely attributed the burden of proof.³³ It also disagreed with the panel in that there were differences in enforcement that would justify the finding that the prohibition was applied in a manner that constituted arbitrary distinction or a disguised restriction on trade.³⁴ Concerning the Interstate Horseracing Act, the Appellate Body agreed with the panel that the US had failed to demonstrate that the act did not favour domestic remote suppliers of horseracing bets by decriminalising their conduct.³⁵

4.2 The decision on market access restrictions

The unique feature of the *US - Gambling* case in terms of GATS provisions was the issue of 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.³⁶ This technical legal issue is of great importance, as Pauwelyn points out, since 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.³⁷ In contrast, Article VI on domestic regulation puts the burden of proof on the complaining member and has a much more indeterminate list of regulatory objectives that could justify introducing technical regulations or licensing and qualification requirements. The national treatment Article XVII puts an initial burden of proof on the complaining member to show that its services are alike or supplied by like service providers as a condition for the national treatment obligation to come into play.

In terms of economic trade theory, the stricter treatment applied to quantitative restrictions as compared to domestic regulation makes sense: Quantitative restrictions limit competition to the number of suppliers within the quota. Suppliers outside the quota cannot compete no matter how competitive they are. Quotas can ensure sufficient market shares for domestic suppliers and can have highly protectionist effects. In contrast, the negative trade effects of discriminatory or unnecessary domestic regulation can still be absorbed by foreign providers as long as they are able to maintain low prices. In a nutshell, quantitative restrictions *guarantee* market share to domestic suppliers, while domestic regulation generally does not.

³⁰ Panel Report, *US - Gambling*, para. 6.525, Appellate Body Report, *US - Gambling*, para. 55.

³¹ Panel Report, *US - Gambling*, para. 6.531.

³² Panel Report, *US - Gambling*, para. 6.607.

³³ Appellate Body Report, *US - Gambling*, para. 309.

³⁴ Appellate Body Report, *US - Gambling*, para. 354.

³⁵ Appellate Body Report, *US - Gambling*, para. 364.

³⁶ Pauwelyn 2005.

³⁷ *Id.*

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.³⁸ The US prohibition therefore had to fall under one of the six types of restrictions for Article XVI to apply.

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.³⁹ In other words, a qualitative regulation prohibited the cross-border mode of supplying the service altogether and had the effect of limiting the number of cross-border foreign and domestic service suppliers to zero.

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.⁴⁰ For the panel, it was decisive that the US prohibited the cross-border mode of supply altogether.⁴¹ According 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.⁴² In essence, the panel 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 and thus did not take the form of a quota.⁴³

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 or effect quotas, monopolies or exclusive service suppliers.⁴⁴ 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. Article VIII is concerned with ensuring that monopoly and exclusive service suppliers do not act inconsistently with the MFN obligations and the specific commitments and do not abuse their monopoly position when they compete with others outside of the scope of their monopoly.⁴⁵ Article VIII:5 includes instances where a member, “formally or in effect, authorises or establishes a small number of service suppliers...”⁴⁶ For the Appellate Body, the reference to ‘in effect’ in Article VIII:5 could be read across to the whole of Article XVI:2(a).

The Appellate Body then turned to the actual wording of Article XVI:2 and, in a stretched interpretation, concluded that it was not clear that Article XVI:2 required the limitations to take a particular form.⁴⁷ To the Appellate Body, Article XVI:2 is not primarily about the form of measures, but rather about their numerical or quantitative nature.⁴⁸ Based on this,

³⁸ Panel Report, *US - Gambling*, para. 6.298.

³⁹ Panel Report, *US - Gambling*, para. 6.221, Appellate Body Report, *US - Gambling*, para. 43.

⁴⁰ Panel Report, *US - Gambling*, para. 6.330.

⁴¹ Panel Report, *US - Gambling*, para. 6.330.

⁴² Panel Report, *US - Gambling*, para. 6.355.

⁴³ See also Pauwelyn 2005.

⁴⁴ Appellate Body Report, *US - Gambling*, para. 230.

⁴⁵ GATS, Article VIII:1,2.

⁴⁶ Appellate Body Report, *US - Gambling*, para. 229.

⁴⁷ Appellate Body Report, *US - Gambling* paras. 226, 231.

⁴⁸ Appellate Body Report, *US - Gambling*, paras. 227, 232.

the Appellate Body considered that Article XVI:2(a) should be read to include measures that have the effect of the listed limitations.⁴⁹ Concerning the US laws, the Appellate Body in essence agreed with the panel that limitations with the effect of a zero quota are quantitative limitations and fall within the scope of Article XVI:2(a).⁵⁰

Krajewski suggests that the panel and Appellate Body saw the purpose of Article XVI as providing for effective market access⁵¹ - and were more concerned with promoting that purpose than with the text of the GATS, one might add. From the point of view of treaty interpretation, the panel and Appellate Body decision in *US - Gambling* can surely be criticised as a disregard of the text of Article XVI:2, whose term 'in the form of' would no longer serve any particular purpose.⁵²

The Appellate Body's conclusions drawn from the definition of exclusive service suppliers in VIII with respect to Article XVI:2 are also unconvincing. First of all, it is doubtful that Article VIII can be considered as a context for the whole of Article XVI, given that the two Articles have very different purposes.⁵³ Article XVI sets forth market access restrictions, while Article VIII deals with abuses of position by monopolies and exclusive service suppliers, and the contravention of the MFN obligation and scheduled commitments. Even if Article VIII were the relevant context, it would be logical to use it only to interpret the term "exclusive service suppliers" in Article XVI:2(a), with the effect that measures in the form or with the effect of establishing a monopoly or exclusive service suppliers fall within Article XVI:2. For the remaining terms of Article XVI:2 (numerical quotas and economic needs tests) only restrictions that actually take the form of quotas and economic needs tests would fall under Article XVI:2.

The Appellate Body also drew on an example given in the 1993 Scheduling Guidelines to support its interpretation that a zero-quota comes within Article XVI.⁵⁴ The Scheduling Guidelines give the example of "nationality requirements for suppliers of services (equivalent to zero quota)." Irwin and Weiler have been critical that the Appellate Body did not engage in any teleological interpretation as required by Article 31 of the Vienna Convention on the Law of Treaties before turning to supplementary means of interpretation.⁵⁵ The Appellate Body's use of the Scheduling Guidelines has also been criticised on the grounds that they are not binding and have little evidentiary value. Furthermore, the Appellate Body overlooked the fact that nationality requirements are origin-specific while zero-quotas of the type in *US - Gambling* are not.⁵⁶

⁴⁹ Appellate Body Report, *US - Gambling*, para. 230.

⁵⁰ Appellate Body Report, *US - Gambling*, paras. 234, 237-239.

⁵¹ Krajewski 2005, 436.

⁵² Panagiotis Delimatsis submits that the list of market access limitations in Article XIV :2 is not exhaustive. He points to the footnote 8 to this Article, which states that commitments on cross-border supply and supply through commercial presence also commit a member to allow cross-border movement of capital. To Panagiotis Delimatsis, restrictions on capital movement are further market access limitations covered by Article XIV. From this, he concludes that the listing in Article XIV:2 should be taken to be merely illustrative. See Delimatsis (2006, 1064f). However, as Pauwelyn claims, it is more reasonable to interpret the special mention of capital movement in footnote 8 as confirming the otherwise limited nature of Article XIV. See Pauwelyn (2005).

⁵³ Federico Ortino also questions whether Article VIII is appropriate context for the interpretation of Article XVI. See Ortino 2006, 135.

⁵⁴ Appellate Body Report, *US - Gambling*, para. 237.

⁵⁵ Irwin and Weiler, 2008.

⁵⁶ Regan 2007, 1313.

4.3 The implications of the US - Gambling market access decision for the treatment of social regulation under the rules of the GATS

The potential legal consequences for WTO members flowing from *US - Gambling* merit further discussion. It is important to be as clear as possible about the scope of the findings. Several commentators are concerned that almost all qualitative regulations could now be considered as limitations in the sense of Article XVI:2, since they will produce quantitative effects.⁵⁷ Pauwelyn provides a graphic example of this when he queries whether regulations that require taxi drivers to pass driving tests will be considered limitations because aspiring taxi drivers who did not pass the test are excluded from the market.⁵⁸

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 to the quota-like effects of a regulation on the total number of suppliers allowed to 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. The reference to ‘number’ suggests that the service suppliers in a given market can be counted and definitively established. Only regulations that actually establish a definite number of service suppliers are thus caught by Article XVI:2(a). Following 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.⁵⁹ It is therefore unlikely that the finding about the quota-like effects extends so far as to capture all the regulatory measures that make the market entry subject to certain conditions, but do not impose limits on the number of suppliers. This observation notwithstanding, many other qualitative regulations may still be considered as quantitative restrictions in circumstances that will be expounded below.

There persist several aspects of concern regarding the finding in *US - Gambling*. 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.⁶⁰ Don Regan argues that this finding is correct.⁶¹ Consider, for example, the remote sale of insurance services. A member might, in principle, allow the remote sale of insurance but only via the mail and not over the telephone or Internet on the grounds that consumers ought to be protected against making hasty and bad decisions on insurances. According to 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, in the usual understanding of a quota, which implies 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,⁶² they merely cannot use certain selling techniques. However, that is a regulation, not a quota. It is also

⁵⁷ Pauwelyn 2005; Trachtman 2005, 801. Markus Krajewski considers that the ruling leaves it uncertain that other measures that effectively limit market access but are not prohibitions will be included in Article XVI. Krajewski 2005, 437.

⁵⁸ Pauwelyn 2005.

⁵⁹ Regan 2007, 1302.

⁶⁰ Panel Report, *US - Gambling*, para. 6.338.

⁶¹ Regan, 2007, 1304.

⁶² Similarly, Irwin and Weiler 2008.

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. Petros Mavroidis takes the position that Article XVI should only apply to origin-specific quotas but not at all to origin-neutral quotas, whether or not they are zero or above zero quotas.⁶³ He makes a number of arguments to support his position, some more textual, others more policy-based. All of them can, I think, be rebutted. He points out that Article XVI speaks about the treatment of foreign service suppliers.⁶⁴ From that, he concludes that origin-neutral quotas should fall outside Article XVI, since they do not single out foreign service suppliers. This argument is not very convincing since an origin-neutral restriction will also treat foreign service suppliers in a particular manner. Mavroidis further submits that the Scheduling Guidelines envisage only origin-specific quotas.⁶⁵ However, for economic needs tests and restrictions on the type of legal entities, this is not the case; they can equally be origin-neutral and apply to domestic suppliers.

Drawing on more policy-based considerations, Mavroidis argues that Article XVI must be interpreted only as giving foreign but not domestic suppliers market access.⁶⁶ This would prevent Article XVI from being turned into a deregulatory instrument. As the disciplining of origin-neutral quotas would also confer market access on domestic suppliers, Article XVI should be limited to origin-specific quotas only. He draws further support from the heading of the part of the GATS containing Article XVI. That heading is called specific commitments. Since commitments can only be made to foreign, but not to domestic suppliers, it is clear to Mavroidis that Article XVI must be limited to origin-specific quotas.⁶⁷ These arguments can be refuted. A number of GATS provisions, in fact, include incidental side benefits for domestic suppliers. The removal of a national treatment violation, for example, can also benefit some domestic suppliers wishing to see regulatory requirements lifted. Moreover, since domestic suppliers have no standing to bring claims under the GATS, members do not really make any commitments to them.

In the final analysis, Mavroidis' submission would turn Article XVI into little more than a specific list of *de iure* national treatment violations under Article XVII. He also admits as much.⁶⁸ It is submitted that there is no good policy reason to limit Article XVI to origin-specific quotas, because the economic effects of origin-specific and origin-neutral quotas are very similar. Both limit competition by preserving market shares for certain incumbents. As suggested above, the trade effects of quotas are worse than those of regulations that violate national treatment; with the latter the market still remains contestable. It can therefore be concluded that Article XVI should not be limited to origin-specific quotas.

Regan argues that an origin-neutral zero quota should not be considered a quota at all. When a member prohibits a service or mode of supply, it prohibits competition entirely. There is therefore no question of the member reserving market shares to domestic

⁶³ Mavroidis 2007, 2, 9.

⁶⁴ Mavroidis 2007, 10.

⁶⁵ Mavroidis 2007, 13.

⁶⁶ Mavroidis 2007, 10.

⁶⁷ Mavroidis 2007, 10-11.

⁶⁸ Mavroidis 2007, 14.

suppliers.⁶⁹ Under such an interpretation of Article XVI, WTO members would obviously enjoy much leeway in prohibiting economic activities on regulatory grounds.

In contrast, Irwin and Weiler maintain that Article XVI should catch origin-neutral zero quotas that preclude the supply of a service, but should not catch regulations that merely require service suppliers to meet certain conditions.⁷⁰ Their main concern is that Article XVI should safeguard the promise of market access that the members have negotiated. If a member totally prohibits the supply of a service into their territory, it reneges on its commitments. Using only a requirement of form for the application of Article XVI will not work, they point out. A member could escape the application of Article XVI by deleting any reference to numbers in its regulatory measure, instead making reference to the foreign nature of the service. They also offer textual support for their position. From the omission of anything like “Add Article III in the GATS”, they reason that WTO members intended prohibitions to be caught by Article XVI. There is no serious departure from WTO law since the SPS and TBT Agreements also apply to origin-neutral measures. The strict enforcement of commitments through the extension of Article XVI to zero quotas, Irwin and Weiler further argue, appropriately counterbalances the great autonomy members enjoy under the GATS. In a nutshell, Irwin and Weiler want to draw a line between measures impeding market access (should be caught by Article XVI) and measures making access conditional on meeting certain requirements (should not be caught by Article XVI). This is the line they consider the ECJ to have drawn in *Dassonville* and *Keck* cases, and they deem it instructive for the purposes of the GATS.

There are several problems with suggestions of Irwin and Weiler. It may be doubted whether the analogy between EU law and the GATS holds. In EU law, indistinctly applicable measures infringing Article 34 TFEU can be justified on the basis of mandatory requirements. In the GATS, a regulatory ban that impedes market access can only be justified on the basis of the limited general exceptions. If, as Irwin and Weiler suggest, the *telos* of the GATS is to strike a balance between liberalisation and regulation, then a construction of Article XVI that limits the right of WTO members to ban services to the grounds listed in the general exceptions is difficult to sustain. Irwin and Weiler’s proposal also requires some difficult qualitative decisions that a member negotiating commitments may not be able to anticipate. For instance, when does a regulation impose conditions whose fulfilment would alter a service to such an extent that it is no longer the same service? Are films displaying sexual conduct between clothed actors still to be considered pornographic? Or, are games played for a constant fee and with the chance to win or lose worthless tokens still gambling? And what about bans on activities that cannot be rendered acceptable by any regulatory means, such as human cloning or surrogate motherhood? There is no other way those services can be provided and yet the goal of the ban is clearly regulatory. Should the panels or the Appellate Body really ignore the obvious regulatory purpose and stick with an objective test in determining whether there is a market access restriction?

The bottom line of the finding in *US - Gambling* is that origin-neutral prohibitions will be considered quantitative restrictions under Article XVI. Most qualitative regulations that make market access subject to some conditions still fall outside of Article XVI. However, some of these qualitative regulations could well be quantitative restrictions under the “effects” test, if they work to limit the supply to a definite number. For instance, what

⁶⁹ Regan 2007, 1306, 1308-1309.

⁷⁰ Irwin and Weiler 2008.

about a qualitative regulation that imposes such demanding capital adequacy standards that, besides the domestic suppliers, only a handful of international financial service 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 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 permitted (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. Commercial presence generally requires greater initial investment and will often subject the service supplier to host rather than home country regulation. Regan thus argues that such a situation is a case of national treatment violation, but not a quantitative restriction.⁷¹ At first sight, this argument seems intuitive. However, consider the case where market entry for commercially present service suppliers is extremely difficult due to other regulatory requirements. Here, the regulatory regime of the member might indeed produce the effect of protecting the position of incumbents in the market and excluding any possibility for competition. What is more, Article XVI does not support a construction that would require looking at effects across modes in order to determine whether there is market access. Paragraph 2 prohibits members from maintaining the listed restrictions in sectors where market access commitments are undertaken. This could point to a cross-modal approach to determine whether a limitation is present.⁷² On the other hand, paragraph 1 of Article XVI can be used as the interpretative context for paragraph 2. It is concerned with safeguarding the commitments made, and speaks of 'market access through the modes of supply'.⁷³ This suggests that each mode of supply has to be considered separately.

The considerations above highlight that the "effects approach" of the Appellate Body in *US - Gambling* calls for a fairly detailed economic analysis. It ultimately leads to considerable uncertainty for WTO members contemplating what to schedule, because it amounts to a case-by-case analysis. From the point of view of safeguarding regulatory autonomy, 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, qualitative regulation and possible national treatment violations. Regulatory measures with the effect of, but not in the form of, a zero or non-zero quota would then either fall under Article VI or Article XVII. The former should catch origin-neutral prohibitions as technical regulations.

As has already been argued above, members that have scheduled national regulations with quantitative effects only as exceptions in the national treatment column of their schedule, but not in the market access column, now incur the need to justify their measures under

⁷¹ Regan 2007, 1308-1309.

⁷² GATS, Article XVI:2.

⁷³ GATS, Article XVI:1.

the general exceptions of GATS Article XIV. They might, possibly, be in violation of the GATS despite their intention to exclude the applicability of the GATS in respect of the specific measure altogether.⁷⁴ The applicability of the GATS to sensitive measures, and the legal uncertainty members are faced with as a result of the decision in *US - Gambling*, could thus produce the paradoxical effect of reducing the members' willingness to schedule commitments.⁷⁵

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 the exceptions of Article XIV are limited, a broad application of Article XVI to qualitative regulations could preclude 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 with respect to any regulations with quota-like effects. Article VI provides no defence for measures that violate the market access commitments. In that sense, *US - Gambling* also limits the ability of the WTO to pursue social regulation.

The above discussion has shown that, although the "effects approach" under Article XVI is likely to apply only in a limited set of circumstances, some qualitative regulations with quota-like effects which members had previously considered to be justifiable under Article VI, or consistent with their national treatment commitments, must now in fact comply with Article XVI. In respect of these measures, it seems that *US - Gambling* has limited the regulatory autonomy of the WTO members.

⁷⁴ Markus Krajewski points out that there is no practice of WTO members of scheduling regulations as market access exceptions. Only Australia did so in respect of one specific regulatory measure. Krajewski 2005, 435.

⁷⁵ Krajewski 2005, 437; Regan 2007, 1315 f.

5 ALTERNATIVE MEANS OF INFLUENCE IN THE GATS: THE AFTERMATH OF THE US - GAMBLING CASE

5.1 Schedule modification and suspension of concessions under the DSU as flexibility mechanisms?

The *US - Gambling* dispute is also interesting because the US withdrew its commitments to gambling in response to the dispute settlement report. For an assessment of the GATS's impact on social regulation through the market access disciplines, the withdrawal of commitments is important. It allows the US to avoid implementation and it also sends the panel and the Appellate Body a strong signal to limit their interpretation of Article XVI.

At the dispute settlement meeting, where the reports in *US - Gambling* were to be adopted, the US criticised the findings concerning Article XVI. This issue has however not attracted criticism from any other WTO members in any of the subsequent meetings of the Dispute Settlement Body or the Council for Trade in Services.⁷⁶ When Antigua followed through with the dispute and sought and obtained a determination that the US' purported implementation of the *US - Gambling* dispute was still inconsistent with the GATS, the US took an unprecedented step: it sought to withdraw its commitments in the gambling sector pursuant to Article XXI of the GATS.⁷⁷

The question to consider next is what impact a US modification of its schedule would have with respect to the further steps in the *US - Gambling* dispute. Under Article XXI, the US may withdraw its commitments at any time, but it must enter into negotiations about compensatory adjustments with any affected WTO member that so requests.⁷⁸ If no agreement is reached, the matter can be referred to arbitration, where appropriate compensatory adjustments can be proposed.⁷⁹ If the US does not offer appropriate compensatory adjustments, the affected members who participated in the arbitration can suspend concessions vis-à-vis US trade.⁸⁰

Antigua and several other WTO members have already notified the Council for Trade in Services that they considered to be affected by the modifications of the US schedule.⁸¹ The US has reached an agreement on compensatory adjustments with several of them, yet it has not agreed with Antigua.⁸² At the same time, Antigua has stated that its notification is without prejudice to its right pursuant to the DSU to suspend concessions vis-à-vis US trade, as the US has not implemented the rulings and recommendations.⁸³ In response to Antigua's request to suspend concessions, the US requested an Article 22.6 DSU arbitration in order to have the amount of nullification and impairment reviewed. The arbitration lowered the

⁷⁶ Dispute Settlement Body, Minutes of the Meeting held on 20 April 2005.

⁷⁷ The US communication itself is secret pending the negotiation over the modification. It is referred to in the notifications of claim of interest from Antigua and Barbuda, S/L/293 of 25 June 2007.

⁷⁸ GATS, Article XXI:1(a),2(a).

⁷⁹ GATS, Article XXI:3(a),4(a).

⁸⁰ GATS, Article XXI:4(b).

⁸¹ Notification of Claim of Interest from Antigua and Barbuda, S/L/293 of 25 June 2007.

⁸² The relevant information can be found at the International Economic Law and Policy Blog of 17 December 2007, available at <<http://worldtradelaw.typepad.com/ielpblog/>>.

⁸³ Notification of Claim of Interest from Antigua and Barbuda, S/L/293 of 25 June 2007.

amount of nullification and impairment, and thus the level of concessions that Antigua may suspend, to US \$ 21 million.⁸⁴

Several legal issues arise in connection to the Article 22.6 DSU arbitration and the US withdrawal from its commitments in the gambling sector. One concerns the question of whether the existence of a dispute settlement report and an authorised suspension of concessions precludes the US from modifying its schedule of commitments. The DSU is not explicitly made subject to GATS XXI, so that Antigua's right could in theory persist.⁸⁵ A US modification of its schedule, consistent with Article XXI of the GATS, might therefore at the same time be inconsistent with the DSU.

Antigua could for instance argue that compensatory adjustment under Article XXI is not the same as compensation under the provisions of the DSU. Its rights under the DSU therefore remain intact. Moreover, Antigua could argue that the DSU and the GATS apply cumulatively, and that the US must comply with the DSU as well. Under the DSU, compensation and the suspension of concessions are viewed as temporary measures, while full implementation of the rulings and recommendations is the preferred solution.⁸⁶ Since Article XXI GATS is silent on whether modifications of schedules may be maintained, the DSU would require their suspension. Finally, Antigua could argue that there is a conflict between the temporary nature of the compensatory measures in Article 22.1 DSU, on the one hand, and the ability to modify or withdraw commitments at any time under Article XXI, on the other. In such a conflict, it is generally considered that the right may not be exercised.

Concerning the legal issue of whether the US would be free to maintain its modified schedule notwithstanding the *US - Gambling* report, it is submitted that the DSU can be interpreted as allowing that. Article 3.2 of the DSU stresses that the purpose of WTO dispute settlements is to preserve the rights and obligations of members under the covered agreements.⁸⁷ It also states that recommendations or rulings of the DSB cannot add or diminish the rights and obligations provided for in the covered agreements.⁸⁸ This provision is commonly interpreted as a safeguard against judicial law-making. It can also be interpreted to mean that a DSB recommendation in a specific case cannot deprive WTO members, including the losing party, of any of the rights they otherwise enjoy under the covered agreements, including the GATS. Article 3.5 DSU, which refers more broadly to all solutions to dispute settlement matters, can be interpreted in a similar manner.⁸⁹

It is also possible to argue that there is no conflict between the US modification of its schedule and the temporariness of compensation or retaliation. 'Temporary' can, after all, refer to shorter or longer durations. Since the GATS contains an in-built liberalisation agenda, i.e., it calls on members to further liberalise trade in services, it could even be argued that the US withdrawal of its gambling commitments is potentially up for disposition and in this sense temporary. It can thus be concluded that the DSU, likely, does not bar the US from modifying its schedule of commitments pursuant to the GATS.

⁸⁴ Decision by the Arbitrator, *US-Gambling*, WT/DS285/ARB, para. 3.188.

⁸⁵ DSU, Article 1.2 and Appendix 2.

⁸⁶ DSU, Article 22.1.

⁸⁷ DSU, Article 3.2.

⁸⁸ *Id.*

⁸⁹ DSU, Article 3.5.

Another issue is whether the US modification of its schedule extinguishes Antigua's rights under the DSU, notably in respect of suspending its concessions vis-à-vis the US for the non-implementation of the report. Neither the DSU nor Article XXI of the GATS deals explicitly with this issue. However, some provisions of the DSU can be interpreted to require that the suspension of concessions be terminated once an outcome under Article XXI has been achieved. Article 22.8 of the DSU provides that the suspension of concession shall only be applied until the inconsistent measure has been removed, until the losing member presents a solution to the nullification and impairment, or until a mutually satisfactory solution is reached.⁹⁰ It could be argued that the term "solution to the nullification or impairment" encompasses the situation where a losing member modifies its schedule of commitments pursuant to Article XXI of the GATS and offers compensation to affected members.

Moreover, an offer of adequate compensation to affected parties by the modifying GATS member could be brought under the term "mutually satisfactory solution". According to the DSU, a mutually acceptable solution is the preferred outcome.⁹¹ Withdrawal of the inconsistent measures is only the second-best option, followed by compensation and, as a last resort, the suspension of concessions.⁹² Based on this ordering of solutions, it could be argued that the modification of schedules with adequate compensatory market opening for affected members under Article XXI of the GATS constitutes the preferred option. The suspension of concessions following an Article 21.5 and 22.6 proceeding must then cease.

The relationship between the DSU and Article XXI of the GATS is more difficult if the modifying member does not offer compensation and the interested member suspends concessions. Does the right to suspend concessions for the non-implementation of the rulings and recommendations of the dispute settlement report remain pursuant to the DSU, offering the affected member the opportunity to retaliate twice? The DSU and Article XXI of the GATS do not address this issue directly, but Article 1.2 of the DSU could be of some limited help. It states that the Chairperson shall determine the applicable rules and procedures in consultation with the parties in disputes involving rules and procedures under more than one agreement. It could be argued that 'rules and procedures' not only refers to rules and procedures concerning dispute settlement (in contrast to the first two sentences of that paragraph) but also to Article XXI, which could then supersede the right to suspend concessions under the DSU.

There are two other new legal issues that the Article 22.6 arbitration and the concurrent US withdrawal of its gambling commitments has highlighted. First, must the level of nullification and impairment determined in the Article 22.6 arbitration be the full value of the commitment or the amount of trade affected by the inconsistency? The second issue is whether the amount set in an Article 22.6 DSU arbitration will also determine the amount of compensatory adjustment in an Article XXI GATS arbitration.

In the Article 22.6 DSU arbitration, Antigua argued for an amount of nullification and impairment that, it claimed, was equivalent to the trade affected by the fact that market access for remote gambling services was not possible.⁹³ Antigua also based its claims on Article 3.7 of the DSU, according to which the first objective of dispute settlement is to secure the withdrawal of the measure to argue that the appropriate counterfactual should

⁹⁰ DSU, Article 22.8.

⁹¹ DSU, Article 3.7.

⁹² *Id.*

⁹³ Decision by the Arbitrator, *US-Gambling*, para. 3.2.

be full market access for Antiguan operators of remote gambling services.⁹⁴ The US objected and maintained that its measure was largely found to be consistent with the GATS, except for the chapeau violation relating to remote gambling services in horseracing.⁹⁵ Consequently, it proposed a scenario where Antigua only has access to remote gambling services in horseracing, but to no other gambling services as the appropriate counterfactual for calculating the level of nullification and impairment.⁹⁶

For the panel, the issue was whether nullification and impairment should be calculated on the basis of a ‘full market access counterfactual’, the trade affected as a result of the inconsistency (‘inconsistency counterfactual’) or the most likely alternative compliance scenario (‘likely compliance scenario’). In a departure from previous arbitrations, which had used ‘full market access counterfactuals’ even though the defending party only lost on some points, the panel largely chose to follow the US. It stated that the level of exports that would have accrued to Antigua, had the US complied with the ruling, was the appropriate basis for determining nullification and impairment.⁹⁷ It found that the counterfactual should be plausible or reasonable, and that what mattered was nullification and impairment as a result of the inconsistent measures.⁹⁸ It then opined that it would not be reasonable for Antigua to ignore the largely successful Article XIV defence of the US⁹⁹. The panel referred to a statement by the Appellate Body that the GATS inconsistency was solely due to the US’ permission of remote gambling services in horseracing by domestic providers.¹⁰⁰

The panel also rejected arguments on the relevance of likely compliance scenarios and the impact of Article 3.7 DSU on determinations of nullification and impairment. With respect to the most likely compliance scenario proffered by the US as the counterfactual, the panel held that the US did not have the freedom to decide among a range of potential compliance measures for the purpose of Article 22.7.¹⁰¹ It further noted that the determination of nullification and impairment should steer clear from imposing punitive damages and from providing for insufficient restoration to the complaining party.¹⁰² Concerning Article 3.7 of the DSU, the panel was of the opinion that the withdrawal of the entire US regulatory regime on gambling was not the only possible outcome allowed by Article 3.7, and it therefore rejected Antigua’s full market access counterfactual.¹⁰³

In a dissenting opinion, one arbitrator maintained that the US should not be able to benefit from its partially successful Article XIV defence.¹⁰⁴ The dissenting arbitrator was also convinced by a sort of disguised protectionism or consistency argument by Antigua when he rejected the compliance scenario proposed by the US. He stated that it was not clear how the US would reconcile the need to protect public morals with full market access for remote horseracing gambling services.¹⁰⁵ Furthermore, the arbitrator noted that it was not

⁹⁴ Decision by the Arbitrator, *US-Gambling*, para. 3.21.

⁹⁵ Decision by the Arbitrator, *US-Gambling*, para. 3.4.

⁹⁶ The US argued that it even had the compliance option of prohibiting its domestic suppliers from providing remote gambling services on horseracing. However, it chose not to propose the scenario as the counterfactual. Decision by the Arbitrator, *US-Gambling*, para. 3.6.

⁹⁷ Decision by the Arbitrator, *US-Gambling*, para. 3.14

⁹⁸ Decision by the Arbitrator, *US-Gambling*, paras. 3.23, 3.27, 3.58.

⁹⁹ Decision by the Arbitrator, *US-Gambling*, paras. 3.43, 3.45.

¹⁰⁰ Decision by the Arbitrator, *US-Gambling*, para. 3.57.

¹⁰¹ Decision by the Arbitrator, *US-Gambling*, para. 3.24.

¹⁰² Decision by the Arbitrator, *US-Gambling*, para. 3.26.

¹⁰³ Decision by the Arbitrator, *US-Gambling*, para. 3.46.

¹⁰⁴ Decision by the Arbitrator, *US-Gambling*, paras. 3.63-3.65.

¹⁰⁵ Decision by the Arbitrator, *US-Gambling*, para. 3.67.

unreasonable for Antigua to expect full market access on remote gambling services. He also considered that the DSU objective of inducing compliance had to be taken into account in deciding on an appropriate counterfactual.¹⁰⁶ However, because the other two arbitrators voted in favour of the counterfactual, focusing only on the GATS inconsistency, the determination of nullification and impairment proceeded on that basis.

It is suggested that the arbitrators in *US - Gambling* were correct in rejecting hypothetical or most likely compliance scenarios suggested by the US. What a party might or might not do to comply with a ruling should not matter at all for the purposes of determining nullification and impairment; Article 22 is concerned with the fact that a party *has not* complied. It is simply illogical to claim that no present nullification and impairment to the trade of the complaining member occurs because the losing party might in the future take steps to come into compliance. In the case at hand, the US could also prohibit remote gambling in horseracing in order to cure the chapeau violation. It can be seen that the use of 'likely compliance counterfactuals' to determine nullification and impairment would undermine the whole purpose of the DSU, which is to preserve the rights and obligations of the members under the covered agreements.¹⁰⁷ Article 22 is in that sense backward looking.

The many practical problems of determining what the 'likely compliance counterfactual' is make it an unworkable approach. The arbitrators cannot know which way of complying will be the appropriate one for the legal and political context of the defending WTO member. By rejecting hypothetical compliance scenarios as the appropriate counterfactual, the arbitrators also avoided a lengthy examination of whether alternative scenarios would in fact comply with the recommendations and rulings. For example, in *EC - Hormones*, such a question would have been difficult for the arbitrators to decide upon, as one possible compliance scenario could have been the development of an Article 5.7 (SPS) defence. The examination of hypothetical compliance scenarios would moreover usurp the task of Article 21.5 compliance proceedings, and would not preserve due process rights of the parties in the short timeframe of Article 22.6 arbitrations.

Finally, it is submitted that the majority in *US - Gambling*, not the dissenting arbitrator, got it right. The DSU gives little guidance on whether nullification and impairment is to be determined based on full market access, i.e., with a counterfactual where the measure is withdrawn or based on the inconsistency alone. A legal argument could be attempted that the DSU presumes an adverse trade impact of breaches of obligations under the covered agreements, but at least does not preclude the possibility of rebutting this presumption. Article 3.8 DSU states: "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut that charge"¹⁰⁸ As the Article speaks of rebutting "that charge" and a *prima facie* presumption of nullification or impairment, it could be maintained that members can also contest the trade impacts and not only the inconsistency. In addition, it states that there is normally a presumption that a breach results in adverse trade impacts. An *e contrario* argument could thus be made that in exceptional cases, no such adverse impact may be present.

¹⁰⁶ Decision by the Arbitrator, *US-Gambling*, para. 3.70.

¹⁰⁷ DSU, Article 3.2.

¹⁰⁸ DSU, Article 3.8.

However, these considerations are outweighed by considerations in favour of a ‘full market access counterfactual’.¹⁰⁹ First, it is not clear how a panel can determine the amount of trade affected based on the inconsistency without also looking to likely compliance scenarios. Is the trade affected by the permission of remote bets in horseracing only--which would allow the part of Antiguan gambling services that is linked to horseracing--because the US *might* keep its strict regulation of remote gambling? Or is the whole Antiguan service industry affected, because the US *might* abolish the prohibition on remote gambling services altogether? Applying the ‘inconsistency counterfactual’ still requires the arbitrators to second-guess what the defending country likely wants to keep and change of its measures. Second, lowering the level of nullification and impairment in relation to the inconsistency fails to achieve the central purpose of the DSU: to provide security and predictability to the multilateral trading system.¹¹⁰ A defending member would no longer have any incentive to implement dispute settlement rulings and recommendations in cases with minor inconsistencies, if nullification and impairment is determined with the ‘inconsistency counterfactual’. Given the considerable time and expense of WTO dispute settlements, potential complainants might shy away from bringing cases if they obtain inadequate remedies. One might ask indeed why the defending member has not implemented the rulings and recommendations, if the inconsistency is so minor. Presumably, there should be no economic and political difficulty in doing so. Finally, it is incorrect to describe retaliation based on nullification and impairment as punitive - the DSU does not allow punitive damages for the defendant’s violation of WTO law, it merely sanctions the non-implementation of rulings and recommendations.

Good arguments can be made for why the counterfactual chosen by the arbitrators was correct. The question then remains whether the level of nullification or impairment of an Article 22.6 arbitration can be read across or apply to an Article XXI arbitration on appropriate compensatory adjustment. Or would it even apply to the suspension of levels of concessions under Article XXI, if the arbitrators’ recommendation is not followed? It is submitted that nullification or impairment levels of an Article 22.6 arbitration are irrelevant to an Article XXI arbitration.

First of all, Article XXI arbitrations are about determining the appropriate level of compensatory adjustment *for the whole commitment*, not about determining nullification or impairment *from an inconsistent measure*. The standard for compensatory adjustment under Article XXI is that the members shall endeavour to maintain a general level of mutually advantageous commitments that is not less favourable to trade than that provided for in the Schedules of specific commitments prior to negotiations.¹¹¹ For the suspension of concessions under Article XXI, the standard is that an affected member may withdraw “substantially equivalent benefits in conformity” with the findings in the arbitration on compensatory adjustment.¹¹² The different standards or benchmarks suggest that compensatory adjustment or suspension of concessions under Article XXI GATS is different from nullification or impairment under Article 22.6 DSU.

¹⁰⁹ I gratefully acknowledge Lothar Ehring’s useful insights on this issue, which have led me to reconsider my argument on this point.

¹¹⁰ DSU, Article 3.2.

¹¹¹ GATS, Article XXI:2(a).

¹¹² GATS, Article XXI:4(b).

It is further suggested that there is an important difference between the withdrawal or the modification of a scheduled commitment and the non-implementation of panel or Appellate Body rulings. In the latter case, the trade impact is linked to the inconsistent measure and will thus remain stable as long as the inconsistency is not removed. In the former case, the member precludes present and future market access altogether. Even if market access was heavily circumscribed by GATS-consistent regulations (and thus not worth much in terms of actual trade volumes), the modifying member in effect states that even if it should make its regulatory regime more trade-friendly--for example by allowing remote gambling services--the affected members would not be able to benefit from this change in regulatory policies. The compensatory adjustment and the consequent level of suspension of concession are therefore forward-looking. Hence, it is to be expected that compensatory adjustments/the suspension of concessions under Article XXI will set higher amounts than nullification or impairment under an Article 22.6 arbitration.

Based on these considerations, it can be concluded that the DSU takes a relatively permissive stance towards the non-implementation of rulings. Flexibility and scope for regulatory autonomy is thereby preserved, albeit at the expense of a rules-based trading system. Furthermore, the existence of dispute settlement reports does not preclude members from withdrawing or modifying commitments pursuant to Article XXI of the GATS. This offers further flexibility to members and permits them to avoid legal challenges from other WTO members to their regulatory policies or market access restrictions. Finally, a withdrawal or a modification of the schedule of commitments carries a higher "price" than a non-implementation of a dispute settlement report. If this is correct, the GATS limits flexibility somewhat, and turns reneging on commitments into an *ultima ratio* solution.

5.2 Assessment of the US' withdrawal of its gambling commitments

As concerns gambling and betting, the US may be able to ignore the findings in the *US - Gambling* report relating to market access, its cross-border commitments and the requirements of the chapeau. Of course, this possibility has a price: the US may have to offer compensatory adjustments, i.e. to liberalise trade in other sectors, see its exports subjected to higher tariffs, or have intellectual property rights revoked.

The subsequent US intent to withdraw its commitments in the gambling sector might serve as an incentive or as a deterrent to future dispute settlements. The litigants often have to bear considerable expenses in a dispute proceeding, which might, in the end, not achieve much if the defending party prefers to be subjected to retaliatory tariffs. This is especially true for small, developing countries. They are reliant on imports and end up shooting themselves in the foot by making foreign goods and services more costly, whilst not really hurting a large, diversified economy like the US. On the other hand, the dispute settlement could also be considered as a means of prying open new service sectors, if defending members prefer compensatory adjustments to changes in their regulatory policies.

As concerns other US regulations, or regulations by any other WTO member to which some or all of the rulings and reasoning in the *US - Gambling* dispute could be applied, it has to be pointed out that there is no *stare decisis* in the WTO. Previous decisions do not automatically have to be applied and followed. In practice, they often carry significant weight, nonetheless.

However, the US modification of its schedule also sends the signal to the WTO dispute settlement bodies that far-reaching interpretations that depart from the text of the GATS

and affect salient regulatory policies, will not be accepted. This might lead the WTO dispute settlement bodies into treading more softly when reviewing regulatory measures pertaining to trade in services.

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 DSU.¹¹³ 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.¹¹⁴ 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.¹¹⁵ 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 states that US domestic law takes precedence over the WTO Agreements.¹¹⁶ 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.¹¹⁷

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. The ban favours established casinos and online horseracing bookmakers vis-à-vis providers of online poker games.¹¹⁸ In the EU context, similar claims could be brought under the free movement provisions of the Treaty on the Functioning of the EU. 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 social regulation by constituting a source of inspiration for claimants to use domestic laws designed to liberalise trade internally.

¹¹³ 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.

¹¹⁴ Motion to Dismiss, *USA v. Gary Stephen Kaplan*, n. 113, 29-32; *United States of America v. Baron Lombardo et. al.*, p.23-26.

¹¹⁵ *United States of America v. Baron Lombardo et. al.*, p 26f.

¹¹⁶ *United States of America v. Baron Lombardo et. al.*, p. 28f.

¹¹⁷ *United States of America v. Baron Lombardo et. al.*, p. 29f.

¹¹⁸ 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.

6 CONCLUDING EVALUATIONS

How should one evaluate the outcome of the *US - Gambling* dispute? Does the fact that the US preferred to modify its commitments instead of implementing the report signal a return to old-style GATT diplomacy that was more concerned with preserving the balance of rights and concessions than with establishing a rule-based, technologically neutral regulatory environment for trade?¹¹⁹ Does the WTO's rule-based trading system give way to interest-based bargains and horse-trading as soon as important service sectors and/or domestic regulatory policies are at issue?

The apparent danger of such a system is that developed countries will be able to buy themselves out of rules and obligations of the GATS and thereby deprive developing countries of the ability to export services of crucial interest to them. The developed countries need not necessarily offer developing countries much in return. Ultimately, countries affected by the modification of schedules have little leverage to seek compensatory trade liberalisation of interest to them, as the modifying member is not required to offer compensation and may prefer to see its exports subjected to retaliation, instead. Especially developing countries may end up shooting themselves in the foot if they increase tariffs on crucial exports from the modifying member.

However, the possibility to modify schedules and withdraw commitments can also be seen in a more positive light as either being part of a framework of global subsidiarity or as a pluralistic accountability mechanism. With respect to the WTO, there is a concern about excessive judicial governance at the expense of the political and regulatory framing of markets. This concern arises for two reasons: First, in the WTO, the adoption of dispute settlement reports by the Dispute Settlement Body is now almost automatic, as non-adoption requires a positive consensus of the WTO members. Thus, even if a sizeable number of WTO members disagree with the findings of a panel or the Appellate Body, they will not be able to prevent its adoption. Second, the WTO has almost no legislative capacity that would allow the members to correct erroneous or illegitimate dispute settlement reports, because the WTO in practice operates by consensus.

Against the backdrop of the global subsidiarity approach advocated by Howse, the modification of a member's schedule of commitments could be seen as correcting the WTO's bent towards judicial governance. It allows politics, in the form of local democratic experimentalism, back in.¹²⁰ Howse argues that if there is no longer any unifying ideology such as the embedded liberalism paradigm, that would legitimise a certain relation of WTO law to domestic law and politics, the governance of the WTO must become flexible and less rigid again. This permits the adjustment of GATS commitments or recourse to soft law mechanisms and plurilateral agreements instead of the now prevalent single undertaking approach.¹²¹ Although Howse does not argue this, it could also be maintained that the modification of schedules of commitment opens the WTO to non-trade issues that he sees as too often suppressed by the 'old' insiders of the GATT. It enables members to pursue

¹¹⁹ The difference between GATT-style diplomacy and the more legalistic approach of the WTO has been elaborated in respect of dispute settlement. See Weiler 2001, 334.

¹²⁰ Howse and Nicolaidis 2001; Howse 2002, 112f.

¹²¹ Howse 2002, 113.

regulatory policies that currently cannot be defended under the rights and obligations of the GATS. The GATS can thereby stay attuned to new, emergent politics of the regulatory state.

The ability to modify schedules also confers on WTO members the ability to signal to the WTO dispute settlement bodies that they disagree with certain interpretations. It could thus be seen as a form of review from below that functions as an accountability mechanism vis-à-vis WTO dispute settlement bodies.¹²² The WTO dispute settlement bodies now have to reckon with the possibility that a defending member in a future dispute might again modify its schedule in response to their findings. The threat of modification can thus constitute an *ex ante* accountability mechanism, as the WTO dispute settlement bodies will need to take the political dimensions of disputes into account in their decisions. Otherwise, they face the risk that their decisions are set aside as illegitimate. The modification of schedules would thus fit the model of a pluralistic global administrative law put forward by Krisch. Krisch argues that global administrative law is characterised by potentially overlapping global accountability mechanisms, whose relations to each other remain uncertain and unstable.¹²³

The modification of schedules--which essentially is a unilateral veto--should as an accountability mechanism work best if used sparingly. If Article XXI GATS is used in moderation, concerns about the breakdown of a rules-based trading system and about trade protectionist motives can to a certain extent be addressed. As has been shown, the GATS already contains some guarantees that Article XXI will be used sparingly. The members have to pay a higher price for withdrawing or modifying commitments than for not implementing dispute settlement reports. As the debate about the US invocation in the meeting of the Dispute Settlement Body shows, a modifying member is also subject to certain multilateral accountability mechanisms. Whether these will be sufficient to safeguard the interests of developing countries, or whether the compensation by the modifying member needs to be made mandatory, at least for the developing countries, remains to be seen.

¹²² Several academics claim that instances where global adjudicatory bodies review national laws and national courts or governments in turn review decisions of international tribunal amount, together with other accountability mechanisms they identify, to an emerging global administrative law. See Kingsbury and Krisch 2006, Kingsbury, Krisch, Stewart and Wiener 2005. The present author would not claim as much since the term 'administrative law' requires the foil of a global legal and political order with clear allocations of competences and separations of power. No such global or international political system currently exists it is suggested that the term 'accountability mechanisms' is more appropriate to describe emerging phenomena of global judicial review and procedural rights such as the right to make submissions.

¹²³ Krisch 2006, 247.

BIBLIOGRAPHY

- Delimatsis, Panagiotis. 2006. Don't Gamble with GATS - The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the US - Gambling Case. *Journal of World Trade* 40 (6): 1059 - 80.
- Delimatsis, Panagotis. 2007. Due Process and Good Regulation Embedded in the GATS - Disciplining Regulatory Behaviour in Services Through Article VI of the GATS. *Journal of International Economic Law* 10 (1): 13 - 50.
- Djordjevic, Margareta. 2002. Domestic Regulation and Trade in Services - a Balancing Act. *Legal Issues of Economic Integration* 29 (3): 305 - 22.
- Ehlermann, Claus-Dieter and Lothar Ehring. 2005. Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade? *Journal of International Economic Law* 8 (1): 51-75.
- Howse, Robert. 2000. Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization. *Michigan Law Review* 98 (7): 2329 - 57.
- Howse, Robert. 2002. From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Regime. *American Journal of International Law* 96 (1): 94 - 117.
- Howse, Robert, and Kalypso Nicolaïdis. 2001. Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far. *Efficiency, Equity and Legitimacy: the Multilateral Trading System at the Millennium*, edited by Roger B. Porter, Pierre Sauvé, Arvind Subramanian, and Americo Beviglia Zampetti, 227 - 52. Washington D.C.: Brooking Inst. Press.
- Irwin, Douglas A., and Joseph H. H. Weiler. 2008. Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285). *World Trade Review* 7 (1): 71 - 113.
- Joerges, Christian. 2005. Free Trade with Hazardous Products? The Emergence of Transnational Governance with Eroding State Government. *European Foreign Affairs Review* 10 (4): 553 - 74.
- Karmakar, Suparna. 2007. Disciplining Domestic Regulation Under the GATS and its Implications for Developing Countries: An Indian Case Study. *Journal of World Trade* 41 (1): 127 - 58.
- Kingsbury, Benedict, Nico Krisch, Richard B. Stewart, and Jonathan B. Wiener. 2005. The Emergence of Global Administrative Law. *Law & Contemporary Problems* 68 (3 - 4): 15 - 62.
- Kingsbury, Benedict, and Nico Krisch. 2006. Global Governance and Global Administrative Law in the International Legal Order. *European Journal of International Law* 17 (1): 1 - 14.
- Krajewski, Markus. 2003. *National Regulation and Trade Liberalization in Services : The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy*. The Hague, London, New York: Kluwer Law International.
- Krajewski, Markus. 2005. 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 (4): 417-48.

- Krisch, Nico. 2006. The Pluralism of Global Administrative Law. *European Journal of International Law* 17 (1): 247 - 78.
- Mattoo, Aaditya. 1997. National Treatment in the GATS: Corner-Stone or Pandora's Box? *Journal of World Trade* 31 (1): 107 - 36.
- Mattoo, Aaditya, and Pierre Sauvé. 2003. Domestic Regulation and Trade in Services: Key Issues. *Domestic Regulation and Service Trade Liberalization*, edited by Aaditya Mattoo, and Pierre Sauvé, 1 - 6. Washington DC: Worldbank and Oxford University Press.
- Mavroidis, Petros C. 2007. Highway XVI Re-Visited: the Road from Non-Discrimination to Market Access in GATS. *World Trade Review* 6 (1): 1-23.
- Ortino, Federico. 2006. Treaty Interpretation and the WTO Appellate Body Report in US - Gambling: A Critique. *Journal of International Economic Law* 9 (1): 117 - 48.
- Pauwelyn, Joost. 2008. The unbearable lightness of likeness : comment. *GATS and the Regulation of International Trade in Services*, edited by Marion Panizzon, Nicole Pohl and Pierre Sauvé 358-369. Cambridge: Cambridge University Press.
- Pauwelyn, Joost. 2005. Rien Ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS. *World Trade Review* 4 (2): 131 - 70.
- Petersmann, Ernst-Ulrich. 1991. *Constitutional Functions and Constitutional Problems of International Economic Law*. Fribourg: University Press.
- Petersmann, Ernst-Ulrich. 1993. National Constitutions and International Economic Law. *National Constitutions and International Economic Law*, edited by Meinhard Hilf, and Ernst-Ulrich Petersmann, 1 - 52 . Boston, Dordrecht: Kluwer Law and Taxation.
- Regan, Donald H.. 2007. A Gambling Paradox: Why an Origin-Neutral "Zero-Quota" in Not a Quota Under GATS Article XVI. *Journal of World Trade* 41 (6): 1297-317.
- Sauvé, Pierre. 1995. Assessing the General Agreement on Trade in Services: Half-Full or Half-Empty? *Journal of World Trade* 29 (4): 125 - 46.
- Trachtman, Joel. 2003. Lessons for the GATS from Existing WTO Rules on Domestic Regulation. *Domestic Regulation and Service Trade Liberalization*, edited by Aaditya Mattoo, and Pierre Sauvé, 57 - 81. Washington DC: Worldbank and Oxford University Press.
- Trachtman, Joel. 2005. Decisions of the Appellate Body of the World Trade Organization. *European Journal of International Law* 16 (4): 801.
- von Bogdandy, Armin. 2001. Law and Politics in the WTO - Strategies to Cope with a Deficient Relationship. *Max Planck Yearbook of United Nations Law*, edited by Jochen A. Frowein, and Rüdiger Wolfrum, 609 - 674. The Hague, London, New York: Kluwer Law International.
- Wunsch-Vincent, Sacha. 2006. The Internet, Cross-Border Trade in Services, and the GATS: Lessons from US - Gambling. *World Trade Review* 5 (3): 319 - 56.
- Wouters, Jan, and Dominic Coppens. 2006. Domestic Regulation Within the Framework of the GATS. Working Paper 93/06. Leuven: Institute for International Law, KU Leuven, available at <http://www.law.kuleuven.be/iir/eng/wp/title.html>.
- Weiler, Joseph H. H.. 2001. The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of Dispute Settlement. *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millenium*, edited by Roger B. Porter, Pierre Sauvé, Arvind Subramanian, and Americo Beviglia Zampetti, 334 - 50. Washington DC, Cambridge, Mass.: Brookings Institution Press and Center for Business and Government.

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