International Law and Non-law Governance in the WTO's General Trade in Services' Approach to International Standards on Services

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ABSTRACT

The international order is characterised by a proliferation of different treaties on overlapping subject-matters responding to an increased need for international co-operation and so called 'new' governance mechanisms, which are non-binding modes of steering. These phenomena have raised concerns of legal fragmentation and conflicts, de-formalisation and loss of accountability. This paper argues that formal international law and 'new' or non-law governance mechanisms can be brought into a fruitful relationship. It proceeds to examine two approaches that argue for the compatibility of law and non-law governance mechanisms. The fourth section analyses whether these approaches are reflected in the WTO's General Agreement on Services' approach to international social regulatory standards. It finds that both are reflected and suggests that they usefully interact by requiring WTO members to account to each other for their social regulation of services while also exposing WTO dispute settlement to critical review.

Keywords: international law, new governance, WTO, GATS, international standardisation, social regulation

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I. Introduction

International law today covers an ever broader field. It also engages in regulation for which multiple objectives often have to be balanced, rather detailed and tailored norms are supposed to emerge and expert knowledge is important. One example is WTO law which is confronted with the social regulation of markets. Traditional international law is challenged by these demands since treaties are negotiated by state representatives, hence often contain vague, compromise language and risk being either under- or over-inclusive.[2]

The proliferation of international law has also increased the fragmentation of international law into various specialised regimes whose objectives can conflict.[3] In the absence of an international legislator, the task of reconciling these different objectives falls to international tribunals, which resort to balancing and proportionality tests. According to some, there is a concern that fragmentation undermines the autonomy of law since balancing is an inherently political exercise.[4] Conflicts of jurisdiction of the specialised regime's tribunals also create risks of forum-shopping and of inconsistent judgments. The potential for conflicting judgments requires diplomatic-political resolution or comity on the parts of international tribunals, revealing the limited steering capacity of international law. Some fear that how a case is decided now depends less on rules than on the regime's subjective political bias that deals with the case, thereby further undermining the authority of law.[5]

Given these new challenges and imperfect responses by international law, it has to be inquired whether non-law, non-binding governance mechanisms might not provide supplementary or better steering mechanisms. Since they are less constrained by treaty text, they can balance conflicting objectives and develop more innovative solutions to problems of conflict of legal

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[2] Rules that are negotiated and remain in force for a long time can become no longer appropriate if underlying circumstances change, for instance if new technologies with a different risk emerge and for which the underlying rationale of the rules is no longer applicable. Rules will then be either over-inclusive in the sense that they regulate the new technology although it poses no risk or under-inclusive because they fail to regulate a new, risky technology.

[3] M. Koskenniemi and P. Leino, 'Fragmentation of International Law: Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002), 553; G. Teubner and A. Fischer-Lescano, 'Regime-Collisions: The Vain Search for Unity in the Fragmentation of Global Law', 25 *Michigan Journal of International Law* (2004), 999; Report of the Study Group of the ILC, 'Fragmentation of International Law. Problems Caused by the Diversification and Expansion of International Law', UN Doc, A/CN4/L.682 (2006).

[4] See discussion in A. L. Paulus, 'From Territoriality to Functionality? Towards a Legal Methodology of Globalization', in: I.F. Dekker and W.G. Werner (eds.), *Governance and International Legal Theory* (Leiden, Boston: Martinus Nijhoff Publishers, 2004), 59: 60f.

[5] M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', 70 *Modern Law Review* (2007), 1: 6-9.

rules. Some non-law governance mechanisms can be embedded in law or be semi-institutionalised, engage in on-going rule-making and produce detailed norms.[6] Other non-law governance mechanisms offer flexibility and frameworks for deliberative or mutual learning processes. Participation of relevant experts and civil society in regulatory non-binding governance mechanisms is also usually easier since there is less of a concern that international law-making authority is abrogated to them at the expense of nation state control.

However, the simultaneous existence of international law and non-law governance mechanisms poses questions with respect to the validity and legitimacy of legal and political rule at the international level, with a risk of mutual deconstruction of these modes of steering. Both the emergence of non-binding governance mechanisms and the involvement of new actors alongside states in the development of norms challenge international law because they question the notion of state consent as the appropriate basis of validity of law beyond the nation state. Moreover, if non-law governance mechanisms succeed in creating normative orders that fulfil certain functional, structural or linguistic criteria proposed to define norms as law, it can be queried whether these mechanisms might themselves make law.[7] They thereby compete with or opt-out of state-based international law, only further exacerbating problems linked to the fragmentation.

On the other hand, non-law governance mechanisms continue to be challenged by legal notions because there is concern that multi-actor, multi-site and multi-level governance with high degrees of informality is incompatible with notions of accountability, the rule of law, the protection of the disadvantaged and respect for human rights. Legal notions can unmask unequal access or arbitrariness that underlies non-law governance mechanisms but may thereby undermine these modes of steering.

The following section examines two positions, which argue for international law and non-law governance respectively as the preferred modes of steering. It aims to show that law and non-

[6] Examples are the Codex Alimentarius Commission which sets food-safety standards, including maximum residue limits or the International Standardisation Organisation, which sets standards for the technical safety of products.

[7] See, e.g. E. Meidinger, 'The Administrative Law of Global Private-Public Regulation: the Case of Forestry', 17 *European Journal of International Law* (2006), 47; E. Meidinger, 'Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems', Legal Studies Research Paper Series – University at Buffalo Law School, Paper No. 019 (New York: 2006). To Meidinger, regulatory activities of private or public-private actors, although non-binding, can also rise to the level of law because they offer legitimate procedures and are backed by de facto sanctions.

law governance are best conceived of as being interdependent. In the third section, two theoretical accounts relevant to the WTO, which integrate these various modes of steering, are discussed. The final section examines, which of the two theoretical accounts is reflected in the General Agreement on Trade in Services' relation to international standardisation organisations. It is shown that the empirical relationship between international law and non-law governance mechanisms in the GATS is complex and varied. Neither of the two theoretical accounts is perfectly reflected in the GATS. This creates the need to examine whether the combination of international law and non-law governance still allows for the benefits of the theoretical accounts to be sufficiently realised.

II. The contested relationship of international law and governance

In a recent edited volume, Scott and de Búrca identify several theses in relation to law and "new" governance.[8] According to views they associate with the "gap" thesis, new governance threatens democracy, the rule of law and accountability. Other proponents of a "gap" thesis are claimed to be arguing that new governance heralds forms of democracy, accountability and better outcomes at the global level and that law is really the problem because it inhibits the development of these mechanisms. Scott and de Búrca distinguish the "hybridity" thesis from these views. According to Scott and de Búrca, its proponents claim that law and new governance have complementary strengths and weaknesses or that law can provide a useful default mechanism when new governance fails. The book's identification of these theses provides a useful analytical distinction for structuring the following analysis.

A. Non-law global governance: deformalisation and less accountability?

One prominent position that can be associated with the gap thesis is that of Koskenniemi. He fears that the increase in non-law governance mechanisms leads to the de-formalisation of rules.[9] Instead of rights and obligations, norms are increasingly made up of softly-worded recommendations, best endeavours and so forth.[10] As a result, the task of the international

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[8] J. Scott & G. de Búrca, 'New Governance, Law and Constitutionalism' in: J. Scott & G. de Búrca (eds.), *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006); J. Scott & D. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', 8 *European Law Journal* (2002), 1.

[9] M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002), 484ff; M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', n.9, 11-15.

[10] Id.

lawyer is replaced by that of a regime-manager, seeking certain technical, economic or other optimisations.[11]

These soft or non-law governance mechanisms are suspect as being political steering mechanisms that privilege technical knowledge or certain other interests masked behind a veil of informality.[12] Soft norms create the appearance of being innocuous and are therefore harder to attack and criticise than formal rules. However, camouflaged by informality, certain interests may nevertheless be privileged.

To Koskenniemi, the value of law lies in its formal character, i.e., in the clear articulation of rules and the absence of moral or political optimisations that law is supposed to fulfil.[13] Under these circumstances, the law's language of rights and obligations can be used as a discursive tool in political struggles and be turned upon dominant interest to reveal exclusions, discrimination and unfairness.[14]

Another group of commentators criticises that non-law governance mechanisms reduce accountability and democratic control. Piciotto submits they reduce accountability because they need informality and secrecy to function.[15] Due to their informality and sometimes technical nature, non-law governance mechanisms are even further removed from parliamentary oversight than international law-making processes, creating a concern that mid-level executive power is strengthened at the expense of democratic control.[16]

These criticisms and concerns have merit but it is suggested that they do not make a case against global non-law governance mechanisms. The remediation of inequalities, arbitrariness and discrimination international law is helpful in voicing will require positive action. If non-legal governance mechanisms work effectively, for instance, if states are unwilling to commit

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11 M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', n..9, 16

12 M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, n. 9, 484ff.

13 M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', n. 9, 30.

14 Id. and M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, cited. n. 9, 494-509.

15 S. Piciotto, 'Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-liberalism', 17 *Northwestern Journal of International Law and Business* (Winter-Spring 1996-1997) 1014:1020-1022, 1047-1050.

16 See, for instance, the general discussion in E.O. Eriksen & J.E. Fossum, 'Europe at a Crossroads: Government or Transnational Governance?', in: C. Joerges, I.J. Sand, G. Teubner, *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004), 115:119-122.

to binding international law or if a non-law governance mechanism strengthens compliance, they can play a useful role in constraining power or remedying inequalities.

Further, the criticism of selective privileging of certain powerful interests and values can also be made in respect of international law. International law-making is mediated through governments and does not necessarily reflect all societal positions in a balanced manner. As between states, inequalities of power and influence exist that affect the extent to which states can shape international law. If the process through which law is made influences its content, it will also affect how useful an instrument law is to unmask and voice exclusions. One has only to think of the marginal and hortatory status of special and differential treatment in the context of the WTO in order to see how the link between the weaker negotiating position of developing countries and the legal rules developed.

Moreover, non-law governance can even be helpful for creating more determinate rules and can thus support rather than undermine formalism. The problem has already been touched on in the introduction: Many treaty rules are indeterminate either because a single rule cannot sensibly encompass all cases, because treaty-makers do not dispose of sufficient relevant knowledge or because they cannot agree on more precise rules.[17] Treaties thus require further concretisation, which non-law governance mechanisms can sometimes provide as they draw on pertinent technical and scientific expertise and are conducted in less politicised contexts. A purely formal international law is unlikely to solve the problem. As demands for effective multilateral regulation persist, international law thereby moves from issues on which universal agreement is possible to issues which are ethically and politically more controversial. One can thus expect that greater disagreements between states will undermine the possibility of creating more determinate rules.

Finally, while some non-law governance mechanisms may well lead to less accountability, some others may also have satisfactory records of accountability. Some commentators argue that the involvement of non-state actors creates a form of international participatory deliberative democracy,[18] which can in principle also be realised in non-law governance

[17] Koskenniemi acknowledges that international law today is often deformalised, resembling soft law but argues that it should retain its formal character. See 'The Fate of Public International Law', n. 9, 13.

[18] R. Nickel, 'Participatory Transnational Governance', in: C. Joerges & E.U. Petersmann (eds.), *Multilevel Trade Governance, Social Regulation and the Constitutionalisation of International Trade Law,*

mechanisms. On these accounts, traditional international law is perceived to be part of the problem since treaty-making processes are secretive political bargains that do not allow for societal participation. In addition, non-binding governance mechanisms can score higher on procedural legitimacy because they allow for greater reversibility than international law.[19] If agreement on binding rules is difficult to reach, treaties may effectively become irreversible because of the risk of undoing the entire agreement in case of reopening single issues. In comparison, agreement on and reversibility of non-binding norms can be easier to obtain. Reversibility of norms and rules over time is an important part of procedural legitimacy since the constituents may change their view about the appropriateness of the norm and desire its revision.

B. Non-law global governance: fast, flexible, effective?

A different set of scholars embraces non-law governance mechanisms as being "fast, flexible and effective", whether they are bureaucracy networks[20] or "new" governance mechanisms such as benchmarking or guidelines. [21] Since these mechanisms are not legally binding, they are claimed to allow for easier adaptation to changed circumstances and to better facilitate mutual learning from diversity than law.[22] Where there is significant controversy over the standards for governing an activity, non-law governance is also perceived to be important for giving rise to a process of convergence that can eventually be consolidated into law as experience with some globally coordinated action is gained.[23]

Non-law governance could also be seen to embody an element of local democracy[24] or subsidiary since it enables constituencies to adapt guidelines to their local circumstances or

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(Oxford: Hart, 2006) 157: 177-179; P. Nanz, 'Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory', in C. Joerges & E.U. Petersmann, op.cit.., 59:73-81.

19 On the importance of reversibility for procedural legitimacy, see A. Herwig & T. Hüller, 'Zur normativen Legitimität der Welthandeslordnung', in C. Hermann, M. Hilf, S. Oeter & F. Schorkopf (eds.), *Perspektiven des internationalen Wirtschaftsrechts*, (Stuttgart: Boorberg Verlag, forthcoming).

20 A.M. Slaughter, 'The Real New World Order', 76 *Foreign Affairs* (1997), 183, 193; A.-M. Slaugther, *A New World Order* (Princeton and Oxford: Princeton University Press, 2004), 261f. Slaughter also acknowledges the existence of accountability concerns with government networks but suggests, most can be solved. See A.M. Slaughter, 'The Accountability of Government Networks', 8 *Indiana Journal of Global Legal Studies* (2001), 347.

21 C. F. Sabel & S. William, 'Gaps and Hybrids', in: J. Scott & G. de Búrca, n.8; J. Cohen & C. F. Sabel, 'Global Democracy?', 37 *New York University Journal of International Law and Politics* (2005), 763: 778-784; For a similar arguments in relation to the EU, see O. Gerstenberg, & C. F. Sabel, 'Directly Deliberative Polyarchy: An Institutional Ideal for Europe?', in: C. Joerges, & R. Dehousse (eds.), *Good Governance in Europe's Integrated Market*, (Oxford: Oxford University Press, 2002), 289.

22 C. F. Sabel & S. William, 'Gaps and Hybrids', n.21.

23 J. Scott & G. de Búrca, 'New Governance, Law and Constitutionalism', n. 8.

24 J. Cohen & C. F. Sabel, 'Global Democracy?',n. 21.

even deviate from them entirely where they consider it necessary. In short, non-law governance is alleged to better respond to diversity and bounded knowledge, while requirements of legal form and parliamentary control linked to international law are perceived to inhibit socially useful steering.

Other commentators introduced already above emphasise particularly the potential for involving different actors in norm-setting activities as a positive feature of non-law, participatory governance mechanisms, in which the responsibility for developing or applying norms is, for example, shared with NGOs. Some of these scholars view participatory governance processes as a global form of deliberative procedural legitimacy.[25] Others maintain that complexity and indeterminacy limits possibilities for uniform rules and instead calls for bringing in diverse actors, thus moving away from prescriptive law to enabling non-law experimental governance processes.[26]

It is submitted that the advocates of non-law governance over-emphasise the flexibility inherent in non-binding, often informal governance mechanisms and de-emphasise the benefits of legal certainty and definiteness provided by law. First, flexibility is no inherent value in itself and on some issues, experimentation would be unwelcome. Rather, abstract legal rules of general application that are above politics might be warranted. On other issues, legal certainty might be useful in order to enable socially beneficial activities. In addition, non-law governance coupled with non-legal sanctions or backed up by a hegemonic power may sometimes be so effective in regulating behaviour that flexibility and adaptability diminishes.

Second, standards of participation and accountability might not be preserved in governance arrangements that are highly informal since those potentially interested might not be able to gain access to the actual decision-making circles or because the reasons for why a result emerges remain unclear.

Third, even conceding that the non-law governance mechanisms score higher on procedural legitimacy than international law-making, the perfect conditions for global deliberative

[25] See the literature cited in n. 18.

[26] J. Cohen & C. F. Sabel, 'Global Democracy?', n. 21 at 780f. Concerning the EU, see also Gerstenberg, & C. F. Sabel, 'Directly Deliberative Polyarchy: An Institutional Ideal for Europe?', n.21, at 6f.

democracy to function hardly exist. Large differences in resources inevitably entail that participation in governance arrangements will be skewed in favour of citizens or NGOs from developed countries. Thorsten Hüller and I have therefore elsewhere argued that substantial standards protecting the position of the excluded and disadvantaged are needed in order to make up for the deficits of imperfect global procedures.[27] This consideration confers an important role upon international law in providing for substantial standards that are not subject to disposition through global governance mechanisms and instead take on the status of quasi constitutional principles.

III. Complementarity of international law and non-law governance

The analysis in the preceding two subsections leads to the conclusion that the relationship of international law and non-law governance is best conceptualised as one of complementarity rather than conflict. Non-law governance mechanisms allow for bringing in experts and other actors with relevant knowledge and resources for the governing task and, because they are non-binding, can enable learning processes that may even eventually lead to the development of more concrete rules but they also depend on legal rules to foster transparency, accountability, inclusion and the protection of the least-advantaged. The following subsections therefore examine two theoretical accounts which conceptualise law and non-law governance mechanisms as complementary.

A. The conflict of laws approach

For WTO product regulation, Joerges' conflict of laws approach submits that WTO law and the governing activities of transnational standardisation organisations are useful and mutually reinforcing mechanisms of politicising markets.[28] He maintains that the governing activities of inter- or transnational standardisation organisations such as those of the Codex Alimentarius Commission inform and lead to a regulatory embeddedness of WTO law but that they also remain subject to law-mediated legitimacy, while the legal non-discrimination and necessity provisions of WTO law rationalise and enable political conflict resolution. In other words, there is a fruitful interplay between hard law duties of reason-giving and

[27] A. Herwig & T. Hüller, 'Zur normativen Legitimität der Welthandeslordnung', n.27.

[28] C. Joerges, 'Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO', in C. Joerges & E.U. Petersmann, op.cit. n. 18; C. Joerges, 'Juridification Patterns for Social Regulation and the WTO: A Theoretical Framework', TranState Working Paper – CRC 597 Transformations of the State, No. 17 (Bremen: 2005); C. Joerges & C. Godt, 'Free Trade: The Erosion of National and the Birth of Transnational Governance', in: M. Zürn & S. Leibfried (eds.), *Transformation of the State* (Cambridge: Cambridge University Press, 2005), 93, also C. Joerges, 'Conflict of Laws as Constitutional Form', TranState Working Paper – CRC 597 Transformations of the State, No.00 (Bremen: 2007).

transparency and soft, non-binding governance mechanism, in which the legitimacy and authority of both is strengthened rather than undermined.

To him, non-law private or hybrid governance arrangements are useful because they can exploit the problem-solving capacities of private actors to politicise markets where a Weberian-type administration is no longer feasible.[29] For their legitimacy, they must, however, remain compatible with the law and therefore develop fair and trustworthy procedures.[30] Since these non-law governance mechanisms combine technical expertise with consensual decision-making of national representatives and remain connected to public spheres they are capable of empirically informed, politically sensitive and problem-oriented deliberation.

As inter- or transnational standardisation activities are insufficiently legitimated to be turned into binding law, Joerges still sees a role for the general non-discrimination and necessity obligations of WTO law. They are claimed to function as meta-norms which provide a framework for states to work out conflicts in a deliberative manner without dictating supranational solutions.[31] Often, law therefore re-initiates essentially political non-law governance processes of conflict resolution that nevertheless function in the shadow of law.[32] As agreement on the acceptability of technical or scientific justification does not require universal agreement on the standards of regulatory protection actually chosen, negative integration is capable of managing diversity through framing a common discourse in which disputing states can reconnect. By allowing express derogation from inter- or transnational standards, it also takes account of the rather limited legitimacy of the associated governing mechanisms to develop regulations.[33]

B. Approaches favouring a plurality of governance mechanisms

Other approaches expand beyond WTO law and inter- or transnational standardisation organisations and argue for a greater plurality of governance mechanisms. Common to both is

[29] C. Joerges, 'Juridification Patterns for Social Regulation and the WTO: A Theoretical Framework', n. 28, at 24f, 27.
[30] Id., at 22, 27.
[31] C. Joerges, 'Juridification Patterns for Social Regulation and the WTO: A Theoretical Framework', n. 28, at 10-13.
[32] Id., at 13
[33] Id., at 15, 26, 29.

that they emphasise the benefits of having multiple sites and modi of governance as a means of preventing the hegemonic dominance of any single form of rationality.

To Teubner and others, governance mechanisms such as *lex mercatoria* or internet governance are the sites of societal law-production that can even become auto-constitutional regimes.[34] Law, understood by Teubner as a form of communication and systemic self-observation here straddles the line between social practices and rules. Teubner and others argue that plural normative orders result in an overall balance since no single institution and rationality will be able to assert itself and establish hierarchical dominance, which would anyway be illusionary today.[35] As it allows different rationalities to be articulated it is reflective of diversity and contradictions. These modes of steering increasingly become constitutionalised because the plural legal orders are irritated through concepts drawn from national constitutions while further functional differentiation prevents dominance and hegemony of any one order.[36] Constitutional-type challenges and differentiation thus put under strain but at the same time strengthen particular normative orders as the first treats them as law while the second preserves the regime's pattern of ex- and inclusion. Translated into the above discussion of law and non-law governance mechanisms, social, non-law governance practices can become the breeding ground for societal law.

To several other legal scholars arguing for the emergence of a global administrative law, the multiple sites and modi of governance can be conceived as accountability mechanisms because they place checks on related governance mechanisms with partially overlapping but unclearly delineated jurisdiction.[37] On this view, top-down accountability results because WTO law requires WTO members to explain and account for their regulations with

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[34] G. Teubner & A. Fischer Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', n.3; G. Teubner, 'Societal Constitutionalism' in: C. Joerges, I.J. Sand, G. Teubner, *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004), 3.7ff; G. Teubner, 'Global Bukowina: Legal Pluralism in the World Society', in: G. Teubner, *Global Law Without a State* (Aldershot: Dartmouth, 1997), 3.

[35] G. Teubner, 'Global Bukowina: Legal Pluralism in the World Society', n. 34, at 6; G. Teubner, 'Societal Constitutionalism', in: C. Joerges, I.J. Sand, G. Teubner, op.cit. n. 18, at 8, 12-15.

[36] G. Teubner, 'Societal Constitutionalism' in: C. Joerges, I.J. Sand, G. Teubner, op.cit.7, 12f

[37] See especially N. Krisch, 'The Pluralism of Global Administrative Law', 17 *European Journal of International Law* (2006), 247, *passim*. On global administrative law and related accountability mechanisms more generally, see also B. Kingsbury and N. Krisch, 'Global Governance and Global Administrative Law in the International Legal Order', 17 *European Journal of International Law* (2006), B. Kingsbury, N. Krisch, R. B. Stewart, J. B. Wiener, 'The Emergence of Global Administrative Law', 68 *Law & Contemporary Problems* (2005), 15, and the various contributions in the special issues.

transboundary effect.[38] Bottom-up accountability of the WTO and its adjudicatory bodies results through national political or judicial reviews of WTO decisions and dispute settlement reports.[39] Similarly, one could imagine horizontal accountability mechanisms between different international treaties and the governing activities of transnational networks or international organisations. Accountability here does not result from hard and higher law duties of reason-giving as in the conflict of law approach but is rather the outcome of overlaps of jurisdiction. Characteristic of a plural model of accountability is that accountability is owed to different constituencies and that conflicts and overlap between different governance mechanisms can lead to accommodation and accountability since no one treaty or institution can command absolute authority.[40]

IV. GATS and non-law governance

Services are traditionally a heavily regulated sector of the economy. Even the issue of whether a transaction is a service or what type of service it is, is sometimes defined through regulation. Prostitution can be considered a service or a crime. Life insurance can be considered as an investment and thus a financial service but also as insurance by providing for survivors in case of death. Since services are often highly complex and their quality is less easy to ascertain than in the case of goods, greater information asymmetries between consumers and providers of services exist. This creates a greater need for regulation. Regulation can be considered to be market-making to the extent that it allows consumers to distinguish between services on the basis of safety and quality. That said, the requisite 'quality' of the service is not as neatly defined as, for instance, the environmental quality of a potentially toxic waste product and the regulation of services often proceeds by regulating the way it is produced. This makes it more difficult to separate justified regulation from unjustified protectionism.

These considerations suggest that non-law governance mechanisms capable of creating regulatory standards for services can be a useful complement or even a precondition for trade liberalisation through the GATS. This section thus analyses whether the relationship of the GATS to non-law governance mechanisms, and in particular international standardisation

[38] B. Kingsbury, N. Krisch, R. B. Stewart, J. B. Wiener, 'The Emergence of Global Administrative Law', n.37, 54 ff.; R. B. Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?', 68 *Law & Contemporary Problems* (2005), 63.

[39] Id.

[40] N. Krisch, 'The Pluralism of Global Administrative Law', n. 37.

organisations, can be interpreted in the light of Joerges' conflict of laws approach or those that favour a plurality of governance mechanisms.

A. Conflicts of laws and the GATS

A key difference between the GATS and the GATT is that the GATS contains no general non-discrimination clause. The most-favoured nation obligation applies horizontally, that is irrespective of whether a member has made commitments for service sectors.[41] In contrast, a member can decide for each service sector and mode of supply whether it wants to grant market access and national treatment. In addition, a member can inscribe limitation to national treatment in its schedule, which can include domestic regulatory measures. It will then be allowed to continue with idiosyncratic and parochial regulations without any need for generally acceptable justification. If a member has granted national treatment and not inscribed any limitation, the national treatment obligation applies fully to the service.

In respect of technical standards, licensing and qualification requirements and licensing procedures, a member has to ensure that these are not more burdensome than necessary to ensure the quality of the service and are based on objective, transparent criteria.[42] The GATS thereby requires members to consider the impact of their national regulations on foreign service suppliers and to provide justifications in universal terms, similar to obligations in the WTO SPS and TBT Agreement. The obligation in Article VI:5(a) is temporary, pending the entry into force of regulatory disciplines developed by the Council for Trade in Services and subject to the commitments a member has scheduled.[43] As the only regulatory disciplines that have so far been developed required lengthy and protracted negotiation and future work on regulatory disciplines seems stalled by deadlock,[44] it is unlikely that Article VI:5(a) will cease to be of relevance.

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41 GATS, Articles II, III.

42 GATS, Article VI:4.

43 GATS, Article VI:5. So far, regulatory disciplines in the accountancy sector have been developed. These are more in the nature of framework principles than detailed international standards. See Disciplines on Domestic Regulation in the Accountancy Sector, S/L/64.

44 J. Wouters & D. Coppens, 'Domestic Regulation within the Framework of GATS', Working Paper – K.U. Leuven Institute for International Law, No. 93, (Leuven: 2006), 18 [with further references]. Wouters and Coppens point out that some WTO members want to await further liberalisation of service sectors as a condition for agreeing to disciplines on additional sectors, while other members prefer to establish regulatory disciplines as a condition for agreeing to the further liberalisation of trade in services.

The GATS also contains provisions that allow it to integrate regulatory standards developed by inter- or transnational non-law governance mechanisms, such as the International Telecommunications Union or the International Accounting Standards Board. In assessing whether members comply with the necessity, transparency and objectivity test, Article VI:5(b) requires that account be taken of the international standards applied by that member.[45] Article VI:5(b) could suggest that compliance with international standards on these matters automatically affords a safe harbour to members under the GATS, while non-compliance creates a justificatory burden for members, similar to provision in the SPS and perhaps TBT Agreement.

On the one hand, Article VI:5(b) does not indicate whether the application of international standards by a member is to be considered as a factor in favour of, against or neutral with respect to finding compliance with Article VI:5(a). The crucial textual difference between Article VI:5(b) and the SPS Agreement is that Article VI:5(b) does not contain language according to which compliance with international standards leads to national regulations being deemed consistent with Article VI:5(a) nor a requirement to base national regulations on international standards.[46]

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

In short, Article VI can be interpreted in ways so that the law of the GATS can make use of the regulatory capacity developed through non-law governance mechanisms. On this interpretation, members would not be required to use international technical, licensing or

[45] GATS, Article VI.5(b).
[46] Cf. SPS Agreement, Article 3.1.

qualification standards but non-use would entail the need to show necessity, transparency and objectivity.[47] In other words, members would be required to justify their social regulation of services to affected trading partners in terms that are generally acceptable to all. It thus seems to be possible to interpret the relationship between the GATS and non-law social regulatory governance outside the WTO along the lines of Joerges' conflict of laws approach.

Two qualifications to viewing Article VI as a bridging mechanism between GATS law and non-law social regulatory governance outside of the WTO need to be mentioned. First, members can choose to avoid the obligations of Article VI by not opening a sector to foreign competition. In other words, the GATS allows free-riding because members that have not made GATS commitments for the sector concerned can use the GATS to try and hold other countries to international standards in respect of services supplied by their suppliers to these countries without having to apply these standards themselves.

It could be speculated whether the possibility of free-riding on international standards will not chill international standardisation activities in the long run. This view assumes that trade balance is always the most important consideration in international standardisation. However, often factors pushing in favour of common international standards, such as technical reasons or the potential for gaining widespread market access may be equally if, not more, important and it can be expected that international standardisation will continue to work.

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

Second, the WTO dispute settlement report in *US – Gambling* has created some conflicts between GATS law and international standardisation. The *US – Gambling* case concerned various pieces of US federal and state legislation prohibiting the remote supply of gambling

[47] Article VI :4 probably requires the complaining party to make a prima facie case that the national measures are not in conformity with its requirements but once such a case is made, the full burden of explanation is always borne by the defending member.

and betting services for reasons of public morals.[48] Panel and Appellate Body decided that this domestic regulation constituted a quantitative market access restriction since it limited the number of cross-border service suppliers to zero.[49] Both focused on the effects of the US ban, despite clear wording of Article XIV that only measures in the form of quantitative restrictions are covered by it.[50]

The decision has been criticised because the language about effects seems to blur the distinction between domestic regulation and market access restrictions. [51] Pauwelyn points out that any domestic regulation can produce quantitative effects.[52] He gives the example of requiring aspiring taxi drivers to pass a driving test.[53] This requirement will preclude market access for all those who do not pass the test.[54] This change in the scope and relationship of various GATS provisions to each other is important because market access restrictions that are not scheduled are *per se* violations that can only be justified on the limited grounds of Article XIV, XIV bis, and XII.[55] In contrast, Article VI on domestic regulation puts the burden of proof on the complaining member and has an open-ended list of regulatory objectives that could justify introducing domestic regulation.[56] In addition, measures based on international standards that have effects of quantitative restrictions also have to be justifiable under the limited general exceptions.

The decision in *US – Gambling* thus seems to contradict the conflict of laws approach in which negative integration is perceived as a discursive frame to enable trading partners to deliberate about the full range of national regulatory measures and their protection objectives. The decision could suggest that the GATS conflicts with or even undermines non-law governance mechanisms to the extent that their international standards can be considered as

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48 Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (hereafter referred to as *US – Gambling*). para. 6.221; Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/AB/R, para. 43.

49 Panel Report, *US – Gambling,* para. 6.355; Appellate Body Report, *US – Gambling,* paras. 238, 251.

50 Panel Report, *US – Gambling,* paras. 6.330, 6.332, 6.338, 6.347; Appellate Body Report, *US – Gambling,* paras. 231-237. For a critique of the interpretative approach, see J. Pauwelyn, 'Rien Ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS', 4 *World Trade Review* (2005), 131, *passim.* and F. Ortino, 'Treaty Interpretation and the WTO Appellate Body Report in *US – Gambling: A Critique'*, 9 *Journal of International Economic Law* (2006), 117, *passim*.

51 J. Pauwelyn, 'Rien Ne Va Plus?', n.50, 132, 162-168.

52 Id., at 166.

53 Id.

54 Id.

55 Id., at 136, 138.

56 Id., at 138.

market access restrictions. The GATS would then in fact regulate these non-law governance mechanisms and require that the objectives pursued by international standards conform to the general exceptions.

While these concerns about the impact of *US – Gambling* are real, it is important to be clear about the scope of the decision. The US measure prohibited an entire mode of supply and therefore produced a definitive quantitative effect on foreign remote suppliers. Qualitative regulations or international standards that merely impose conditions service suppliers must meet, such as, in Pauwelyn's example, driving tests for taxi drivers, inevitably exclude all those who fail to meet the condition but the quantitative effect is different since the number of foreign service suppliers allowed on the market is in principle unlimited. The decision in *US – Gambling* is narrower than what Pauwelyn fears as it likely only applies regulatory measures that preclude entire modes of supply. Consequently, it does not negate the conclusion that the GATS is amenable to being interpreted as a manifestation of a conflict of laws approach.

B. A plurality of governance mechanisms?

The *US – Gambling* case is also insightful because it reveals a different relationship between international law and non-law governance mechanisms, more in line with the theories on plural, multi-site and –level governance outlined above, where accountability can be the outcome of conflicts and overlap between various governance mechanisms even within a single legal regime like that of the WTO.

After Antigua, as the complaining party in the case, had sought and obtained a determination that the US' purported implementation of the *US – Gambling* dispute was still inconsistent with the GATS, the US took the unprecedented step of seeking withdrawal of its commitments in the gambling sector pursuant to Article XXI of the GATS.[57] Under Article XXI, a WTO member may withdraw its GATS commitments at any time but it must enter into negotiations about compensatory adjustments with any affected WTO member that so requests.[58] If no agreement is reached, the matter can be referred to arbitration, which can suggest appropriate compensatory adjustments.[59] If the US does not offer appropriate

[57] 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.
[58] GATS, Article XXI 1(a), 2(a).
[59] GATS, Article XXI :3(a), 4(a).

compensatory adjustments, the affected members who participated in the arbitration can suspend concessions vis-à-vis US trade.[60]

There is a legal issue whether, given the DSU, the US can still rely on Article XXI. Under the DSU, compensation and the suspension of concessions are viewed as temporary measures and full implementation of the rulings and recommendations is the preferred solution.[61] As the DSU is not made explicitly subject to GATS Article XXI it could be argued that the US violates the DSU by not fully implementing the rulings and recommendations and introducing permanent compensation or suspension of concessions.

On the other hand, the DSU can be interpreted to allow the US to maintain its modified schedule. The purpose of WTO dispute settlement is to preserve the rights and obligations of members under the covered agreements.[62] It also states that recommendations or rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements.[63] While this provision is commonly interpreted as a safeguard against judicial law-making, it can also be interpreted to mean that the existence of a DSB recommendation cannot produce the effect of depriving WTO members, including the loosing party, of any of the rights they otherwise enjoy under the covered agreements.

Moreover, the right in Article XXI GATS applies *at any time* and the DSU states that compensation or the suspension of concessions is *temporary*. How short or long term 'temporary' is, is subject to interpretation. Since the GATS contains an in-built liberalisation agenda, even the US withdrawal of commitments in the gambling sector is therefore in a sense temporary.

While the GATS allows the US to nullify the dispute settlement findings as they apply to the gambling sector, the US nevertheless faces consequences under its domestic law. A defendant seeks to dismiss criminal charges against him 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

60 GATS, Article XXI :4(b).
61 DSU, Article 22.1.
62 DSU, Article 3.2.
63 Id.

DSU.[64] 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.[65] Further, a US provider of on-line poker games has brought a claim in a Washington state court alleging that the US ban on remote gambling in interstate commerce and the permission of intrastate remote gambling violates the US commerce clause, as interpreted in light of US treaty obligations, because it favours established casinos and online horseracing bookmakers vis-à-vis providers of online poker games.[66] For different defending parties, similar claims could be brought under the free movement provisions of the EC treaty or under the non-discrimination provisions of regional trade agreements and bilateral investment treaties.

The US intention to modify its schedule suggests several things for the relationship of international and non-law governance. It sends a signal to the WTO dispute settlement bodies that far-reaching purposive interpretations that affect salient regulatory policies will not be accepted. The factual impact of *US – Gambling* report lies somewhere between that of a regularly adopted DSU report and that of an unadopted old GATT report. The WTO dispute settlement bodies now have to reckon with the possibility that a defending member in a future dispute again modifies its schedule in response to their findings. The threat of modification could therefore entice them to soften their review of sensitive national regulatory bodies. It thus suggests that the political review mechanisms of schedule modification could inform the application of international law.

However, the form of political review from below Article XXI of the GATS allows is itself again embedded in broader forms of law and non-law governance mechanisms since the US has to account to the other WTO members in the Dispute Settlement Body and the Council for Trade in Services for its schedule modification and is affected by the domestic law suits. This empirical analysis suggests that multiple governance mechanisms, including law, political review at national level, domestic law and multilateral discursive fora affect each other and shape the conduct of states through a blend of governance mechanisms as suggested by the approaches arguing for a plurality of overlapping, conflicting governance mechanisms.

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64 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.

65 Motion to Dismiss, *USA v. Gary Stephen Kaplan*, n. 64, 29-32.

66 Complaint *Lee H.Rousso v. State of Washhington*, Superior Court of Washington County of King, available via http://pokerplayersalliance.files.wordpress.com/2007/07/lee_rousso_complaint.pdf, 6-8.

V. Conclusion

Even within a single international legal instrument like the GATS, law and non-law governance mechanisms empirically interact in complex multiple ways across various global mechanisms (horizontal dimension) and levels of governance (vertical dimension). While the GATS can be interpreted in light of a conflict of laws approach, members also have the possibility of opting out of the GATS obligations but they still remain entangled in a web of governance mechanisms. No single normative blueprint for the relationship between international law and non-law governance mechanisms is therefore perfectly reflected in actual trade governance and its proclaimed benefits cannot be fully reaped.

To complicate matters further, the law of the GATS often times seems to be irrelevant to the actual practice of global liberalisation and regulation of services trade. WTO members *de facto* liberalise trade flows of services to a much greater extent than they are willing to commit to in their GATS schedules.[67] In addition, inter- and transnational regulatory organisations such as the International Telecommunication Union, the World Health Organization or even corporate codes of conduct have developed regulatory standards and best practices independently from the GATS, a development which seems to suggest that trade governance can be viewed through the lens of those that argue for functional differentiation as an important way for different rationalities to flourish.

What do the results of the empirical analysis of the GATS suggest for the theoretical accounts presented above? It is submitted that the schedule modification in response to the *US – Gambling* report could be considered as a means of maintaining the discursive openness of the substantive law if it is used sparingly. The potential discursive closure that resulted from examining the justification of regulatory bans pursuant to the limited grounds of GATS Article XVI is counteracted due to the political signals the US schedule modification sends. Because schedule modification carries costs and is subject to further governance mechanisms, there is little danger of specious, widespread use that could undermine the deliberative potential of GATS non-discrimination and necessity provisions.

That said, the GATS will need to ensure that the interests of developing countries are sufficiently protected in the process. Care also needs to be taken that in the interplay of the

[67] WTO, Guide to GATS. An Overview of Issues for Further Liberalization of Trade in Services (London: Kluwer, 2001), vi:

various different empirical relationships of international law, non-law governance and experimental governance, accountability is not lost and certain countries or interests one-sidedly derive benefits. Plural governance need not come at the price of accountability if procedural standards of transparency and public reason-giving are followed, including with respect to members' practice of engaging in experimental liberalisation and regulation but legal obligations of transparency, accountability and protection of disadvantaged interests can be a useful default when these practices are not followed.