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The GATS Approach towards
Liberalization

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THE GATS APPROACH TOWARD LIBERALIZATION THE INTERACTION BETWEEN DOMESTIC REGULATION, MARKET ACCESS, NATIONAL TREATMENT AND SCHEDULED COMMITMENTS IN THE GATS

*Simon Tans**

Introduction	5
Part 1 Background	
1.1 The <i>US – Gambling</i> case	9
1.2 Interpretative methodology	10
1.3 Classification of sources according to the VCLT	13
1.4 The Scheduling Guidelines	16
Part 2 The GATS approach to liberalization	
2.1 Introduction	21
2.2 Comparison with the GATT structure	22
2.3 The GATS structure	24
2.4 Importance of making the right choice	26
2.5 Brief description of the provisions	28
2.5.1 Article VI, domestic regulation	28
2.5.2 Article XVI, market access	31
2.5.3 Article XVII, national treatment	34
2.5.4 Article XVIII, additional commitments	37

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Part 3 Analysis of problems and possible solutions

3.1	How to distinguish between domestic regulation and measures addressed by specific commitments?	39
3.1.1	The interpretation in Gambling on VI:4/5 and XVI/XVII	39
3.1.2	Provisions complementary	43
3.2	How to draw the line between VI and XVI	44
3.2.1	The scope of article XVI as defined in Gambling	45
3.2.2	The measures having the same effect as a zero quota	46
3.2.3	Prohibition of service is a 'zero quota'	50
3.3	Relationship between XVI and XVII GATS	53
3.3.1	Overlap in scope of article XVI and XVII	53
3.3.2	Article VI and conflicting commitments under article XVI and XVII	57
3.4	The type of measures addressed by article XVI	58
	Conclusions	67
	References	69

INTRODUCTION

The General Agreement on Trade in Services (GATS) provides a framework for the liberalization of international trade in services. The negotiation of specific commitments on market access and national treatment and the development of disciplines on domestic regulation should lead to the progressive dismantling of barriers to services trade between World Trade Organization (WTO) Members.¹

The text of GATS provisions VI on domestic regulation, XVI on market access and XVII on national treatment, and to a lesser extent XVIII on other commitments, leave ambiguity concerning their substance, scope and interaction. This in turn blurs the functioning of central GATS concepts and the consequences attached to inscribed commitments.² The *United States – Gambling* case (*US – Gambling*)³ specifically dealt with the provision on market access and touched upon several issues related to the other provisions or their interaction. In turn this decision rekindled a lively debate in the literature, sometimes reflecting opposing positions regarding the understanding of these provisions.

Using appropriate international rules of treaty interpretation, this paper aims to further a deeper understanding of the scope and regulation of the GATS rules on domestic regulation, market access and national treatment, and the consequences of inscribing specific commitments.

Research performed on this topic can and has led to important insights which WTO Members may wish to pay heed to. Such research has clarified current obligations derived from article VI and the inscribed specific commitments. The current services negotiations taking place within the Doha Round could benefit from greater clarity as well. The present uncertainty regarding these provisions could impact Member's negotiating positions as the implications of their commitments may be unclear.

Moreover, correctly applying the provisions under discussion here is particularly important as they can be said to touch the heart of the GATS Agreement. These provisions reflect the balance between trade liberalization on the one hand, and the right to domestically regulate services in order to meet national policy objectives on the other.⁴

1 Preamble to the GATS, see also article XIX GATS.

2 Mattoo 1997, p. 107-108 and 113; Ortino 2008, p. 173.

3 Appellate Body Report on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/AB/R, 20 April 2005.

4 Preamble to the GATS, see also: Krajewski 2003, p. 56-60 and Wouters & Coppens 2008, p. 208.

Countries are at liberty to apply their national regulatory services standards as long as these standards comply with the GATS trade norms. Interpretation of these trade norms therefore affects regulatory autonomy directly.⁵

The main aim of this paper is to help to provide clarity regarding the central concepts of domestic regulation, market access and national treatment. Despite various publications aiming at the same goal, clarity is still lacking, not least because some publications adopt different approaches and conclusions. In working towards this central aim, the paper will address several problems.

In the first place, the paper will demonstrate that article VI on the one hand and articles XVI and XVII are not mutually exclusive. Instead they should be seen as complementary. However, future disciplines should take a clear stance on this issue as non-exclusiveness or exclusiveness between these provisions has significant consequences.

Secondly, the paper will argue that the seemingly diverse opinions concerning the delineation between market access and domestic regulation are actually closer than an initial reading of the *Gambling* case and the various reactions following it suggest.⁶

Thirdly, the paper will address two types of problems relating to the scope of the provisions on market access and national treatment. The overlap in scope can lead to conflicting commitments. While, article XVI and XVII alone can lead to this problem, the application of article VI can give rise to a similar conflict between inscribed commitments under article XVI and XVII as well. While various options are available to enable one commitment to prevail over the other, making this choice might be problematic due to existing commitments which have been inscribed after negotiations based on reciprocity. It is therefore all the more important to make this choice before the conclusion of the Doha Round and the inscription of new commitments.

Finally, the paper will examine the recently argued position that article XVI should be interpreted to apply only to discriminatory measures.⁷ Though such a view is contrary to the generally accepted stance that the provision applies to both non-discriminatory and discriminatory measures, the text of the GATS it-

5 Arup 2000, p. 79. As will become apparent below, the *Gambling* case's delineation of the provision on domestic regulation from the provision on market access in particular has led to a fierce debate in the literature, precisely because the decision touches this balance.

6 It should be emphasised that the topic of this paper moves beyond the scope of the *Gambling* case. Nevertheless, the importance of the case and the literature following it to the topic at hand justify its central position within this paper.

7 To my knowledge this position has first been posed by Marchetti and Mavroidis, see: Marchetti & Mavroidis 2006 and Mavroidis 2007, discussed in detail in §3.4. This paper will discuss the arguments posed in the latter publication, thus only referring to Mavroidis.

self does not provide clarity. As some of the problems discussed in this paper would not arise if article XVI applies to discriminatory measures only, it is worth considering further.

The paper is divided in three parts. Part 1 will provide the necessary background. Part 2 will provide an overview of the GATS provisions under scrutiny and their interaction. Part 3 contains the main substance of this paper, providing a legal analysis of the four abovementioned problems and suggesting, where possible, solutions.

PART 1 BACKGROUND

Before dealing with the topic itself it is necessary to provide a brief overview of the *United States - Gambling* case (§1.1). The following section will identify the appropriate means of interpreting the GATS (§1.2). Next, an overview of the various sources for interpretation used in this paper and their respective legal value will be provided (§1.3). An extensive description of the methodology used in interpreting these provisions is warranted. As will become apparent, the interpretation of the text of these GATS provisions can lead to opposing conclusions. This requires judicial prudence as rejecting one textual treaty interpretation over another should be based on a sound fundament of interpretative sources. Due to their importance the Scheduling Guidelines will be dealt with in a separate paragraph (§1.4).

1.1 The *United States – Gambling* case

The *US – Gambling* case concerned a complaint submitted by Antigua and Barbuda (Antigua) against several United States' measures that allegedly entailed the impediment of cross-border supply of gambling and betting services.⁸ The small Caribbean island nation of Antigua had set up 'a primarily Internet-based, "remote-access" gaming industry as part of its economic development strategy.'⁹ According to Antigua this industry suffered from an increasingly aggressive US strategy to impede these cross-border gaming activities.¹⁰

The complainant argued that these measures were inconsistent with several GATS provisions as the US had inscribed a full commitment on cross-border gambling and betting services in its schedule of commitments.¹¹

8 Notably the Wire Act, the Travel Act and the Illegal Gambling Business Act, see: *US – Gambling* Panel Report, par. 3.72. Note that the Panel states that Antigua has not made a *prima facie* demonstration that the Interstate Horseracing Act (IHA) is inconsistent with the GATS, *US – Gambling* Panel Report, par. 6.218. Nevertheless that measure did play a role in the dispute as the IHA was found to exempt domestic suppliers of remote gambling and betting services from the other three Acts which outlaw remote supply of such services, *US – Gambling* Appellate Body Report, par. 364 and 396.

9 Panel Report on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/R, 10 November 2004, par. 3.2.

10 *US – Gambling* Panel Report, par. 3.5. A more extensive description of the facts and background of the *Gambling* case can be found in Krajewski 2005, p. 419-422.

11 The US had inscribed a mode 1 commitment under market access and national treatment under 'other recreational services', a sub-sector part of the service sector 'recreational, cultural, and sporting services'. This commitment only explicitly exempted sporting services. While the US schedule of commitments did not contain any language on 'gambling and betting services', the Services Sectoral Classification List (GATT (GNS) 1991a)

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In brief the case was decided as follows. The Panel and Appellate Body found that the US indeed had inscribed a full market access commitment for cross-border gambling and betting services, in particular based on the argument that a Member's intention in scheduling is not conclusive as schedules represent a common agreement among all Members.¹²

Based on reasoning discussed extensively below the US measures were considered to be market access restrictions as listed in article XVI:2(a) and (c) prohibiting the remote supply of gambling services. However, the Appellate Body accepted the US argumentation that the measures, with the exception of the Interstate Horseracing Act (IHA), were necessary to protect public morals or public order and thus fell under the general exemption to GATS obligations provided in article XIV(a) GATS.¹³ The IHA was found to be discriminatory contrary to the non-discrimination requirement contained in the chapeau of article XIV as the measure exempts domestic suppliers of remote gambling and betting services from the other three measures (the Wire Act, the Travel Act and the Illegal Gambling Business Act) which prohibit remote supply of these services.¹⁴

1.2 Interpretative methodology

The GATS is a multilateral agreement, included in annex 1B of the WTO Agreement and forms an integral part thereof.¹⁵ The Dispute Settlement Understanding (DSU), providing the rules and procedures concerning WTO disputes,¹⁶ indicates that customary rules of interpretation of public international law are to be applied to clarify provisions of WTO Agreements.¹⁷ These cus-

places 'gambling and betting services' within this sub-sector. This issue is discussed in more detail in §1.4.

Antigua claimed that GATS articles VI, XVI, XVII and XI (concerning the prohibition of restrictions of international transfers and payments) had been infringed by the US measures, *US – Gambling* Panel Report, par. 2.1.

12 *US – Gambling* Appellate Body Report, par. 159, in detail: Krajewski 2005, p. 422-427.

13 The prohibition of remote gambling services is connected to the prevention of organised crime which uses the industry for money laundering and fraud. Moreover, the prohibition relates to the prevention of underage gambling and health issues, *US – Gambling* Panel Report, par. 3.15-3.19.

14 *US – Gambling* Appellate Body Report, par. 354-357, 364 and 369, see also the summary contained in par. 372. See in detail: Krajewski 2005, p. 438-444.

15 Article II:2 WTO.

16 Article 1 DSU and annex 1. See also article XXIII GATS.

17 Article 3:2 DSU. International agreements are normally interpreted according to customary rules of treaty interpretation; see Krajewski 2003, p. 49.

tomary rules of interpretation have, to an important extent,¹⁸ been codified in articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT).¹⁹ As such, they are applied by the Dispute Settlement Bodies and most commentators consider them as the standard of interpretation for WTO law.²⁰

The GATS provisions here under scrutiny will be interpreted in accordance with these customary rules of interpretation. To that end, the ordinary meaning of the terms in these provisions will have to be examined in their context bearing in mind their object and purpose.²¹

18 General rules of customary international law, other than interpretation rules, apply to the WTO agreements as well, see: Panel Report on *Korea – Measures Affecting Government Procurement (Korea – Procurement)*, WT/DS163/R, 19 June 2000, par. 7.96, see in particular: Pauwelyn 2001, p. 544.

Moreover, article 31(c) VCLT specifically states that ‘any relevant rules of international law applicable in the relations between the parties’ are to be taken into account. Most commentators agree that other rules of public international law can therefore be applied when interpreting WTO law, Marceau 1999, p. 87; Krajewski 2003, p. 53. Note that the phrase ‘applicable in the relations between the parties’ in article 31(c) presumably applies to relevant rules that apply between all parties to a treaty, not just to parties in a particular dispute, see regarding that debate: Krajewski 2003, p. 53. To this can be added that a view contrary would be problematic when interpreting treaty provisions outside the context of a particular dispute, as I am about to do here.

Finally, it should be noted that Pauwelyn convincingly argues that, besides the specific reference to rules of customary international law in article 3:2 DSU (and, though implicit, 31(c) VCLT), all general international law, including general principles of international law that apply between all WTO Members, applies to the WTO Agreements, Pauwelyn 2001, p. 542-543.

19 Vienna Convention on the Law of Treaties, concluded at Vienna 23 May 1969, entered into force on 27 January 1980, 8 ILM 679 / United Nations, Treaty Series vol. 1155, p. 331. The International Court of Justice ruled that the Vienna rules indeed reflect customary international law, ICJ *Territorial Dispute Libya v. Chad (Libya v Chad)*, 13 February 1994, ICJ Reports 1994, p. 4, par. 41. See also Aust 2000, p. 11.

20 Krajewski 2003, p. 49, who is referring to *inter alia*: Appellate Body Report on *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS2/AB/R and WT/DS4/AB/R, 20 May 1996, section III.B; Pauwelyn 2001, p. 542; Lennard 2002, p. 17-18. See in relation to the GATS: *US – Gambling* Appellate Body Report, par. 190 and recently Panel Report on *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)*, WT/DS363/R, 12 August 2009, par. 7.922. Implicitly confirmed by the Appellate Body, Appellate Body Report on *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)*, WT/DS363/R, 21 December 2009, par. 348.

21 Article 31 VCLT indicates that the terms of the provisions, their context and their object and purpose consists of the following sources: preamble and annexes; agreements relating to the treaty which were made between all the parties in connection with the conclusion of the treaty; any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty; any subsequent agreement between the parties regarding the inter-

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It is important to realise that the elements contained in article 31 VCLT are all part of a single rule of interpretation, no hierarchy is intended. Nevertheless, in practice the text itself, (commonly called the textual approach) does take a central position. Object and purpose are often used to confirm initial textual interpretations.²²

Article 32 VCLT establishes that supplementary means of interpretation, including preparatory work and circumstances of its conclusion, are to be used to confirm the outcome of the initial examination as prescribed in article 31 and to clarify ambiguous, obscure or manifestly absurd or unreasonable results. The approach adopted in the VCLT places the meaning of the text above the intention of the parties without reducing the use of supplementary means, such as preparatory work, to an ineffective role. Rather, the system adopted intends to ensure that the supplementary means do not form an autonomous method of interpretation.²³

pretation of the treaty or the application of its provisions; any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; any relevant rules of international law applicable in the relations between the parties. Treaty terms must be given special meaning when parties intended a treaty term to have such special meaning.

- 22 The International Law Commission states: 'that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.' International Law Commission 1966, at 219-220. Article 31 VCLT creates one general rule of interpretation, indicating that text, context and object and purpose are all to be equally considered. No hierarchy is intended, Aust 2000, p. 186-187.

However as indicated by Sinclair 'it is in any event clear that, within the framework of the Convention regime, consideration of the object and purpose is only one element of the general rule, and a subsidiary element at that' (emphasis added), Sinclair 1984, p. 118. Similar: determination of ordinary meaning cannot be done in abstract, context and object and purpose needed as well. However, in practice object and purpose is more for the purpose of confirming an interpretation, thus precedence is given to the textual approach, Aust 2000, p. 188, referring to O'Connell 1970, p. 225; Lennard 2002, p. 21-22; Krajewski 2003, p. 50.

In a dissenting opinion Judge Schwebel provides an excellent overview, indicating that all elements of the rule are poised towards retrieving the intention of the parties. The text is presumed to be an authentic expression (hence the practical starting point of interpretation) whereas evidence of the intentions of parties besides the text can repair situations where the outcome of the textual interpretation is not viable or unclear, ICJ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), 15 February 1995, dissenting opinion of Vice-President Schwebel, ICJ Reports 1995, p. 25-37.

Note that the Dispute Settlement Bodies have been criticized for failing to embrace a holistic approach which considers all the relevant elements suggested in article 31:1 VCLT, see Ortino 2006, p. 117 and Irwin & Weiler 2008, p. 90-95.

- 23 Sinclair 1984, p. 115-116; Aust 2000, p. 185-187; Lennard 2002, p. 22; Ortino 2006, p. 130-132 and fn 46.

The method of interpretation used within this paper will take the text of provisions as a starting point. As various different sources will be used to confirm initial conclusions or to clarify ambiguous results it may be helpful to classify all sources used throughout this paper in the beginning. The classification exercise below will prevent sources from being used in a manner other than the VCLT prescribes.

Opinions of various commentators will be examined as well to indicate and clarify possible issues or interpretative problems left unclear. Finally, conclusions will be drawn indicating remaining issues and where possible suggesting solutions.

1.3 Classification of sources according to the VCLT

The text of the GATS includes the preamble of the Agreement and all annexes. Note that the schedules of commitments are annexed to the Agreement and form an integral part of the GATS.²⁴

In accordance with article 31(2)(a) VCLT, the context of the GATS includes all Agreements and instruments contained in the final act of the Uruguay Round. In particular this paper will refer to the GATT as a means of interpretation by analogy, as parts of the GATS have been modelled on the GATT. Besides the reference to customary rules of interpretation, the WTO Agreement states in article XVI:1 that: 'the WTO shall be guided by the decisions, procedures and customary practices followed by the contracting parties to GATT 1947 and the bodies established in the framework of GATT 1947'. Therefore the adopted language includes the interpretation of those provisions in earlier case-law since the creation of the GATT in 1947. GATS articles containing old GATT concepts and similar language to GATT provisions therefore allows for analogous interpretation.²⁵

24 Article XX:3 GATS, as confirmed by the Dispute Settlement Bodies in relation to the GATT in Appellate Body Report on *E.C. – Customs Classification of Certain Computer Equipment (EC – Computer Equipment)*, WT/DS62/AB/R, 22 June 1998, par. 109 and analogously applied to the GATS in *US – Gambling Panel Report* par. 6.44, Appellate Body Report par. 159, see also Krajewski 2005, p. 422.

25 See Jackson 1998, p. 14; Al-Kashif 2008, p. 510; Krajewski 2003, p. 52; Ortino 2008, p. 176. The analogous interpretation approach was confirmed for WTO agreements in Appellate Body Report on *US - Section 211 Omnibus Appropriation Act of 1998 (US – Section 211 Appropriations Act)*, WT/DS176/AB/R, 2 January 2002, par. 242 and Panel Report on *EC – Measures Affecting the Approval and Marketing of Biotech Products (EC – Approval and Marketing of Biotech Products)*, WT/DS291/R, WT/DS291/R, WT/DS293/R, 21 November 2006, par. 7.2401-7.2406 and specifically for the GATS based on GATT provisions in Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*, WT/DS27/AB/R, 25 September 1997, par. 229-232. As noted by Krajewski, although not expressly indi-

Adopted Panel reports and Appellate Body conclusions are only legally binding with respect to resolving the particular dispute between the parties to that dispute. However, previously adopted Panel reports should still be taken into account when they are relevant in a dispute.²⁶ Regarding Appellate Body conclusions, the Appellate Body has ruled that: 'following the Appellate Body's conclusions in earlier disputes is not only appropriate, [i]t is what would be expected from Panels, especially where the issues are the same.'²⁷

In the *US – Stainless Steel (Mexico)* case the Panel explicitly rejected earlier Appellate Body conclusions in its report.²⁸ On appeal the Appellate Body stated, in no uncertain terms, that this practice undermines the development of a coherent and predictable WTO *acquis*. Nevertheless, the Appellate Body, although specifically asked to do so by the European Community (EC), did not rule that a Panel is *obliged* to follow earlier Appellate Body conclusions.²⁹

Concluding, earlier case-law is particularly relevant when interpreting WTO provisions as such rulings are part of the WTO *acquis*. While rulings are non-binding and interpretative lines in case-law can and have changed, case-law interpretations form authoritative legal interpretations which WTO judges should follow absent compelling reasons.³⁰

It should be noted that academic studies play a different role than judge made case-law. A particular function of such studies is to analyse and when necessary critique the findings of such case-law. Therefore, this paper will apply WTO case-law retaining the possibility to criticize.

cated, this method of interpretation can be seen as based on the context of the GATS as prescribed in article 31(2) VCLT, Krajewski 2003, p. 52. Some reference will also be made to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT).

26 Appellate Body Report on *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 1 November 1996, p. 14. The Appellate Body rejected the Panel conclusion that adopted reports are subsequent practice included in article 31 VCLT, Panel Report on *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)*, WT/DS8/R, WT/DS10/R, WT/DS11/R, 11 July 1996, par. 6.10. See also article 3:2 DSU and Al-Kashif 2008, p. 543-544.

27 Appellate Body Report on *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (US – Oil Country Tubular Goods Sunset Reviews)*, WT/DS268/AB/R, 11 May 2007, par. 188. See also Appellate Body Report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia (US – Shrimp (Article 21.5 – Malaysia))*, WT/DS58/AB/RW, 22 October 2001, par. 108-109 where the Appellate Body extended the reasoning adopted in *Japan – Alcoholic Beverages II* to Appellate Body conclusions.

28 Panel Report on *US – Final Anti-dumping Measures on Stainless Steel from Mexico (US – Stainless Steel (Mexico))*, WT/DS344/R, 20 December 2007, par. 7.106.

29 Appellate Body Report on *US – Stainless Steel (Mexico)*, WT/DS344/AB/R, 20 May 2008, par. 146 and 158-162, see regarding the EC request, par. 149.

30 See also *US – Stainless Steel (Mexico)* Appellate Body Report, par. 160.

Article 31(2)(b) VCLT indicates that instruments made by one or more parties in connexion with the conclusion of the GATS and accepted by all parties are also part of the context. Protocols and ministerial decisions taken at Marrakech Conference should be seen as belonging to this category.³¹

Subsequent agreement and practice, as referred to in article 31(3)(a) and (b) VCLT, includes the additional protocols to the GATS resulting from post Uruguay Round negotiations. Subsequent practice also includes decisions of relevant WTO bodies and relevant parts of ministerial declarations.³²

Article 31(3)(c) VCLT refers to relevant rules of international law applicable between the parties. As explained, most commentators agree that this allows interpreting with reference to other rules of public international law that apply between the Members.³³

As is clear from article 31 VCLT, the object and purpose of the GATS are part of the initial means of interpretation.³⁴ For the purpose of the provisions under scrutiny in this paper it is enough to refer to the preambular paragraphs on liberalization and the expansion of trade in services and the right of Members to regulate. It is important to keep these potentially conflicting objectives in mind while interpreting GATS provisions, in particular those relating to domestic regulation, market access and national treatment.³⁵

Article 32 identifies preparatory work and the circumstances of its conclusion as supplementary means of interpretation. The most important sources to be considered as supplementary means are the Scheduling Guidelines (Guidelines) which will be discussed separately in §1.4.

As is apparent from the text of article 32 VCLT, the supplementary means of interpretation are not limited to a specific list of sources. As such generally accepted other methods are: logic, good sense, effective interpretation and the principle of *in dubio mitius*.³⁶

31 Krajewski 2003, p. 51.

32 Krajewski 2003, p. 52.

33 Above n 18.

34 Above n 22.

35 See for a more thorough description of GATS interpretation and the object and purpose of the Agreement Krajewski 2003, p. 56-57. As noted by Krajewski, the Appellate Body is extremely reluctant to refer to the object and purpose of WTO agreements, though it does refer to the object and purpose of specific provisions. I agree with Krajewski that this judicial self-restraint is not suitable for an academic study interpreting specific provisions. The object and purpose of the GATS reveals a conflict of objectives underlying the GATS which must be kept in mind when interpreting GATS provisions.

36 The principle of effective interpretation entails that effect is given to the meaning that most effectively supports the objectives of the parties to the treaty. The principle of *in dubio mitius* entails that effect is given to the meaning that is least restrictive on a State's sovereignty, confirmed by the Appellate Body as a principle to be used in WTO law in →

Although not legally binding, the rulings of the Panel and the Appellate Body in the *Gambling* case address several aspects of these provisions. These rulings will be discussed extensively. Moreover, the *Gambling* case has rekindled a lively debate regarding articles VI, XVI and XVII GATS which has led to useful insights which will be examined as well.

Finally, there are numerous documents created by various organs of the WTO, such as secretariat notes, notes provided by the chairs of specific negotiation groups, notes of meetings and accounts of discussions in relevant working groups. These notes are not legally binding, yet they often provide useful insight, not least as indicating those issues that are not unambiguous. As such they will be used similarly as opinions in the literature.

1.4 The Scheduling Guidelines

The Scheduling Guidelines are used in the *Gambling* case and in the literature to support many arguments, yet until recently their legal and interpretative status was unclear. Moreover, the discussion reflected in the last part of this paper revolves in part around the legal status of the Scheduling Guidelines. Therefore, it is necessary to specifically and extensively address this interpretative source.

During the Uruguay Round, the Group of Negotiating on Services created a document, known as the Scheduling Guidelines 1993, suggesting a common approach in scheduling in order to ensure that Member's schedules of commitments remain comparable and unambiguous.³⁷

This document has been revised, resulting in the Scheduling Guidelines 2001.³⁸ As the 2001 Guidelines apply from the moment of their adoption all schedules drafted prior to 23 March 2001 have been drafted according to the 1993 Guidelines.³⁹ The 2001 Guidelines are mostly a reproduction of the 1993 Guidelines with a few added provisions not leading to substantive

terpretation in *European Communities – Measures Concerning Meat and Meat Products (Hormones) (EC - Hormones)*, WT/DS26/AB/R, 13 February 1998, par. 165, see Krajewski 2003, p. 50. See also: Mavroidis 2007, p. 11.

37 GATT (GNS) 1993a, par. 1. See also addendum 1 to the Scheduling Guidelines: GATT (GNS) 1993b providing answers to several questions submitted by delegations relating to scheduling commitments. For clarity hereinafter referred to as: Scheduling Guidelines 1993 and Scheduling Guidelines 1993, addendum 1.

38 WTO (CTS) 2001a, for clarity hereinafter referred to as: Scheduling Guidelines 2001.

39 Scheduling Guidelines 2001, footnote 1. For this reason, the Panel and the Appellate Body in the *US – Gambling* case refer to the 1993 Guidelines. As the Appellate Body explains, the 2001 Guidelines are to the current negotiations what the 1993 Guidelines were to the Uruguay Round negotiations, *US – Gambling* Appellate Body Report, par. 190 fn 236.

changes.⁴⁰ To simplify matters, I will refer to 1993 version only, unless specifically indicated otherwise.⁴¹

The Guidelines provide information regarding the manner in which Members should schedule their commitments, a matter on which the GATS itself is relatively brief.⁴² Moreover, several interpretations of GATS provisions, in particular regarding articles VI, XVI, XVII and XX, are included in the Guidelines to facilitate the interpretation of a Member's scheduled commitments.

The Scheduling Guidelines are non-binding.⁴³ Opinions have often differed regarding the exact status of the Guidelines and their place within the VCLT as a means of interpreting the GATS and the schedules of specific commitments.⁴⁴

The Panel in *US – Gambling* believed the Scheduling Guidelines were to be seen as relevant context, thus falling under article 31(2) (a) or (b) VCLT.⁴⁵

40 As indicated by the Appellate Body there are some minor additions, *US – Gambling* Appellate Body Report, par. 190, fn 236. For example, paragraph 8 of the 2001 Guidelines corresponds to paragraph 4 of the 1993 Guidelines yet adds a clarifying sentence. However, the substance of the paragraph is unaltered by this addition. See also Mavroidis 2007, p. 5. Note that some annexes and an illustrative list of limitations to national treatment have been added.

41 As existing commitments are based on the 1993 Guidelines, it is submitted that, as no substantive changes were made, citing either the 1993 or 2001 version should not make a difference except when referring to the attachments made to the 2001 version.

42 A brief amount of information can be found in articles XVI, XVII, XVIII and XX GATS.

43 The Guidelines do not provide a legal interpretation of the GATS, Scheduling Guidelines 1993, par. 1. As the name suggests, they are intended as guidelines, Krajewski 2003, p. 76.

44 Prior to the circulation of the Panel and Appellate Body Reports in the *Gambling* case, Krajewski refers to the Scheduling Guidelines 2001 as subsequent practice of WTO Members according to article 31(3) (b) of the VCLT, Krajewski 2003, p. 77. Mavroidis implies that the Panel in *Mexico – Telecoms* considered the Scheduling Guidelines as an integral part of the *Travaux Préparatoires*, which would classify them under article 32 VCLT, Mavroidis 2007, p. 7. However, I do not agree with this reading for two reasons. First, while the Panel relies on two documents attached to the Scheduling Guidelines 2001, a Note by the Chairman attached to the Notes for Scheduling Basic Telecommunications Services Commitments, WTO (NGBT) 1997 and the Draft Model Schedule of Commitments on Basic Telecommunications, WTO (NGBT) 1995, it is not the legal status of the Scheduling Guidelines 2001 that is addressed by the Panel; it is the two attached documents that are considered to be an integral part of the *Travaux Préparatoires*. The Panel did not express an opinion on the interpretative value of the Scheduling Guidelines themselves: 'We accept that the footnote means that the attachment of the Draft Model Schedule and the Note by the Chairman to the Scheduling Guidelines should not in itself affect the existing interpretative status of the two documents.' Second, the Panel does not provide a definitive answer to the question whether these documents should be considered under article 32 of the VCLT. It only states that even if the documents should not be assessed under article 31, they still could be treated as an important part of the 'circumstances of its conclusion' within the meaning of article 32 VCLT, Panel Report on *Mexico – Measures Affecting Telecommunications Services (Mexico – Telecoms)*, WT/DS204/R, 1 June 2004, par. 7.67. (Emphasis added).

However, on appeal the Appellate Body rejected the view that the Scheduling Guidelines should be considered as an instrument of treaty interpretation under article 31 VCLT.⁴⁶ Furthermore, the Appellate Body concluded that the Scheduling Guidelines 2001 cannot be considered as subsequent practice of the 1993 Guidelines under article 31(3) (b) VCLT. As they were adopted in the context of future commitments (i.e. those inscribed during the Doha Round), they cannot constitute evidence regarding existing commitments (i.e. those inscribed during the Uruguay Round).⁴⁷ Instead both documents are treated by the Appellate Body as preparatory work for their respective negotiating rounds and thus they form supplementary means of interpretation within the meaning of article 32 VCLT for those rounds.⁴⁸

The Appellate Body's classification of the Guidelines as preparatory work under article 32 VCLT is not without its critics. The underlying issue in the assessment of the Scheduling Guidelines in *US – Gambling* was whether the United States' commitment could be interpreted by applying the Services Sectoral Classification List (which is based on the United Nations' Provisional Central Product Classification and often referred to as the 'W/120 list'), as suggested by the Guidelines.⁴⁹ As noted by Ortino, the Appellate Body recognised that the negotiating history recorded: 'confirmation of the agreement to base the classification of services sectors and sub-sectors as much as possible on the Central Product Classification (CPC) list.'⁵⁰ According to Ortino, it is thus unclear why the Appellate Body in the *Gambling* case did not consider the Guidelines to 'constitute evidence of an underlying, albeit more limited in scope, consensus among parties that had emerged during the negotiations', i.e. evidence of sub-

45 *US – Gambling* Panel Report par. 6.86 and 6.94, and rejecting an interpretation that would consider the Guidelines as preparatory work in the sense of article 32 VCLT, par. 6.95.

46 *US – Gambling* Appellate Body Report, par. 174-178 and 190-195.

47 *US – Gambling* Appellate Body Report, par. 190-195. Moreover, the Council for Trade in Services Decision adopting the 2001 Guidelines specifically states that they are non-binding and shall not modify any rights or obligations of the Members under the GATS: WTO (CTS) 2001c, par. 1-3. See also Mavroidis 2007, p. 5. As such, the non-binding status of the Guidelines is repeated in the revised edition, Scheduling Guidelines 2001, par. 1.

48 *US – Gambling* Appellate Body Report, par. 196-197.

49 Scheduling Guidelines 1993, par. 16, Services Sectoral Classification List: GATT (GNS) 1991a, see Ortino 2006, p. 125. This W/120 list is based on the United Nations' Provisional Central Product Classification which creates a detailed categorization of both goods and services. The W/120 list simply copies the services categorization of that list.

50 Ortino 2006, p. 128. GATT (GNS) 1991b, par. 18, referred to in *US – Gambling* Appellate Body Report, par. 176 fn 210.

sequent agreement under article 31 VCLT rather than preparatory work under article 32.

According to Ortino, not accepting the Scheduling Guidelines as relevant context under article 31 is based on a view that the document should be considered in its entirety only. On this view, the fact that parts of the document do not reflect general agreement amongst Members precludes its use as evidence of subsequent agreement. However, Ortino takes the view, and I concur, that when interpreting GATS provisions and schedules of commitments nothing prevents those parts of the Guidelines that do enjoy wide acceptance among Members being considered as evidence of subsequent agreement under article 31.⁵¹

From a practical perspective, the Guidelines are followed by most Members when scheduling their commitments leaving them significant in understanding the schedules.⁵² Moreover, the Appellate Body uses the rest of a Member's schedule and schedules of other Members as context for a particular commitment.⁵³ As noted by Krajewski, the combination of these two facts leads to the conclusion that Members wishing to deviate from the CPC list should do so explicitly.

In the *China – Distribution Services* case the Panel confirmed the approach adopted in *US – Gambling*. Initial conclusions performed on the basis of article 31 VCLT regarding a Member's inscribed commitment are specifically confirmed by comparing the commitment with the CPC list and the W/120 list in

51 Ortino warns that the Appellate Body's approach to the interpretation method in article 31 VCLT and the resulting use of article 32 VCLT ignores that the latter provision should only be relied upon if the examination resulting from article 31 leads to ambiguous or obscure results. Article 32 should not be employed as a standalone solution precisely because its use would be applied to a 'difficult' treaty text (since the application of article 31 VCLT did not provide a satisfying result). Recourse to article 32 forms a discretionary step, which is signified by the phrase: '[r]ecourse may be had to supplementary means of interpretation' in article 32 VCLT. See for a full explanation of this critique on the Appellate Body's approach, Ortino 2006, p. 125-132.

52 See for a similar argument based on the schedules of commitments, Mattoo 1997, p. 110 fn 6, p. 115 and 117. He states that if scheduling practice by Members was based on a certain view that this gives an interpretation according to that view 'a certain credence'. This argument applies to the Guidelines as well as many Members have scheduled according to its suggestions. It is important to realise that the schedules of specific commitments form an integral part of the GATS, see article XX:3 GATS. Therefore, schedules might be drafted unilateral but they are interpreted as agreement among all Members, see *US – Gambling* Panel Report, par. 6.44 and Appellate Body Report, par. 159, see also Krajewski 2005, p. 422-423.

53 *US – Gambling* Appellate Body Report, par. 178.

the light of the rest of a Member's schedule and the schedules of other Members.⁵⁴

To conclude, the Scheduling Guidelines should be seen as supplementary means of interpretation within the meaning of article 32 VCLT, the 1993 Guidelines regarding the Uruguay Round negotiations and the 2001 Guidelines for the current negotiations. Furthermore, it is sensible to regard the CPC list and the W/120 document as a source of evidence regarding a Member's commitments. As these documents are non-binding, Members have the possibility to specifically deviate from that list, however, this should be done explicitly.

54 *China – Publications and Audiovisual Products* Panel Report, par. 7.923. The Panel adopts a very careful and thorough approach based on the Vienna Convention towards analysing specific commitments, perhaps in response to the critique following the *Gambling* case. See for instance: *China – Publications and Audiovisual Products* Panel Report, par. 7.943-7.954 and in particular the 66 paragraphs concerning China's commitment on 'sound recording distribution services': par. 7.1182-7.1247. The Panel decision has been appealed by China: *China – Publications and Audiovisual Products*, Notification of an Appeal by China, WT/DS363/10, 22 September 2009.

PART 2 THE GATS APPROACH TO LIBERALIZATION

Before turning to the substance of this paper it is essential to provide an analysis of the GATS approach towards liberalization. After a brief introduction (§2.1) and a description of the GATT approach for comparison (§2.2), the GATS structure towards liberalization will be described (§2.3). The next section will emphasize the importance of upholding the adopted structure by classifying measures according to their appropriate GATS provision (§2.4). Finally, the specific provisions that, combined with Members' schedules of commitments, provide the regulatory framework towards liberalization adopted in the GATS will be analysed separately (§2.5).

The analysis provided in part 2 will be used when examining the more problematic aspects of these provisions in part 3. As such part two contains the generally accepted approaches and interpretations regarding these provisions which will be used to provide a base for approaches and interpretations which are still under discussion in the literature. Suggestions for solutions to the indicated problems in part 3 will be included where possible.

2.1 Introduction

Liberalizing international trade in services takes a different form than the traditional approach adopted to liberalize trade in goods. Due to the characteristics of services and the fact that proximity of supplier and consumer is often required, international trade in services often does not cross borders in the same way as trade in goods does. Therefore international trade in services cannot effectively be controlled at physical borders.⁵⁵ The consequence of this is that barriers to trade in services take a different form than traditional border measures such as tariffs and quantitative restrictions.

55 As explained by Karsenty, cross-border trade, or mode 1, is similar to trade in goods if the service can be embodied in a transportable medium, Karsenty 2000, p. 35-36. The nature of services, and the delineation between goods and services tends to shift due to technical and structural change, a process which is described by Bhagwati as 'the splintering of goods from services and services from goods' and the 'disembodiment of services', see Bhagwati 1984, p. 134-138.

Djordjevic explains that cross-border trade in services does not entail the transfer of a service across a border but rather the result of the service performed, Djordjevic 2002, p. 306, referring to Karsenty 2000, p. 41: 'The consumer, although being abroad, remains a resident of its home country, thus giving rise to transactions between residents and nonresidents. The result is an import of services for the country of the consumer and an export for the supplying country.' Services supplied through commercial presence, mode 3, or the presence of natural persons, mode 4, are equally 'undetected' at the border as these services are produced and consumed within the host state.

While such barriers can be used for protectionist aims, normally the intention is not to restrict trade in services as such. Instead, these barriers may often take the form of justifiable regulatory measures or other policy instruments, as a side effect, restrict trade in services. For example, measures aimed at improving the quality or efficient supply of services or the capability of the provider. Some forms of regulation do not address a particular service at all, yet nevertheless forms a barrier that affects trade in that service.⁵⁶

Government measures affecting services trade appear in many forms. In the first place, the concept of services itself includes a wide range of different activities and can, from a GATS perspective, be supplied through four different modes.⁵⁷ As there are currently 153 WTO Members with differing political, social and economic systems and numerous regulatory methods, the degree of regulatory variation is high indeed.⁵⁸

Moreover, services sectors tend to be heavily regulated. The GATS does not aim to remove such regulations, as is evident from its recognition of a Member's right to regulate services. Rather, the focus of the agreement is on the removal of ineffective or unnecessary regulations and disguised forms of protectionism.⁵⁹

2.2 Comparison with the GATT structure

As the GATS mechanism of liberalization is partly modelled on the GATT, it is useful to briefly explore the GATT structure, which contains several provisions that might be viewed as the counterparts of the GATS provisions here under discussion.⁶⁰

56 See for a brief explanation, including the problem of assessing trade effects of domestic regulation, Delimatsis 2006b, p. 16-17.

57 Article 1:2 GATS, the international provision of services is defined by referring to four possible modes of supply: cross-border supply, consumption abroad, commercial presence and the movement of natural persons.

58 Cape Verde was the last member to join on 23 July 2008, see the website of the WTO <www.wto.org>. Krajewski 2003, p. 39. Krajewski has created a useful general overview of economic and political motivations for regulation as well as a description of common instruments of regulation and regulatory policies. From this overview Krajewski distils a typology of regulatory measures based on the degree of intervention or restriction of economic behaviour. This typology consists of three categories from least to highest interventionist: economic incentives, behavioural controls and restrictions of activities. Krajewski's categorisation is useful when dealing with the notions of 'necessity' and 'least-restrictiveness' in WTO law, see Krajewski 2003, chapter 2. See also OECD 2001.

59 Matsushita *et al* 2006, p. 604; Van den Bossche & Denters 2007, p. 646.

60 See for a more thorough explanation regarding the purpose of these GATS provisions and their GATT counterparts: Pauwelyn 2005, p. 133-139 and Irwin & Weiler 2008, p. 99-101. See also Mattoo 1997, p. 112-113. See §1.3 regarding the use of GATT provisions for analogous interpretation.

The GATT structure applying to trade in goods differentiates between two types of measures. Custom duties and quantitative restrictions are applied at a Member's borders and are referred to as border measures or market access restrictions. Regulations that apply within a Member's territory, such as safety standards or internal taxation, are referred to as domestic regulation or internal measures.⁶¹

As market access restrictions only target the import of goods, and therefore do not affect domestic products, the presumption is that these measures are aimed at protectionism. The GATT aims at the reduction of such restrictions and therefore market access restrictions are in principle prohibited.⁶²

The GATT approach to domestic regulation is different. By targeting both foreign and domestic products, non-discriminatory domestic regulations presumably have a non-protectionist aim and as such fall within the sovereign right of Members to regulate. Such measures are therefore in principle allowed. Following the same rationale, discriminatory domestic regulation, when disfavouring the import of goods, is in principle prohibited.⁶³

As indicated by Pauwelyn, there are both economic and political arguments for the distinction adopted within the GATT. Protectionist measures are, in general, economically wasteful both for foreign producers and domestic consumers. From a political perspective, protectionism usually serves an economic interest only. In contrast, domestic regulation normally addresses various legitimate objectives such as safety for consumers, quality of products and environmental protection.⁶⁴

The original GATT regime on domestic regulation was altered in 1995 with the adoption of the WTO Agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT). These agreements impose certain conditions on non-discriminatory domestic regulations.⁶⁵

61 Article II GATT addresses market access restrictions in the form of custom duties and 'other duties or charges imposed on or in connection with importation'. Article XI GATT addresses quantitative import prohibitions or restrictions. Article III GATT addresses domestic regulation, thus measures which apply to foreign and domestic products.

62 Article II GATT states that a Member cannot impose tariffs higher than a country's schedule which contains that country's concessions on the bindings of tariffs. Article XI GATT contains a general prohibition on quantitative restrictions.

'In principle' as the GATT contains several justification provisions, Mattoo 1997, p. 112 and Pauwelyn 2005, p. 134.

63 Article III GATT contains the national treatment obligation, note that the GATT does not address discriminatory treatment in favour of imported products. See also: Pauwelyn 2005, p. 134.

64 Pauwelyn 2005, p. 134-135.

65 Examples of these conditions are the requirement that such measures should not be more trade restrictive than necessary to fulfil certain objectives, such as the protection of hu-
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2.3 The GATS structure

While different views exist as to whether a similar regime for market access restrictions and domestic regulation is adopted in the GATS, a similar rationale can be discerned in its provisions.⁶⁶

The structure of the GATS differentiates between measures that limit market access for foreign services and service suppliers and measures that are aimed at public policy objectives.⁶⁷ This distinction is incorporated through articles XVI and XVII on the one hand, and article VI on the other. Market access restrictions contained in article XVI GATS are quantitative in nature and in principle prohibited, as are discriminatory regulations on the basis of article XVII GATS.⁶⁸

It should be stressed that articles XVI and XVII strive towards market access and national treatment but do not generally impose these obligations. Market access and national treatment apply only insofar as Members have specifically undertaken commitments in their schedules of commitments.⁶⁹

man health (5:6 SPS and 2:2 TBT), see: Pauwelyn 2005, p. 135. See also: Irwin & Weiler 2008, p. 101.

66 Mattoo states that the delineation of disciplines in GATS runs between quantitative measures and discriminatory measures. He indicates that the distinction in the GATS 'does not correspond in any neat way to GATT distinctions'. While that is certainly true when comparing articles XVI and XVII GATS to their GATT counterparts, in my opinion the approach adopted by Pauwelyn, who includes article VI in the comparison, provides a better view on the general approach of both agreements. Pauwelyn indicates that the dividing line in the GATS, as in the GATT, runs between market access restrictions on the one hand and domestic regulation on the other, see Mattoo 1997, p. 113 and Pauwelyn 2005, p. 135-136. Ortino, albeit less explicitly, adopts the same approach, Ortino 2006, p. 140 fn 75. Note however that this general comparison of the rationale behind the divisions adopted in GATT and GATS provisions is forced, mainly due to the difference between international trade in goods and trade in services (and therefore the differences between regulatory barriers restricting such trade). The comparison certainly does not apply to the specific provisions as such, as both Mattoo and Pauwelyn indicate: Mattoo 1997, p. 113 fn 14 and Pauwelyn 2005, p. 134 fn 9. Similar: Delimatsis 2006a, p. 1063 fn 20. Compare for example the general prohibition on quantitative restrictions in GATT article XI and the 'mere' requirement to schedule limitations under GATS article XVI.

67 Low & Mattoo 2000, p. 455.

68 Pauwelyn 2005, p. 136-137. This is 'in principle' because, like the GATT, the GATS prohibitions are not absolute due to justification provisions. Measures violating general obligations and specific commitments can be justified based on the economic emergency exception (article X), threats to the balance of payments (article XII), general exceptions (article XIV) or security exceptions (article XIV bis).

69 The provisions on market access and national treatment only apply to specific sectors and modes of supply depending on a Member's inscribed commitments. This approach is referred to as a positive list approach and links market access and national treatment to

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Similar to the GATT structure, non-discriminatory domestic regulations are presumed to address the quality of services and the qualifications of service providers and therefore are in principle allowed.⁷⁰ However, article VI GATS targets unnecessary impediments to international trade caused by such non-discriminatory domestic regulations, as do the SPS and TBT agreements regarding trade in goods. As it is impossible to categorically classify regulatory interventions as either restricting trade or not restricting trade, article VI requires the measure in question to be the least-trade restrictive.⁷¹

It is important to realise that this least-trade restrictive regime regarding domestic regulation has not yet been implemented but rather is still the subject of negotiations. In the meantime, article VI:5 establishes several provisional conditions which apply to licensing and qualification requirements and technical standards.⁷²

Incorporating this regime proved troublesome when drafting the GATS. One reason is that trade in services is ill-suited for regulation at the border,⁷³ for example, because such trade often takes place intra-territorially.⁷⁴ Barriers to trade in services are therefore more often caused by domestic regulatory measures. Moreover, even regulation that does not address trade in services as

progressive liberalization: Delimatsis 2006a, p. 1060; Wouters & Coppens 2008, p. 212-213. See also: *US – Gambling* Panel Report, par. 6.310.

70 Pauwelyn 2005, p. 136.

71 Low & Mattoo 2000, p. 455. See for an explanation of the aim of article VI GATS in particular: Delimatsis 2006b, p. 17-18. This division between articles VI, XVI and XVII is often referred to as a three-pronged approach. Articles XVI and XVII target market access restrictions and discriminatory measures while article VI complements this approach towards effective access to services markets by targeting unnecessary non-discriminatory domestic regulation, see for example Feketekuty 2000, p. 101 referring to the approach as a 'three-legged stool'. It should be made clear that I do not believe that the text of article VI excludes discriminatory measures from its scope, a matter discussed in detail at §3.1.1.

72 As indicated by Nicolaïdis & Trachtman, the negotiating parties could at the time not agree on blanket restrictions on their national regulatory sovereignty, Nicolaïdis & Trachtman 2000, p. 258-259. It is possible that the future regime will take the form of a necessity test, see Wouters & Coppens 2008, p. 246-254.

73 Services often cannot be controlled at the border or would require a costly and burdensome policing system, see: Matsushita *et al* 2006, p. 604-605. The invisible character of services (Wouters & Coppens 2008, p. 207), the intangible nature of services (Pauwelyn 2005, p. 135), the intangible and personal nature (Ortino 2006, p. 140 fn 75) and the requirement of proximity between supplier and consumer (Djordjevic 2002, p. 306) are cited as explanations for the difficulty of controlling trade in services through border measures. Thus this difficulty is directly related to the nature of services provision. These often used characteristics differentiating services from goods have been summarized by Levitt 1983, p. 92-102 and Bhagwati 1984, p. 135-136.

74 Matsushita *et al* 2006, p. 604.

such can form a barrier to trade.⁷⁵ Finally, the service sector tends to be heavily regulated to begin with.⁷⁶ All these factors lead to a large number and widely varying range of regulatory barriers restricting trade in services, complicating attempts to liberalize service markets.⁷⁷

Therefore, the helpful presumptions available when dealing with trade in goods (i.e. that border measures are presumed protectionist and non-discriminatory domestic regulations are presumed non-protectionist), are less useful in the context of trade in services.⁷⁸ The GATS distinction between market access and domestic regulation is thus not based on whether a measure is applied at the border.⁷⁹

As often indicated, the GATS provisions have to strike a delicate balance between the preservation of legitimate trade regulation falling within the sovereign right of Members to regulate on the one hand, and trade liberalization and the abolishing of protectionist and unnecessary barriers to trade in services on the other.⁸⁰ The interaction between articles VI, XVI and XVII can best be understood against this background. The provisions try to regulate the reduction of barriers to trade in services derived from market access restrictions, discriminatory regulation and unnecessary restrictive non-discriminatory domestic regulation.

2.4 Importance of applying the right provision

The GATS provisions VI, XVI and XVII differ in restrictive nature and scope. Article XVI provides a *per se* prohibition, in principle none of the measures listed in article XVI:2 may be applied. In contrast, article XVII and VI provide normative criteria to be followed when enacting regulation – as long as the criteria listed in those provisions are fulfilled they are lawful from a GATS perspec-

75 Delimatsis 2006b, p. 15; Krajewski 2003, p. xviii. See for a useful overview of measures affecting trade in services OECD 2001 and Krajewski 2003, p. 21-39, see earlier: n 58.

76 Matsushita *et al* indicate asymmetry of information, negative external influences and concentration of power among dominant players as often listed grounds in the literature for such regulation, Matsushita *et al* 2006, p. 604.

77 Matsushita *et al* 2006, p. 605.

78 Similar: Delimatsis 2006b, p. 17 and Ortino 2006, p. 140 fn 75.

79 Types of measures to which market access applies in the context of trade in goods, tariffs, quantitative restrictions and other border measures, are not readily available in the services context. As Lang states, the list of market access restrictions included in article XVI:2 GATS is roughly analogous to these border measures traditionally applied in relation to trade in goods, Lang 2009, p. 160.

80 See for example: Wouters & Coppens 2008, p. 207; Delimatsis 2006b, p. 15; Pauwelyn 2005, p. 133; Djordjevic 2002, p. 305-306. See for a thorough discussion on the interaction between the concepts of trade liberalization and regulatory autonomy: Krajewski 2003.

tive.⁸¹ As indicated by Ortino, the difference in the type of restriction used in each provision has its reflection in the scope of each provision: 'the more lenient the normative content, the broader is the reach of each provision'.⁸²

As such, article XVII applies to all measures affecting the supply of services and requires only national treatment in respect of those measures. In contrast, article XV imposes a *per se* prohibition on a limited list of measures. Article VI can be placed in the middle, prescribing due process conditions to the administration of all measures of general application and a reasonableness standard (transparency, objectivity and necessity) to licensing and qualification requirements and technical standards applying to services.⁸³

As is apparent from the different legal consequences, applying the appropriate GATS provision to measures is important. For example, applying the wrong type of provision may result in a market access restriction being treated as domestic regulation, frustrating liberalization. Alternately, as is emphasized in the literature, market access violations might be found in situations that properly fall within a Member's regulatory autonomy.⁸⁴

As will be discussed below, distinguishing which measure falls under which provision has proven difficult, as certain measures cannot be clearly classified.⁸⁵

81 See in particular Ortino 2006, p. 137-139. As indicated by Ortino, articles XVII and VI:5 require regulatory instruments to be non-discriminatory and of a 'reasonable nature' (i.e. regulation needs to be based on objective and transparent criteria and should not be more burdensome than necessary). To this can be added that article VI contains conditions of a procedural nature, see §2.5.1.

82 Ortino 2006, p. 139.

83 Ortino 2006, p. 139.

84 Pauwelyn 2005, p. 133; Ortino 2006, p. 141. A specific problem with classifying article VI measures erroneously under article XVI or XVII is that violations of these last provisions can only be justified with the exhaustive exceptions contained in articles XIV and XIV *bis*, whereas the range of policy justifications under article VI is open-ended. In addition, the burden of proof under article VI rests on the complainant whereas successful justification under articles XIV and XIV *bis* requires proof by the defendant. The conditions contained in the chapeau of articles XIV and XIV *bis*, including the requirement of non-discrimination, are stricter than article VI as well. It is also important to remember that, contrary to article XVI and XVII, violations under article VI cannot be scheduled, see Pauwelyn 2005, p. 138-139.

85 As is apparent from the wide variety of opinions regarding the matter among Members and in the literature, see below n 197.

2.5 Brief description of the provisions

2.5.1 Article VI, domestic regulation

The intention of article VI is to discipline those regulations that are not dealt with by the provisions on market access and national treatment but yet present unnecessary impediments to international trade in services.⁸⁶ Article VI paragraphs 1, 3, 5 and 6 only apply to sectors where specific commitments have been undertaken.⁸⁷ The regulations intended to be captured by article VI are those that address objectives, in a non-discriminatory manner which fall within the scope of regulatory autonomy of the Members, yet do so in a manner that is not required in achieving that objective.⁸⁸

Article VI consists of three parts: procedural rules, a mandate relating to the development of disciplines concerning licensing, qualifications and technical standards and rules relating to the provisional application on the topic provided in the mandate.⁸⁹

The first three paragraphs and paragraph 6 provide procedural rules referred to by Delimatsis as introducing the concept of procedural due process in the GATS.⁹⁰ Members are required to ensure that measures of general application are administered in a reasonable, objective and impartial manner. Regarding specific administrative decisions, Members are required to provide independent review. Moreover, where appropriate, remedies for decisions that affect trade in services must be provided. Finally, transparency and due

86 A thorough description of article VI GATS is provided in Delimatsis 2006b.

87 As indicated, no commitments regarding article VI itself can be inscribed. Article VI paragraphs 1, 3, 5 and 6 only apply to sectors that have been scheduled. It is unclear whether this requires commitments under both XVI or XVII or whether a specific commitment in one domain is enough, though the text seems to indicate the latter and I will adopt this approach, see Wouters & Coppens 2008, p. 217. Article XVIII is included in the specific commitments part of the GATS. Thus scheduling a measure under this provision should trigger the application of article VI as well. In my opinion, it is safe to presume that article VI applies only insofar as commitments have been scheduled under either provision.

88 Delimatsis 2006b, p. 17; in the words of the Panel in *US – Gambling*, ‘... Members maintain the sovereign right to regulate within the parameters of Article VI of the GATS.’, *US – Gambling Panel Report*, par. 6.316.

89 Delimatsis 2006b, p. 18.

90 Delimatsis 2006b, p. 32-33. Feketekuty describes due process as the opportunity to consult the government on the interpretation and application of regulations, to appeal regulatory decisions and to obtain a timely response to requests for regulatory decisions, Feketekuty 2000, p. 229-230.

process are required in procedures where a service supplier has made a request for authorization.⁹¹

Paragraph 6 requires Members to provide adequate procedures to verify the competence of professionals of other Members. The only requirement is the availability of an adequate procedure, no substantial requirement is listed. Exactly what an adequate procedure entails is unclear.⁹²

Article VI:4 provides a mandate to the Council for Trade in Services relating to the development of disciplines (i.e. substantive rules) concerning qualification requirements and procedures, technical standards and licensing requirements. The standards included in paragraph 4 set a minimum that needs to be addressed by these disciplines, as is evident from the phrase '*inter alia*'.⁹³

VI:4.

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

91 Thus article VI:1 seems to apply to measures of general application while paragraphs 2, 3 and 6 apply to measures with a specific scope such as administrative decisions, Wouters & Coppens 2008, p. 218. Measures of general application affect 'an unidentified number of economic operators' or 'a range of situations or cases, rather than being limited in their scope of application.', Delimatsis 2006b, p. 20, referring to article X GATT case law concerning the identical term. VI:1 does not refer to the substantive content of domestic regulations, but only to their administration. *US – Gambling* Panel Report, par. 6.432; Wunsch-Vincent 2006, p. 388; Delimatsis 2006b, p. 19. Delimatsis provides an extensive description of the concept of 'administration' based on case law regarding the comparable requirement contained in article X GATT. The distinction between the substance of measures and their administration becomes problematic for substantive measures that are administrative in nature. According to the case-law on current article X GATT, such measures are considered as administrative measures, Delimatsis 2006b, p. 21-24. For a thorough analysis of these procedural rules, see: Delimatsis 2006b, p. 20-24, 28-31 and 31-35. See also: Wouters & Coppens 2008, p. 217-219.

92 Delimatsis 2006b, p. 47-48.

93 Delimatsis 2006b, p. 18, the substance of article VI was left for future negotiations as the work on the market access and national treatment provisions took precedence, see: GATT (GNS) 1991c, par. 46. See also Krajewski 2003, p. 132-134. The obligation contained in article VI:4 will apply in general and not only to committed sectors to licensing, qualifications and technical standards (as is the case with the provisional application of these obligations through article VI:5). Considering the far reaching consequences, the negotiations were left for another day, Delimatsis 2006b, p. 36-37.

- (b) *not more burdensome than necessary to ensure the quality of the service;*
- (c) *in the case of licensing procedures, not in themselves a restriction on the supply of the service.*

The mandate of article VI:4 has led the Council for Trade in Services to establish a Working Party on Professional Services (WPPS), tasked with the development of multilateral disciplines in the accountancy sector.⁹⁴ The resulting Disciplines on Domestic Regulation in the Accountancy Sector were adopted but are not yet in force. The adoption of the Accountancy Disciplines will not take place before the conclusion of the Doha Round negotiations.⁹⁵

In contrast with the sector specific Accountancy Disciplines, the mandate is currently being used to negotiate horizontal disciplines on domestic regulation within the Working Party on Domestic Regulation (WPDR).⁹⁶ As expressed in a note by the secretariat, the Accountancy Disciplines should not be seen as setting precedent but nevertheless constitute a helpful background for future work on article VI:4.⁹⁷

Article VI:5 provides for the provisional application of the requirements contained in the mandate of paragraph 4, but only in sectors where commitments have been inscribed.

VI:5.

- (a) *In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:*
 - (i) *does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and*
 - (ii) *could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.*

94 WTO (CTS) 1995.

95 WTO (CTS) 1998a, for clarity hereinafter referred to as the Accountancy Disciplines. While the Accountancy Disciplines are not in force, Members that have inscribed specific commitments on accountancy should 'to the fullest extent consistent with their existing legislation, not take measures which would be inconsistent with these disciplines.' WTO (CTS) 1998b, par. 2.

96 Replacing the WPPS, see for a detailed description of the negotiations relating to the Disciplines on Domestic Regulation: Wouters & Coppens 2008, p. 220-253.

97 WTO (CTS) 1999, par. 6.

- (b) *In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations⁹⁸ applied by that Member.*

Specific commitments may not be nullified or impaired through the application of domestic regulatory measures covering licensing, qualifications, or technical standards.⁹⁹ The listed criteria in VI:5(a) apply cumulatively.¹⁰⁰

Depending on what is considered 'reasonably expected' the effectiveness of article VI:5 could be greatly reduced. As all domestic regulation within the meaning of this provision already in place when a commitment is undertaken could be seen as reasonably expected, this provision would not apply to such regulations.¹⁰¹

2.5.2 Article XVI, market access

Article XVI contains the market access principle.¹⁰² This provision only applies if Members have undertaken a specific commitment. Paragraph 1 provides:

*'With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.'*¹⁰³

98 (Original footnote) The term 'relevant international organizations' refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

99 For a discussion concerning the concept of nullification or impairment, see Delimatsis 2006b, p. 41-45.

100 That they apply cumulatively is apparent from the word 'and'.

101 This view is supported by Pauwelyn and considered viable by Delimatsis, see Pauwelyn 2005, p. 167-168 and Delimatsis 2006b, p. 40-41. This reading is supported by a Secretariat Note: WTO (CTS) 1999, par. 11. Regarding existing commitments, this would entail that measures in place when the GATS entered into force in 1995 would be exempted from article VI:5. However, as is apparent from discussion in the WPDR, not all Members agree to this reading, WTO (WPDR) 2003b, par. 16 and 30. For example: the Singapore representative expresses the opinion that this article could be said to exempt pre-existing domestic regulation, while the Hong Kong, China representative expressed that the opposite could hold true as well: 'If, for example, a Member undertook a commitment on mode 4 in a particular service sector, it would be expected that the Member eliminate procedures that would make it impossible for someone from abroad to have their qualifications certified.'

102 A useful short assessment of this provision is provided by: Ortino 2006, p. 120-121. See also Mavroidis 2007, p. 3.

103 (Original footnote) If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member

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As indicated by the Appellate Body, this paragraph in itself contains no obligation, simply linking the market access obligation to the obligations a member has undertaken as inscribed in its schedule.¹⁰⁴

Article XVI paragraph 2 describes the substance of an article XVI commitment as it lists the type of measures a member can no longer maintain if a full market access commitment has been inscribed. The listed measures are considered as particularly damaging for market access and unjustified from an economic policy perspective.¹⁰⁵ The list provided in paragraph 2 is exhaustive, a reading confirmed by the Panel in the *Gambling* case. Therefore, Members can maintain other measures restricting market access even if a full market access commitment has been inscribed.¹⁰⁶

The Panel's finding was not reviewed by the Appellate Body on appeal. However, as noted by Krajewski, the Appellate Body stated that the US could not maintain any of the listed measures by inscribing a full market access commitment, which would seem to confirm the Panel's view.¹⁰⁷

undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of article I, it is thereby committed to allow related transfers of capital into its territory.

104 *US – Gambling* Appellate Body Report par. 235.

105 Zleptnig 2008, p. 392. Incorporating the market access discipline in the area of services has proven difficult, see above text at n. 73 and n. 78.

106 For an explanation of earlier uncertainty regarding the exhaustive nature of the list, see: Krajewski 2003, p. 82-84, who concluded that the list is indeed exhaustive; implicit *Mattoo* 1997, p. 109; Arup 2000, p. 121; see also the Scheduling Guidelines, par. 4.

Article XVIII provides the possibility of scheduling other measures besides those subject to scheduling in article XVI and XVII, including measures relating to qualifications, standards, or licensing (the subject of article VI). If article XVI was not limited to the list provided in the second paragraph, the possibility of scheduling these other measures under a separate provision, article XVIII would not be needed. This reading of article XVI has been confirmed by the Panel in the *Gambling* case in a finding not reviewed by the Appellate Body, *US – Gambling* Panel Report, par. 6.298 and par. 6.318. See also Pauwelyn 2005, p. 159; Krajewski 2005, p. 431-432; Delimatsis 2006a, p. 1064-1065 and Zleptnig 2008, p. 393.

107 Krajewski 2005, p. 431, referring to: *US – Gambling* Appellate Body Report, par. 215 and Zleptnig 2008, p. 401. Ortino, on the other hand, indicates that the Appellate Body would possibly disagree with the finding that the list in article XVI:2 is exhaustive. He considers the fact that the Appellate Body applies both article XVI:2(a) and (c) to the US measures as indicating the opinion that they are not really exhaustive in nature, as that would not allow for the limitations listed in subparagraphs (a) to (f) to apply cumulatively. In my opinion this argument is incorrect as nothing prevents a measure from falling into two categories of exhaustively formulated limitations. A measure can simply restrict both service suppliers and service transactions, thus falling within both subparagraph (a) and (c). I do not see why that would make those subparagraphs no longer exhaustive. Ortino cites Pauwelyn as source for the argument, yet Pauwelyn does not seem to indicate such argument at the cited page, nor anywhere else in the specific publication, Ortino 2006, p. 137 fn 67 citing Pauwelyn 2005, p. 163. Ultimately, I do not think the Ap-

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Members can also inscribe partial commitments. Under article XVI a member inscribes a partial commitment by specifying one or more of the measures listed in paragraph 2 they wish to maintain.¹⁰⁸

XVI:2 provides:

'In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- (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;*
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;*
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;¹⁰⁹*
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;*
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and*
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.*

Not only is the list contained in paragraph 2 exhaustive, the same applies to the elaborations contained within that list. The *Gambling* case confirmed that

pellate Body would consider the XVI:2 list non-exhaustive as there is overwhelming evidence and support for the exhaustive nature of that list, see above n 106.

108 In contrast with article XVII and XVIII, where partial commitments can relate to any measure Members wish to exempt from their commitment, partial commitments under article XVI only specify the paragraph 2 measures they wish to maintain as the exhaustive nature of the list renders scheduling other exceptions to the undergone commitment unnecessary.

109 (Original footnote) Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

only measures in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test are addressed by article XVI:2(a) and only measures in the form of designated numerical units in the form of quotas or the requirement of an economic needs test are addressed by article XVI:2(c).¹¹⁰

While this Panel ruling only applies to XVI:2(a) and (c), in my opinion the exhaustive nature of the elaborations should apply to sub (b) and (d) – (f) as well.¹¹¹ The Panel conclusion was not reviewed by the Appellate Body on appeal; it nevertheless seemed to implicitly agree when it stated that the words ‘in the form of’ should not be replaced by ‘that have the effect of’.¹¹²

2.5.3 Article XVII, national treatment

Article XVII contains the national treatment provision. As with article XVI, article XVII only applies insofar as Members undertake specific commitments. Article XVII provides:

*1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.*¹¹³

110 *US – Gambling* Panel Report, par. 6.325 regarding XVI:2 (a) and 6.341 regarding XVI:2 (c).

111 XVI:2 (a) contains the phrase ‘whether in the form of’. The Panel specifically indicated that the omission of the word ‘whether’ in XVI:2 (c) is irrelevant. As the Panel’s reasoning is based on the phrase ‘in the form of’, logically the exhaustive nature of the elaborations should also apply to XVI:2 (b) and (d), containing the same phrase. Moreover, I agree with Pauwelyn’s implicit application of the Panel reading relating to XVI:2 sub (a) and (c) to all six definitions, as XVI:2 sub (e) and (f) are also formulated in an exhaustive manner, see Pauwelyn 2005, p. 159. This conclusion is less relevant regarding XVI:(e) as it does not contain an elaboration of forms the included measures can take by simply stating that measures which restrict or require specific types of legal entity or joint venture shall not be maintained. Note that article XVI:2(f) contains the phrase ‘in terms of’. Nevertheless, I see no reason to apply different reasoning to this phrase, as it is equally formulated in an exhaustive manner as XVI:2 (a) to (d).

112 Krajewski 2005, p. 432, referring to: *US – Gambling* Appellate Body Report, par. 232. Note that the actual application by the Dispute Settlement Bodies of article XVI to the facts of the *Gambling* case have been heavily critiqued, which will be discussed below, see for example: Krajewski 2005, p. 432 and Pauwelyn 2005, p. 159-160.

113 (Original footnote) Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

A recent Panel report adopted following a dispute between the United States and China relating to distribution services for publications and audiovisual entertainment products provides a useful interpretation of article XVII.¹¹⁴

A member scheduling a full commitment under article XVII would no longer be allowed to adopt any measure affecting the supply of the service sector to which the commitment applies, if that measure treats foreign services or service suppliers¹¹⁵ less favourably than domestic like services and like service suppliers.¹¹⁶ As indicated in paragraph 2, both *de jure* and *de facto* discrimination are covered by article XVII.¹¹⁷

In order for article XVII to apply, a measure needs to affect the supply of a service. In *EC – Bananas III*, the Appellate Body gave article XVII, in analogy with its equivalent GATT provision, GATT article III, a broad interpretation.¹¹⁸ A measure does not have to regulate the provision of the service in question, it is enough that a measure has influence on the conditions of competition in the supply of a service, albeit that the measure must affect service suppliers in their capacity as service suppliers.¹¹⁹

114 *China – Publications and Audiovisual Products* Panel Report.

115 Regarding the criterion 'service supplier of another Member' the Panel in *China – Publications and Audiovisual Products* had to establish whether foreign invested enterprises are to be seen as service suppliers of another Member. Regarding mode 3, the Panel concluded that this form of service provision requires the provision of a service through an entity 'owned' or 'controlled' by persons of another Member, *China – Publications and Audiovisual Products* Panel Report, par. 7.973-7.974, repeated in several other paragraphs.

116 See also: *China – Publications and Audiovisual Products* Panel Report, par. 7.956.

117 Mattoo 1997, p. 110, Krajewski 2003, p. 108, confirmed by the Appellate Body in *EC – Bananas III* Appellate Body Report, par. 233.

118 *EC – Bananas III* Appellate Body Report, par. 220. Article XXVIII, sub c GATS contains the following, non-exhaustive examples of measures affecting trade in services: the purchase, payment or use of a service; the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally; the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member.

119 Krajewski 2003, p. 67-68; Van den Bossche & Denters 2007, p. 635.

Article XVII:3 defines less favourable treatment as modifying conditions of competition in favour of a Member's own services or service suppliers.¹²⁰ In order to determine whether the conditions of competition relating to the supply of the provision of a specific service are influenced, it must be clear which services or service suppliers are like services or like service providers. Competition is only distorted when services or service providers are competing and thus when likeness is established. The 'likeness' criterion is therefore essential in establishing whether the forms on non-discrimination that have been incorporated in the GATS are infringed.

However, the GATS does not specify what determines likeness and as of yet there is no jurisprudence regarding the matter. Guidance regarding the term likeness can be found in GATT jurisprudence as article III GATT contains the similar principle of 'like products'.¹²¹

Determining whether services or service suppliers are 'like' leads to difficult questions such as 'is the underwriting of a bond issue 'like' a bank lending transaction?' and 'are European art movies and American action movies 'like' services?'¹²² As noted by Van den Bossche, two service providers providing like services are not automatically like service providers. The size of the company, the used technology and the experience of the company are all conditions that

120 See for an extensive description of the concept of less favourable treatment, including a comparison with the same principle in the GATT: Ortino 2008, p. 177-186.

121 GATT and WTO jurisprudence regarding article III GATT has not led to a predictable and consistent approach determining when products are 'like', Nicolaïdis & Trachtman 2000, p. 254-255.

Factors determining whether products can be considered as like products are *inter alia*: the physical characteristics of products, the habits and preferences of consumers regarding the products, the purpose for which the products are used and the international tariff-classification of the products. For the last factor the classification list in services could be used, Van den Bossche & Denters 2007, p. 635. A complicating factor in the use of classification systems is that more than one system is in use, Fernandes 2008, p. 137. The following classification systems are used regarding services: the UN Central Product Classification (CPC), UN 2008a, the Services Sectoral Classification List, GATT (GNS) 1991a (W120 list), and the International Standard Industrial Classification of all economic activities (ISIC), UN 2008b, all available through the UN statistics division website: <<http://unstats.un.org/unsd/cr/registry/regct.asp?Lg=1>>. The use of different classification systems is problematic as the W/120 list is based on the CPC list but is not identical. The W/120 list combines several CPC classifications in one sub-sector. Moreover, the CPC list was created for statistical purposes and therefore not necessarily based on competitive relationships of services, Krajewski 2003, p. 101.

122 These examples are provided by Nicolaïdis & Trachtman 2000, p. 252 and Van den Bossche & Denters 2007, p. 635.

must be taken into account.¹²³ Ultimately, determining likeness requires an examination on a case by case basis.¹²⁴

2.5.4 Article XVIII, additional commitments

Article XVIII reads:

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

Article XVIII does not contain any legal obligations. As is apparent from the text, some restrictions to trade in services do not fall within the scope of article XVI or XVII. Thus non-discriminatory measures, not similar to the limitations listed in article XVI:2 can be inscribed under article XVIII.¹²⁵ The fact that article XVIII provides no description regarding the measures that can be scheduled under this provision indicates that a definition for such measures could not be provided.¹²⁶

The text of article XVIII clearly delineates additional commitments from those inscribed under articles XVI and XVII, as article XVIII only relates to measures that do not fall under those provisions.¹²⁷

However, article XVIII is connected to the mandate included in article VI:4.¹²⁸ The overlap between these two provisions can be understood as follows. Article VI:4 provides a mandate for the development of horizontally applicable disciplines relating to qualifications, technical standards and licensing requirements. Prior to the development and application of these disciplines Members can inscribe commitments relating to qualifications, standards and licensing matters under article XVIII.¹²⁹ Note that article XVIII is not limited to the type of measures described in VI:4, as is apparent from the word 'includ-

123 Van den Bossche 2005, p. 323-324.

124 Nicolaidis & Trachtman 2000, p. 255.

125 *US – Gambling* Panel Report par. 6.311, WTO (CSC) 2002, par. 3 and Delimatsis 2006a, p. 1062.

126 *US – Gambling* Panel Report par. 6.311, WTO (CSC) 2002, par. 3. For various examples of additional commitments, see: WTO (CSC) 2002 under II and attachment 1.

127 As also noted by Pauwelyn 2005, p. 152 and Delimatsis 2006a, p. 1075.

128 WTO (CSC) 2002, par. 4, recognised by the Panel in *US – Gambling* Panel Report par. 6.312. See also Wouters & Coppens 2008, p. 216.

129 Delimatsis 2006a, p. 1075.

ing'.¹³⁰ An example can be found in the regulatory disciplines of the Reference Paper on Telecommunications which were inscribed by several Members making use of article XVIII.¹³¹

130 *US – Gambling* Panel Report par. 6.312; WTO (CSC) 2002, par. 3 and 4; see also: Delimatsis 2006a, p. 1075.

131 WTO (CSC) 2002, par. 15 and 16; Delimatsis 2006a, p. 1075. See for an extensive description of the Reference Paper: Bronckers & Larouche 2008, p. 330-347. The Reference Paper itself can be found on the website of the WTO: <www.wto.org>, trade topics, services, sector-by-sector, telecommunications services. It is also included in Bronckers & Larouche 2008, p. 377-378.

PART 3 ANALYSIS OF PROBLEMS AND POSSIBLE SOLUTIONS

After considering the GATS approach towards liberalizing international trade in services and an overview of the relevant GATS provisions, it is hoped that the basic concepts are now clear. In light of the above analysis, the provision on additional commitments in context with the other provisions should not lead to specific problems. Therefore, it is not necessary to deal with article XVIII in the rest of this paper. However, the text and context of the other provisions leave much uncertain. The uncertainties regarding these provisions lead to several problems which will be addressed in the remainder of this paper:

- Distinguishing VI measures from XVI/XVI measures (§3.1)
- How to draw the line between VI and XVI (§3.2)
- How to draw the line between articles XVI and XVII (§3.3)
- Specific problem in relationship between articles VI, XVI and XVII GATS (§3.4)
- Does article XVI apply to discriminatory and non-discriminatory measures? (§3.5)

3.1 Distinguishing VI measures from XVI/XVI measures

As has been explained, classifying measures according to their appropriate GATS provision is of great importance, as the legal consequences attached to each provision are different. A particularly thorny issue relates to drawing a line between domestic regulation and measures addressed by specific commitments. The uncertainty relating to the scope of articles VI on the one hand and XVI and XVII on the other, resurfaced after the *Gambling* case and the academic debate that followed its adoption.

3.1.1 The interpretation in *Gambling* on VI:4/5 and XVI/XVII

The interaction between article VI on domestic regulation and articles XVI/XVII on market access and national treatment is not explicitly regulated in the GATS. Case-law regarding articles VI:4 and 5 exists in the form of the Panel ruling in the *Gambling* case.¹³² While Antigua claimed that paragraphs 1 and 3 had been breached by the United States measures as well, the Panel ruled that Antigua had not made a 'prima facie demonstration that the measures at issue are inconsistent with articles VI:1 and 3.'¹³³

¹³² US – *Gambling* Panel Report, par. 6.305.

¹³³ US – *Gambling* Panel Report, par. 6.437. The Appellate Body did not rule on article VI.

The Panel concluded that articles VI:4 and 5 and XVI are mutually exclusive. As noted by Wouters and Coppens, the Panel implicitly extended this conclusion to article XVII.¹³⁴ However, this specific conclusion has received convincing critique and should, in my opinion, be rejected.¹³⁵ On appeal, the Appellate Body felt it was neither necessary nor appropriate to rule on article VI and draw the line between quantitative and qualitative measures.¹³⁶ As such it did not confirm nor reject the Panel's conclusion on mutual exclusivity.¹³⁷

The Panel based its conclusion on the Scheduling Guidelines 1993 and an informal Chairman Note of the WPPS attached to the Scheduling Guidelines 2001.¹³⁸

The Scheduling Guidelines 1993 indicate that: 'Minimum requirements such as those common to licensing criteria (e.g. minimum capital requirements for the establishment of a corporate entity) do not fall within the scope of article XVI.'¹³⁹

The Chairman's Note basically states that disciplines to be developed under article VI:4 cover domestic regulatory measures which are not regarded as market access limitations as such, and which do not in principle discriminate against foreign suppliers. Accordingly, new disciplines must not overlap with articles XVI (and XVII), as this would create legal uncertainty.¹⁴⁰

In my opinion, these Panel arguments should be rejected. The text of article VI:4/5 does not indicate that it does not apply to the measures specified in article XVI. This would elevate an approach based on an informal note and

134 '[T]he organization of the GATS (...) cast(s) light on the inter-relationship between Articles XVI, XVII and XVIII, the last of which can include measures falling within the scope of Article VI:4'. Wouters & Coppens 2008, p. 231, referring to *US – Gambling* Panel Report, par. 6.309 (emphasis added). See also par. 6.311.

135 As will be discussed here, critique is provided by Pauwelyn and Delimatsis, however Wouters & Coppens agree with the Panel conclusion.

136 *US – Gambling* Appellate Body Report, par. 250. Analysing the measures at issue in the *Gambling* case under article XVI does have implications for the question where that line lies, as will be discussed below, see: Pauwelyn 2005, p. 163 fn 111 and Irwin & Weiler 2008, p. 98.

Note that the US claimed that the measures at issue in the dispute should be interpreted as domestic regulation in the general sense of the GATS, thus as part of the concept recognized in the preamble and not domestic regulation in the sense of article VI, see: *US – Gambling* Appellate Body Report, par. 26.

137 *US – Gambling* Appellate Body Report, par. 250. Both Pauwelyn and Delimatsis indicate that the Appellate Body most likely would not agree with the Panel conclusion regarding article VI:4 and 5, Pauwelyn 2005, p. 163 and Delimatsis 2006a, p. 1070 fn 58.

138 *US – Gambling* Panel Report, par. 6.305-6.308. Note that the Panel considered these documents as part of the context for interpreting the GATS within the meaning of article 31 VCLT.

139 Scheduling Guidelines 1993, par. 5.

140 Scheduling Guidelines 2001, attachment 4; WTO (WPPS) 1998, par. 2 and 3.

supplementary means of interpretation above the clear text of the GATS itself. Moreover, the arguments provided by the Panel do not support a different conclusion.

While indeed minimum capital requirements do not fall within the scope of article XVI, other examples lead to a different conclusion. Delimatsis and Krajewski point out that articles VI:4 and 5 can address domestic licensing systems that contain quantitative restrictions, e.g. regarding the number of service suppliers.¹⁴¹

The overlap between articles VI:4/5 and XVII can be demonstrated as well. The Scheduling Guidelines contain a reference relating to the division between article VI and article XVII. The provided example in the Guidelines specifies that discriminatory residency requirements must be scheduled under article XVII. If the residency requirement is not discriminatory, it would be subject to the disciplines of Article VI:5.¹⁴² In my opinion this remark does not claim that the text of article VI:4/5 excludes discriminatory measures from its scope. Rather it is meant precisely to address the issue of possible overlap. The provided example of a *de facto* discriminatory requirement that service suppliers should demonstrate prior residence before supplying a service shows that the provisions do overlap. This measure could be perceived to be more burdensome than necessary to ensure the quality of the service within the meaning of article VI:4. It would also fall within the scope of article XVII.¹⁴³

The Chairman's Note on which the Panel relies contains an explanation of the approach the WPPS took on the relationship between articles VI:4 and XVI/XVII when drafting the Accountancy Disciplines. It is true that the Accountancy Disciplines, so far the only product of the mandate in article VI:4, provide that the disciplines are mutually exclusive with articles XVI and XVII.¹⁴⁴ Moreover, the Chairman's Note states that future disciplines should contain a similar provision, in order to prevent duplication of the obligations contained in articles XVI and XVII. However, there is no such provision in the general GATS system. Naturally, the fact that the Accountancy Disciplines provide for mutual exclusiveness between articles XVI and XVII and state that future disciplines should

141 Krajewski 2003, p. 140, Delimatsis 2006a, p. 1070, see also: Pauwelyn 2005, p. 156 fn 88.

142 Scheduling Guidelines 1998, par. 5, Scheduling Guidelines 2001, par. 14.

143 Scheduling Guidelines 1998, par. 5, Scheduling Guidelines 2001, par. 14. See also: Krajewski 2003, p. 140.

144 Accountancy Disciplines article 1.

do likewise does not address the current relationship between article VI:4/5 and XVI.¹⁴⁵

Wouters and Coppens indicate on the one hand that there is overlap between articles VI:4/5 and XVI yet they also accept the reasoning of the Panel and state that articles VI:4/5 and XVI/XVII are mutually exclusive.¹⁴⁶ This view should, in my opinion be rejected as well. Similar to the Panel's conclusion, they rely on several WPPS and WPDR documents.¹⁴⁷ While I certainly agree with their conclusion that there *should* be no overlap, this does not change the fact that the text of the GATS leads to the conclusion that both article VI:4/5 and XVI address discriminatory measures.

Nevertheless the assumption that overlap should be prevented is correct. As noted by Pauwelyn, it is important that the issue of overlap between article VI:4 and articles XVI/XVII is specifically addressed in disciplines developed on

145 In her discussion of the scope of future disciplines derived from the mandate contained in VI:4, Terry indicates a growing consensus within the WPDR to consider measures addressed by article VI:4 disciplines to be mutually exclusive with articles XVI and XVII, Terry 2003, p. 96-98. As indicated by Pauwelyn, this would entail mutual exclusiveness with a preference for market access over domestic regulation. This is the opposite situation from that established under the GATT where the Ad Note to article III provides that measures that apply to imports and domestic products should be considered under article III on domestic regulation. For a more thorough explanation, see: Pauwelyn 2005, p. 142 and 156. While it is certainly possible that the WPDR will incorporate such mutual exclusivity in future disciplines, as has been done earlier with the Accountancy Disciplines, the text of articles VI and XVI and XVII do not provide for this. See also Pauwelyn 2005, p. 156 fn 88 and p. 157.

146 Wouters & Coppens 2008, p. 229: 'Article VI:4 is not explicitly limited to strictly non-discriminatory measures' p. 230: 'Although some authors criticize this narrow approach, most tend to agree that there *should* be no overlap' (footnote omitted, emphasis added), and referring to the Panel's conclusion that article VI:4/5 and article XVI are mutually exclusive on p. 231: 'This conclusion of the Panel can be extended to the relationship between Article VI:4/5 and Article XVII (...) Thus, there *can* be no overlap between measures falling within the scope of Article VI:4 and Article XVII.' (Emphasis added).

147 Note that their references in fn 124 specifically address the remark that most authors tend to agree that there *should* be no overlap.

Nevertheless, Krajewski indeed states that: 'Article VI applies to non-discriminatory measures, whereas Article XVII applies to discriminatory measures.', Krajewski 2003, p. 112. I do not see how such disciplines based on article VI:4 could overlap with article XVI/XVII while article VI:4 itself does not allow for such overlap. As stated by Krajewski himself: 'Neither Article VI:4 nor Articles XVI and XVII explicitly address this question. It is not inconceivable that a measure could come in the ambit of both sets of disciplines', Krajewski 2003, p. 139-140. Possibly Krajewski's claim that article VI does not address discriminatory measures should be seen in the light of the more general claim that article VI is part of a three-pronged approach to effective access to services markets (see above n 71). Within that approach article VI is seen to address non-discriminatory domestic regulations, supplementing articles XVI and XVII which prohibit market access restrictions and discriminatory measures., Krajewski 2003, p. 130.

the basis of the VI:4 mandate. If measures falling within the scope of article XVI and XVII are excluded from the application of disciplines on domestic regulation then scheduled measures cannot be scrutinized according to the obligations specified under VI:4 and 5. If on the other hand, measures scheduled under XVI or XVII still have to comply with disciplines on domestic regulation, a conflict could arise as the scheduled measure may run afoul of the obligations contained in the disciplines.¹⁴⁸ Therefore, the answer to the mutual exclusivity question has significant consequences.

Regarding the current provisional application of these conditions through article VI:5, Pauwelyn indicates that the overlap problem does not arise due to the condition contained in article VI:5(a)(ii) that a measure could not reasonably have been expected by other WTO Members. As a possible conflict arises with scheduled measures this condition would not be fulfilled.¹⁴⁹

To conclude, the following statements can be made. Article VI and XVI/XVII are not mutually exclusive. Nevertheless, there appears to be a growing consensus among Members in the WPDR that future disciplines and specific commitments should be mutually exclusive. As the choice between non-exclusiveness and exclusiveness has significant consequences, it is advisable that future disciplines indeed specifically deal with this matter.

3.1.2 Provisions complementary

In the absence of clear case-law on the subject, the relationship between articles VI and articles XVI/XVII can best be understood as complementary. Key to understanding the issue is that measures can consist of various elements, each possibly addressed by different GATS provisions.¹⁵⁰ Therefore, each respective element of a measure can be dealt with under the relevant provision.¹⁵¹

148 This problem is also recognised by Krajewski and Wouters and Coppens, Krajewski 2003, p. 113 and Wouters & Coppens 2008, p. 231.

149 See §2.5.1. Possible solutions once disciplines on domestic regulation are developed without providing for mutual exclusiveness are to regard XVI or XVII as *lex specialis* as specific commitments have been inscribed. However, the opposite can be argued as well. Future disciplines on domestic regulation may be considered as *lex posterior*, thus prevailing over commitments, in particular regarding advantages and disadvantages of both options, Pauwelyn 2005, p. 157-158, fn 92 and 93. See the listed solutions in §3.1.1.

150 As indicated by the secretariat during WPDR meetings: 'In the GATS context, there needed to be a distinction between a licensing system and its various components, in terms of their different requirements and different measures. Licensing systems could be composed of both Articles XVI and XVII and Article VI:4 measures, the Secretariat had noted, and there was no overlap.' WTO (WPDR) 2003a, par. 12 and WTO (WPDR) 2001, par. 44, see also the clear statement by the US delegate in par. 43.

151 Delimatsis 2006a, p. 1070.

As noted by Delimatsis, article VI:1 applies to sectors where a Member has undertaken specific commitments. Thus measures affecting trade in these service sectors will be scrutinized on the basis of the inscribed commitment under XVI/XVII, as well as under article VI:1 with respect to the measure's administration.¹⁵² The information requirements contained in VI:3 should be complied with when a measure contains authorization requirements. Finally, article VI:6 applies to verification procedures of professionals.¹⁵³

Similarly, a quantitative licensing system should be evaluated according to article XVI regarding the quantitative restriction and according to article VI:4 and 5 regarding the licensing requirement. Article XVII would address any discriminatory elements of the measure.¹⁵⁴

The addendum to the Scheduling Guidelines confirms this understanding by indicating that article XVI continues to apply to measures that also fall within the scope of articles VI:4 and 5.¹⁵⁵

The understanding that the provisions on domestic regulation and specific commitments are complementary leaves two uncertainties. In the first place, it is still unclear where the line between measures falling under article VI and XVI should be drawn. In the second place, the clearer delineation between articles VI and XVII may nevertheless still lead to problems.

3.2 How to draw the line between VI and XVI

A fundamental problem left unclear by the text of the GATS lies in discerning between domestic regulation and market access restrictions. While the other paragraphs of article VI (concerning administration of measures and authorization requirements) has been fairly unproblematic, distinguishing VI:4 and 5 measures from XVI measures has proven difficult.

The basic distinction between market access and domestic regulation can be explained as follows:

Articles VI:4 and 5 address qualification requirements and procedures, technical standards and licensing requirements (QTL requirements). Market access restrictions can be considered as 'maximum limitations' regulating the

¹⁵² Delimatsis 2006a, p. 1070 fn 58. See also: Pauwelyn 2005, p. 152.

¹⁵³ Note that article VI:2 only contains the institutional obligation to set up judicial, arbitral or administrative tribunals or procedures, and not substantive obligations which could overlap with other provisions in the GATS.

¹⁵⁴ Delimatsis 2006a, p. 1070.

¹⁵⁵ Scheduling Guidelines 1993 addendum 1, p. 1 and in slightly different wording: Scheduling Guidelines 2001, par. 11. Note that Pauwelyn refers to the Scheduling Guidelines 2001 and not to the addendum, but this seems to be an error. Pauwelyn 2005, p. 156 fn 85.

‘quantity’ of services and service suppliers.¹⁵⁶ QTL requirements are ‘minimum requirements’ that regulate the quality of a service or the ability of a service supplier.¹⁵⁷

Another way of looking at the difference is that market access restrictions entail limitations that cannot be overcome by an act of the supplier. In contrast, QTL requirements can be fulfilled by the supplier, for instance by obtaining required qualifications.¹⁵⁸

It should be noted that measures imposing qualitative requirements on services or service suppliers can have a quantitative effect. This does not automatically turn such measures into market access limitations.¹⁵⁹

3.2.1 The scope of article XVI as defined in the *Gambling* case

As explained in part 2.5.2, the *Gambling* case confirmed two important limitations relating to article XVI. In the first place, the list contained in article XVI:2 is exhaustive. Thus, market access restrictions covered by article XVI are limited to the specifically listed measures in subparagraphs (a) to (f). In the second place, the elaborations contained within subparagraphs (a) and (c) are also exhaustive. As explained, in my opinion the exhaustive nature of the elaborations applies to XVI:2 in its entirety. Therefore, only measures in the listed forms are addressed by article XVI.¹⁶⁰

While narrowly interpreting the scope of article XVI, the outcome of the *Gambling* case nevertheless held that the measures in question, by prohibiting the remote supply of gambling and betting services should be seen as market access restrictions covered by article XVI:2(a) and (c) because the prohibition amounted to a ‘zero quota’.

The crucial aspect of the case leading to this conclusion is made up of two parts. The first element is that the Appellate Body did not repeal the Panel conclusion that the measures at issue (the Wire Act, the Travel Act and the Illegal Gambling Business Act) had the same effect as a zero quota. The second

156 As noted by Pauwelyn, article XVI:2(e) and (f) are different as they address legal entity and foreign equity participation, Pauwelyn 2005, p. 153 fn 74.

157 Scheduling Guidelines 1993, par. 5, Scheduling Guidelines 2001, par. 11; Pauwelyn 2005, p. 153; Delimatsis 2006a, p. 1070; Zleptnig 2008, p. 394. As indicated in the Scheduling Guidelines, quantitative restrictions can be expressed numerically or through the criteria specified in XVI:2(a) to (d), Scheduling Guidelines 1993, par. 4 and 5.

158 Pauwelyn 2005, p. 153. See also: Delimatsis 2006a, p. 1069.

159 Pauwelyn 2005, p. 159-160, Delimatsis 2006a, p. 1070 fn 62. See also *US – Gambling* Panel Report, par. 6.304.

160 See: §2.5.2. Note that the *Gambling* case only explicitly confirmed the exhaustive nature of elaborations contained in XVI:2(a) and (c).

element is that the Panel and Appellate Body consider a measure that has the same effect as a zero quota to be covered by article XVI:2(a) and (c).¹⁶¹

3.2.2 The measures having the same effect as a zero quota

As summarized by Irwin and Weiler, the Panel concluded that: '(i) as regards a particular service, a Member that has made an unlimited market access commitment under mode 1 commits itself not to maintain measures that prohibit the use of one, several or all means of delivery of that service; and (ii) a Member that has made a market access commitment in a sector or subsector has committed itself in respect of all services that fall within the relevant sector or subsector.'¹⁶² The Panel then concluded that all of three US measures at issue restricted the means of delivery and moreover restricted part of the committed sector.¹⁶³

On appeal, the United States did not challenge the Panel's conclusions that measures restricting either means of supply or (sub-) service sector were limitations under article XVI:2. The Appellate Body thus decided to limit its examination and did not rule on the matter.¹⁶⁴

Although Pauwelyn considers that the Appellate Body sidestepped the Panel's conclusion on this point, it seems rather that the Appellate Body implicitly accepted that the measures in question, by restricting modes of supply or a (sub-) sector indeed have an effect similar to a zero quota, and proceeded to decide the case on this basis.¹⁶⁵ As indicated by Irwin & Weiler, since this issue is pivotal to the outcome of the case it would have been better if the Appellate Body had expressly addressed the point.¹⁶⁶

Three possible scenarios can be envisaged. A first approach would be to follow the reasoning adopted by the Panel that restricting even one means of supply would amount to a market access restriction. This approach should in my opinion be rejected. Without examining what type of measure listed in article XVI:2 might be used for the prohibition on remote supply, the Panel indicated

161 As explained by Irwin & Weiler 2008, p. 88-89, see also Ortino 2006, p. 118 fn 4.

162 Irwin & Weiler 2008, p. 88, summarizing *US – Gambling* Panel Report, par. 6.287 and 6.290.

163 *US – Gambling* Panel Report, par. 6.363-6.364 (Wire Act), 6.370-6.372 (Travel Act) and 6.377-6.379 (Illegal Gambling Business Act). As exemplified by the facts of the *Gambling* case, the prohibition of remote supply falls under the first Panel conclusion while the prohibition of the sub-sector 'gambling and betting services' as part of the service sector 'other recreational services' falls under the second.

164 *US – Gambling* Appellate Body Report, par. 220 and 239.

165 Pauwelyn 2005, p. 163, Irwin & Weiler 2008, p. 88-89 and Zleptnig 2008, p. 404.

166 Irwin & Weiler 2008, p. 88-89.

that an article XVI limitation had been found, an approach that contradicts the exhaustive nature of article XVI:2.¹⁶⁷

Moreover, the Panel indicated that '[i]f a Member desires to exclude market access with respect to the supply of a service through one, several or all means of delivery included in mode 1, it should do so explicitly in its schedule'.¹⁶⁸ However, as noted by Low and Mattoo 'since the only restriction that may be scheduled under GATS article XVI:2 are those that are listed, this implies that limitations on the means by which a service is delivered can neither be scheduled nor directly disallowed'.¹⁶⁹

A second approach, comparable with Pauwelyn's reasoning, entails the exact opposite. According to Pauwelyn, the fact that the prohibition on remote supply coincides with a complete prohibition of a particular mode of trade in services (mode 1) does not lead to a market access restriction. That the measure bans a means of supply or even all means of supply might become relevant under either article VI or XVII but the only way it can be relevant under article XVI is if it makes use of the exhaustive list of market access restrictions. There might be better alternatives than a complete ban on remote supply, yet that is a question to be addressed under article VI:4/5 and future disciplines.¹⁷⁰

A third approach, indicated by several authors, takes the view that it would be preferable to distinguish between measures that prohibit all means of supply and measures that only restrict one or several means. As such, the Panel and Appellate Body conclusions regarding measures that in effect amount to a zero quota would apply to measures that completely restrict all

¹⁶⁷ *US – Gambling* Panel Report, par. 6.285-6.287. Pauwelyn 2005, p. 163; Zleptnig 2008, p. 400-401. Zleptnig indicates that this approach turns the provision on its head as the normal focus should be on the measures, yet the Panel had already found a limitation without consulting the list contained in XVI:2.

The Panel was accused of being overly concerned with trying to capture measures that would allow circumvention of article XVI. See for the reasoning that this risk is minimal: Pauwelyn 2005, p. 166. To this can be added that article XVI is not meant to outlaw all restrictions of market access, just those that are considered most damaging. The XVI:2 list is exhaustive and it is possible to limit market access through other means than the measures listed. Mattoo provides the example of fiscal measures, which do not fall within the scope of article XVI:2 yet have the possibility to severely limit market access, Mattoo 1997, p. 109.

¹⁶⁸ *US – Gambling* Panel Report, par. 6.286.

¹⁶⁹ Low & Mattoo 2000, p. 454. The argument in this paragraph is derived from Wunsch-Vincent 2006, p. 333. See also Adlung & Roy, p. 1177-1178 who indicate that the schedules of commitments contain many wrongfully entered inscriptions under the article XVI column, both misplaced national treatment entries and inscriptions relating to other measures than those listed in XVI:2.

¹⁷⁰ Pauwelyn 2005, p. 166-167. Thus, Pauwelyn considers the measures as technical standards defining how the service is to be provided.

means of supply. The conclusions would also apply when measures result in the total exclusion of the product from the market. On the other hand, the prohibition of a means of delivery, for instance the electronic delivery of a service, would not amount to a quota on total value or volume if there are other means of cross-border delivery left.¹⁷¹

It should be noted that the *Gambling* case concerned measures that completely restricted trade in gambling services through mode 1 to the United States.¹⁷² It is not at all certain how the Appellate Body would decide cases where means of delivery are restricted while other means remain available.¹⁷³

At this point, the differences in opinions regarding the specific measures in *Gambling* become apparent. Pauwelyn considers the measures to be qualitative measures with quantitative effects. It should be stressed that the various opinions examined in this paper do not disagree with his conclusion that such measures should not be treated under article XVI.¹⁷⁴ However, several commentators do disagree with his qualification of the measures in the *Gambling* case as qualitative measures. As Wunsch-Vincent emphasizes, this particular case is not to be confused with qualitative measures that have a quantitative effect. The mode 1 commitment inscribed by the US indicates agreement to postal, electronic or other remote ways of delivering the service. However, the total prohibition of electronic delivery in practice amounts to a 'significant market access limitation'.¹⁷⁵

171 Zleptnig 2008, p. 406. This approach is suggested by Mattoo & Schuknecht in the context of electronic commerce, Mattoo & Schuknecht 2000, p. 15; see also Wunsch-Vincent 2006, p. 341-342.

172 Remote supply and cross-border supply are two different concepts. While cross-border supply requires remote supply, cross-border supply presumes that consumer and supplier are in different WTO Member territories. As is apparent, restricting remote supply entails a complete restriction of mode 1, *US – Gambling* Panel Report, par. 6.32; Wunsch-Vincent 2006, p. 341; Zleptnig 2008, p. 387. This complete restriction is also emphasized by Delimatsis in his explanation: 'the Appellate Body accepted that a total prohibition equivalent to a zero quota (in that it forbids altogether the market access through mode 1 to service suppliers and hence limits their number to zero), is a measure of numerical nature', Delimatsis 2006a, p. 1066, referring to *US – Gambling* Appellate Body Report par. 227-233.

173 Zleptnig 2008, p. 406-407.

174 Pauwelyn 2005, p. 159-160; Delimatsis 2006a, p. 1070 fn 62. See also *US – Gambling* Panel Report, par. 6.304. Irwin & Weiler indicate that 'almost any regulatory regime can translate into some quantitative numerical impact on the provision of services'. Where such regulation addresses not just the commercial arrangement of the provision of the service (opening hours or labour protection) but the service itself (prohibition of TV advertising of tobacco or alcohol) the regulation will amount to some form of 'zero quota' on a service provider providing only that service, Irwin & Weiler 2008, p. 96.

175 Wunsch-Vincent 2006, p. 341-342. See also: Delimatsis 2006a, p. 1071. Pauwelyn provides the example of taxi drivers and the requirement of passing a driving test, an →

In my opinion, several of the concerns expressed in the literature are based on the assumption that the *Gambling* ruling has broadened the scope of article XVI to the detriment of article VI and that this brings domestic regulations under the strict regime of the market access provision.¹⁷⁶ Admittedly, it remains to be seen how the next case will be decided, yet I do not think that this is what the *Gambling* ruling entails. The scope of article XVI is still determined by the type of measure in question and not just by the fact that a measure restricts a means of supply. However, if a measure completely restricts all means of supply this approach assumes that this type of measure is a market access restriction.¹⁷⁷

As a final point, Irwin and Weiler suggest an interesting approach towards the problem of distinguishing qualitative and quantitative measures within the GATS by a comparison with the GATT regime and European Community law. Noting that caution is required as the EC and WTO are very different organisations, they propose that the distinction can run parallel with the *Dassonville* and *Keck* decisions of the ECJ.¹⁷⁸ They indicate that this approach entails that: 'a State measure that has a quantitative effect will be caught by the Market Access provision only when the effect in question is such as to totally exclude the product from the marketplace' and that this balance could be useful in the context of the WTO, both for the GATT and GATS.¹⁷⁹ This approach seems to

example that indeed clearly falls in the category of a qualitative measure with the quantitative effect of restricting service supply by those who have not passed this test. While this is a good example, in my opinion, the reasoning adopted by the Appellate Body in the *Gambling* case would not lead this example to be classified as a market access restriction. In response to Pauwelyn's example, Zleptnig indicates that a total prohibition of Internet-based services cannot be compared with a taxi driver passing a driving test, Zleptnig 2008, p. 407-408.

176 Notably Krajewski 2005; Ortino 2006 and Pauwelyn 2005.

177 According to this approach, this is different from concluding that measures having the effect of the measures listed in article XVI:2 are market access restrictions. An example can clarify this. A complete restriction on the means of supply, for instance a ban on the use of remote means of supply completely restricting mode 1 service supply, is a zero quota. A measure that requires diplomas or a license conditional on the use of environmental friendly products when supplying a service (for example in the transport sector), will have a similar effect as a numerical quota, in the sense that the number of service suppliers will be less due to the requirements, but not in a manner listed in article XVI:2. A complete restriction of supply would fall within the category of market access restrictions as the inscribed commitment is completely frustrated. While the theory behind this extension might not be without flaw, the simple conclusion is not to inscribe a commitment while maintaining a complete restriction on the supply of the sector in question.

178 Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 00837; Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-06097.

179 Irwin & Weiler 2008, p. 102-105.

suggest that a new line needs to be drawn, a line that will demarcate zero effect measures (as caught by XVI) and measures that leave sufficient room for supply (thus not caught by XVI).

3.2.3 Prohibition of service is a 'zero quota'

The second step leading to the conclusion that the measures at issue in the *Gambling* case restricting remote supply are market access restrictions results from the argument that measures amounting to a zero quota are covered by article XVI:2(a) and (c).

The Panel indicated that the prohibition of a service should be seen as a 'zero quota' which is therefore covered by subparagraphs (a) and (c).¹⁸⁰ The Panel argued that a zero quota was not included in XVI:2(a) because it 'was not drafted to cover situations where a Member wants to maintain full limitations.' A Member would not schedule a commitment if it would have wanted to maintain a full prohibition.¹⁸¹ The Appellate Body repeated and agreed with this line of reasoning adopted by the Panel.¹⁸²

The Panel argument that a zero quota limitation was not included in XVI:2 because it was not foreseen has received convincing critique. According to the Panel such types of limitations were not foreseen because Members wanting to keep zero quota would not have inscribed a commitment at all. However, as indicated by the Panel itself, a Member would need to inscribe a type of service provision (for instance face-to-face delivery) in order to be allowed to prohibit that type which would require a zero quota type limitation.¹⁸³

Moreover, as argued by Krajewski, monopolies have been included as a form of market access restriction in article XVI:2. Following the same argumentation, there is no reason why monopolies were foreseen as a market access restriction and included in the list while the restriction in the form of a zero quota was not. Why would a Member schedule a sector while maintaining a public monopoly?¹⁸⁴

180 *US – Gambling* Panel Report, par. 6.332.

181 *US – Gambling* Panel Report, par. 6.331.

182 *US – Gambling* Appellate Body Report, par. 234.

183 *Ortino 2006*, p. 136, *US – Gambling* Panel Report, par. 6.287 and 6.331, upheld by the Appellate Body *US – Gambling* Appellate Body Report, par. 233-234. As indicated by Krajewski, the argument is not reflected in reality. There is little doubt that the US wanted to restrict online gambling while at the same time making a full commitment to market access, although Krajewski admits that this is possibly due to the fact that negotiators did not foresee Internet supply of gambling services at the time of negotiating the specific commitment (1992/1993), Krajewski 2005, p. 434; Zleptnig 2008, p. 385. Note that the United States measures have been adopted years before the creation of the GATS.

184 Krajewski 2005, p. 434.

By analysing the elements ‘numerical quotas’ and ‘form’ in article XVI:2(a), the Appellate Body concluded that the focus of the provision is on limitations relating to numbers. Ultimately the Appellate Body concluded that limitations in the form of a numerical quota ‘would encompass limitations which, even if not in themselves a number, have the characteristics of a number. Because zero is *quantitative* in nature, it can, in our view, be deemed to have the “characteristics of” a number—that is, to be “numerical”.’¹⁸⁵

The Appellate Body continued by concluding that the other elaborations included in article XVI:2(a) suggest a similar conclusion, namely that limitations that in effect are monopolies or exclusive service suppliers should be included in the scope of the provision.¹⁸⁶ Finally, the Appellate Body concluded that, as it was not clear that the limitation in the form of economic needs tests should take a particular form, the limitation suggested that ‘in the form of’ should not be interpreted as prescribing rigid mechanical formula.¹⁸⁷

The Appellate Body observed that its argumentation should not be interpreted as replacing ‘in the form of’ with ‘that have the effect of’ in article XVI:2(a). Rather, the Appellate Body concluded that ‘it is clear that the thrust of sub-paragraph (a) is not on the *form* of limitations, but on their *numerical*, or *quantitative*, nature.’¹⁸⁸ Thus, measures caught are not those that *have the effect of quantitative limitations* but rather limitations that are quantitative *in nature*.¹⁸⁹

In light of the above, in my opinion it may be presumed that the Appellate Body did not adopt an effect-based approach to article XVI:2.¹⁹⁰ Much of the heavier critique and warnings issued in the literature should certainly be borne

185 *US – Gambling* Appellate Body Report, par. 225-227.

186 The Appellate Body compares the concept of monopoly with ‘monopoly supplier of a service’ in article XXVIII(h) which includes suppliers of a service that are in effect monopoly suppliers. The concept of exclusive service supplier in article XVI:2(a) is compared with the definition of article VIII:5 where the concept exclusive service supplier applies to service suppliers that are in effect exclusive suppliers, *US – Gambling* Appellate Body Report, par. 228-129.

187 *US – Gambling* Appellate Body Report, par. 231, see par. 240-247 for similar conclusions regarding XVI:2(c).

188 *US – Gambling* Appellate Body Report, par. 232.

189 As summarized by Zleptnig 2008, p. 403. As the Appellate Body states: ‘measures equivalent to a zero quota fall within the scope of Article XVI:2(a)’ (emphasis added), *US – Gambling* Appellate Body Report, par. 237, see par. 247 regarding sub (c).

190 Similar, Delimatsis 2006a, p. 1067-1068. Zleptnig’s summary of the Appellate Bodies reasoning indicates that the effect-based approach has not been adopted, ‘as such an approach would be inappropriate’, Zleptnig 2008, p. 403. See also: Krajewski 2003, p. 84.

in mind, yet ultimately it seems that this particular conclusion of the Appellate Body does not warrant such critique.

As certain ambiguities remained, both the Panel and Appellate Body used additional means of interpretation to support their arguments.¹⁹¹ Both institutions relied on the Scheduling Guidelines 1993 which state that nationality requirements should be seen as a zero quota. According to the Panel, the zero quota example in the Guidelines suggested that measures not expressed in the listed forms may still fall within the scope of article XVI:2(a).¹⁹² The Appellate Body was more explicit, simply stating that the example confirmed the conclusion that a prohibition of a service should be seen as a zero quota.¹⁹³

An important difference between the Panel and Appellate Body's reasoning concerning the zero quota example is that the emphasis of the argument used by the Panel is to indicate that it is possible that forms not listed in article XVI:2 can still be captured by it. While the conclusion that a prohibition can be considered as a zero quota is logical, this is actually not the thrust of the argument made by the Panel. The Appellate Body appeared to consider a prohibition and a nationality requirement as two similar restrictions, to be regarded as a zero quota. As will be discussed below, both adjudicating bodies have been criticised for the Appellate Body's use of the example. In my opinion, however, the Panel's use of the argument deserved more attention.¹⁹⁴

At this point the following conclusions regarding the delineation of articles VI and XVI can be drawn. Although at first glance it seems that commentators and the Dispute Settlement Bodies are all deeply divided in their opinions, the general idea concerning the delineation of the two provisions is broadly shared.¹⁹⁵ In my opinion the discussion mainly concerns the conclusion in *Gambling* that measures completely restricting trade in services through a particular mode fall within the scope of article XVI. The feared extension of the scope of article XVI to the detriment of article VI does not follow from the *Gambling* case.

191 *US – Gambling* Appellate Body Report, par. 236.

192 Scheduling Guidelines 1993, par. 6, Scheduling Guidelines 2001, par. 12, *US – Gambling* Panel Report, par. 6.332.

193 *US – Gambling* Appellate Body Report, par. 237. Krajewski notes that this argument could be further supported by the practice of many Members to schedule nationality requirements, which could indicate that it has become practice accepted by other Members, Krajewski 2003, p. 86.

194 Especially when one adopts the position that only restricting all means of supply would amount to a restriction falling within the scope of article XVI. If article XVI indeed would include forms that in essence entail market access restrictions then this conclusion would lead to the *Gambling* measures being caught under XVI without adopting an effect-based approach.

195 See §3.2.

3.3 The relationship between XVI and XVII GATS

Two similar problems can be discerned relating to the scope of the provisions on market access and national treatment. Due to an overlap in scope it is possible that inscribed commitments under these provisions can conflict. While article XVI and XVII alone can lead to this problem, the application of article VI can give rise to a similar conflict between inscribed commitments under article XVI and XVII. Both issues will be addressed in this paragraph.

3.3.1 Overlap in scope of article XVI and XVII

The provisions on market access and national treatment do not expressly establish criteria to distinguish between their scopes. Reading article XVII, which applies to 'all measures affecting the supply of services', suggests that discriminatory measures as listed in article XVI also fall within the scope of article XVII. This is confirmed by article XX:2 which provides:

Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

As article XX:2 indicates that inconsistency with both provisions is possible there must be an overlap in their scope.¹⁹⁶ Unfortunately, this is where certainty ends and there is striking disagreement in the literature and among Members as to how articles XVI and XVII interrelate.¹⁹⁷

The measures in articles XVI and XVII that overlap are the discriminatory measures listed in article XVI:2. Two different readings can be discerned from the literature. Article XVI may be seen as applying to both discriminatory measures and non-discriminatory measures or only to discriminatory measures. Phrased differently, the question is whether the measures listed in article XVI cover foreign and domestic suppliers or only foreign suppliers. Most commenta-

196 Similar, Mattoo 1997, p. 113; Krajewski 2003, p. 114; Pauwelyn 2005, p. 148-150; Delimatsis 2006a, p. 1072-1073 and Mavroidis 2007, p. 9. See also, Scheduling Guidelines 2001, par. 8. See for a clear summary of the issue: WTO (CSC) 2003, par. 2-4.

197 See in particular: Krajewski 2005, Pauwelyn 2005, Delimatsis 2006a, Ortino 2006 and Mavroidis 2007.

Note that these publications have all been written after, and in response to, the *US – Gambling* case which constitutes the first interpretation of these GATS provisions. An early identification of possible problems relating to overlap between article XVI and XVII can be found in Mattoo 1997. Disagreement among Members is evident, see WTO (CSC) 2004, par. 4. The WTO document includes a summarising statement by the Chairman in the 4th paragraph and a range of opinions expressed by delegates.

tors assume that article XVI applies to both non-discriminatory and discriminatory measures, yet the position that article XVI should be interpreted to apply only to discriminatory measures is argued as well. This part of the debate will be discussed below.¹⁹⁸

Without further clarification as to the scope of these provisions it is possible for scheduled commitments to contradict each other as measures may fall under both provisions.¹⁹⁹ An oft-cited example is a situation where a Member has scheduled unbound under market access and none under national treatment. Discriminatory measures listed in article XVI:2 fall under both provisions, thus it is uncertain whether the scheduled 'none' or 'unbound' prevails.²⁰⁰ The reverse position, 'none' under XVI and 'unbound' under XVII can cause similar problems.²⁰¹ Partial commitments lead to similar uncertainties insofar as the substance overlaps. Thus a schedule containing a market access commitment with the exception of XVI:2(a) type measures causes uncertainty regarding all other discriminatory XVI:2 measures, when none has been inscribed under article XVII.

198 Mattoo 1997, p. 109-110, and more recent Low & Mattoo 2000, p. 450-451; Krajewski 2005, p. 430; Pauwelyn 2005, p. 148; Delimatsis 2006a, p. 1063; Ortino 2006, p. 139-140; Zleptnig 2008, p. 392. Mavroidis adopts a fundamentally different approach to articles XVI and XVII as he states that article XVI only applies to discriminatory measures. His opinion avoids the problem related to the scope of article XVI and XVII here under discussion, Mavroidis 2007. It should be pointed out that Mavroidis shares and constructed this opinion together with Marchetti, see Marchetti & Mavroidis 2006.

199 Note that the problem of overlap between articles XVI and XVII is different from the above described delineation problems between article VI and XVI/XVII. The problem here is not whether the measure can be seen as discriminatory or containing elements of the list in article XVI:2, as the discriminatory element should be easy to verify. This makes the delineation simple even though the list of article XVI clearly can lead to problems. The overlap problem between XVI and XVII only rises in relation to the schedules of commitments, and only when a Member's article XVI and XVII commitments are not similar.

200 For example, Mattoo 1997, p. 113 and 118 and Krajewski 2005, p. 418-419. Krajewski explicitly links the uncertainty to the ongoing negotiations. See also WTO (CTS) 2002, par. 6.

201 There is nothing providing certainty in the GATS as to which commitment applies, Delimatsis 2006a, p. 1073. Note that in the discussion on the overlap between these provisions in the Committee on Specific Commitments the Hong Kong, China delegate submitted that the reverse position is less problematic as article XX:2 states that measures inconsistent with both market access and national treatment should be inscribed under market access. As there is a full commitment under market access it can be deduced that measures scheduled under national treatment are not inconsistent with both provisions and thus are only inconsistent with national treatment. Even the inscription unbound under national treatment would not lead to the possibility to limit market access, see WTO (CTS) 2002, par. 8. The delegate of Japan agreed with this reasoning, see par. 10. However, these arguments are opinions of delegates in discussions, not legal interpretations.

The drafters of the GATS foresaw these potential problems and attempted to include a technical bookkeeping provision to prevent duplication and confusion. Article XX:2 provides the outcome of these deliberations.²⁰² However, the discussion leading to article XX:2 did not consider the possibility of schedules containing contradictory inscriptions.²⁰³ Therefore, article XX:2 can be said to have added to the confusion.²⁰⁴

Delimatsis summarizes several solutions explored in the literature and in discussions between Members within the Council for Trade in Services.²⁰⁵ A first option is to consider article XVI commitments to prevail over XVII commitments, article XVI then functions as *lex specialis* to article XVII. Some authors indicate that this option could be legally based on a reading of article XX:2 as that provision states that an inscription under XVI provides a qualification for XVII as well. However, others reject that solution as the text of article XVII clearly indicates that it applies to all measures.²⁰⁶

202 Delimatsis 2006a, p. 1073, referring to WTO (CTS) 2002, in particular par. 5-6 and 12 in turn referring to a background note on the drafting history and scope of XX:2.

203 WTO (CTS) 2002, par. 6. Note that the Scheduling Guidelines address the overlap between the two provisions in the scenario that no limitation is inscribed under XVII while the commitment under XVI still allows discriminatory measures. In that scenario article XX:2 provides that the commitment under XVI also applies to XVII, thus the discriminatory measure can be maintained despite the inscription under XVII. However, this does not address the problem of schedules containing an 'unbound' inscription under XVI and 'none' under XVII, Scheduling Guidelines 2001, par. 18, see also Mattoo 1997, p. 113 fn 15.

204 Mattoo 1997, p. 113.

205 Delimatsis 2006a, p. 1074-1075. Mattoo takes a different approach and considers the overlap problem from a mode 3 and 4 perspective only as he focuses on measures affecting the ability to establish or enter a Member's territory to provide a service, and those that apply post-establishment, a distinction that relates to border measures and domestic regulation. In this approach mode 1 and 2 are less relevant. Using this approach Mattoo considers a solution to the overlap problem in which establishment and entry related measures would be excluded from the scope of the national treatment obligation, while measures applying post-entry would fall within the domain of national treatment, Mattoo 1997, p. 115-116 and more recent Low & Mattoo 2000, p. 451.

206 While recognising the counter argument based on the fact that article XVII applies to all measures, Krajewski supports this solution. He considers article XX:2 to provide strong support for article XVI as *lex specialis* of article XVII. Krajewski considers article XX:2 of extra importance as it possibly was intended as more than just a scheduling rule and no other provisions concerning the relationship between article XVI and XVII are included in the GATS. Krajewski 2003, p. 115-116. Pauwelyn rejects the solution based on the same argument, article XVII applies to all measures. Moreover, he considers article XX:2 to reject the *lex specialis* option. Article XX:2 states that measures scheduled under XVI can no longer violate article XVII. However, to state that measures included in XVI do not fall within the scope of article XVII and can therefore not violate the provision goes much further. This would mean that even though a full commitment to national treatment was inscribed, no commitment undertaken under XVI would still allow discriminatory market
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A second option is to consider article XVII commitments to prevail over article XVI commitments, a solution referred to as strong national treatment.²⁰⁷ The second solution is supported by the fact that article XVII applies to all measures. However, this reading of national treatment cannot explain XVI:2 (e) and (f) which can only have a discriminatory form.²⁰⁸

Two other options are to let unbound entries prevail over commitments undertaken or vice versa. The first option would be consistent with the international law principle of *in dubio mitius*, as in international law state sovereignty should not be considered restricted unless clear and unambiguous. The second scenario would protect other Member's expectations and favours the idea of progressive liberalization.²⁰⁹

Finally, the matter could be left to each Member to decide and thus to indicate in its schedule of commitments which inscription takes precedence.²¹⁰

In my opinion it is currently not possible to resolve the matter from the text alone. Not only are all possible solutions susceptible to equally valid counterarguments, the actual solution adopted can lead to Members having a more liberal Schedule than intended. As commitments are negotiated on the basis of reciprocity choosing a solution for existing commitments is already problematic. Therefore, as is rightly stressed in the literature, it is all the more important that the matter is resolved before new commitments are undertaken.²¹¹

access restrictions. Pauwelyn submits that it would be more logical to consider the commitment not to discriminate as prevailing over the more general non-commitment on market access, Pauwelyn, 2005, p. 150 fn 65. Note that Mattoo submits the possibility of the *lex specialis* option but does not explicitly take a stance on the issue, Mattoo 1997, p. 116 and 118. Delimatsis considers the option to lack legal basis in the GATS, Delimatsis 2006a, p. 1074.

207 Delimatsis 2006a, p. 1074, Similar: Mattoo 1997, p. 115-116.

208 Mattoo 1997, p. 116, who only refers to sub (f); Delimatsis 2006a, p. 1074.

209 Delimatsis 2006a, p. 1074, Pauwelyn indicates that the commitment not to discriminate could prevail over the general non-commitment as *lex specialis*, Pauwelyn 2005, p. 151 fn 65.

210 Delimatsis 2006a, p. 1074.

211 Delimatsis 2006a, p. 1073 and 1074-1075. Both Delimatsis and Mattoo link their solutions to consequences for liberalization, Mattoo 1997, p. 119, Delimatsis 2006a, p. 1074. Two vital issues can be distinguished, how to interpret existing commitments and clarifying the GATS before new commitments are inscribed. If all Members know exactly what the effect is of contradictory scheduled commitments they can negotiate accordingly, opening their markets and requesting the opening of other Members markets. Therefore, it would be better to resolve the matter before continuing negotiations as current requests and offers could be affected. The irony is that the actual choice only affects current commitments. Whether one option leads to more or less liberalization does not matter, as long as Members are aware they will inscribe their wishes accordingly.

3.3.2 Article VI and conflicting commitments under article XVI and XVII

A closely related problem of conflicting commitments under articles XVI and XVII is caused by article VI:4 and 5. Article VI aims at the reduction of trade distortion caused by non-discriminatory domestic regulations not covered by the six categories in article XVI:2.²¹² Therefore, at first glance, the interaction between article VI and XVII does not seem to lead to problematic results. Discriminatory domestic regulation should be dealt with under the national treatment obligation while non-discriminatory domestic regulation is dealt with under article VI. Nevertheless, conflicting commitments can again lead to difficulties when article XVI enters the equation.

The relationship between paragraph VI:4 and 5 and XVII can cause problems in the situation where a Member has inscribed a market access commitment but leaves national treatment unbound. The inscribed commitment under XVI triggers the application of article VI. As such, discriminatory qualification requirements and procedures, technical standards and licensing requirements should fulfil the requirements in VI:4 and 5. Imagine a discriminatory licensing requirement which is not based on objective or transparent criteria and does not contain elements listed in XVI:2. The fact that the requirement is applied discriminatorily could 'nullify or impair' the commitment under article XVI in a manner foreseen under article VI:4 and 5, yet the Member has specifically exempted the discriminatory element by leaving the national treatment obligation unbound.²¹³

Note that only paragraphs 4 and 5 of article VI contain requirements that can lead to conflicts between commitments under article XVI and XVII. The obli-

212 Delimatsis 2006b, p. 18, see also *US – Gambling* Panel Report, par. 6.304; implicitly Feketekuty 2000, p. 101; Low & Mattoo 2000, p. 455; Nicolaïdis & Trachtman 2000, p. 257; Pauwelyn indicates that while article VI:4 refers to objective and transparent criteria, it does not include a non-discrimination requirement, Pauwelyn 2005, p. 139 fn 29; implicitly Zleptnig, who indicates that: 'domestic regulation covered by article VI is normally not protectionist or economically unjustifiable (in contrast to market access restrictions or *discriminatory* regulation)' (emphasis added), Zleptnig 2008, p. 398.

213 For instance, a member introduces a qualification system containing a language requirement in the construction services sector after it has undertaken a full commitment on market access. While the measure is not listed in article XVI:2 it is clear that the market access commitment is now useless for construction services suppliers from other Members if they cannot fulfil the language requirement needed to obtain a qualification. It is also clear that the measure does not comply with any of the requirements listed in article VI:4(a) and (b).

gation in article VI:1 does not refer to the substantive content of domestic regulation, but only to their administration.²¹⁴

Regarding VI:3, it is possible that a measure or policy regulating the provision of information obligations is favourable to domestic services or service suppliers. This would violate article XVII but not VI:3 in itself, as long as the response fulfils the time obligations. The same holds true for paragraph 6, as long as adequate procedures to verify the competence of professionals of other Members have been set up. If such procedures are discriminatory, this would violate article XVII, yet article VI:6 would not lead to problems so long as the procedure for foreigners remains adequate.²¹⁵

The solution to this specific problem should be similar to the solution chosen to deal with the conflicting commitments under articles XVI and XVII. Either the commitment inscribed under market access or national treatment should prevail, be it on the basis of the subject of the provision (strong market access or strong national treatment) or the nature of the commitment (unbound or none prevails over the other). Again, the solution adopted could lead to difficulties with existing commitments but the consequences for future negotiations are limited. As long as Members know which rule applies they can draft their requests and offers according to their wishes.

3.4 The type of measures addressed by article XVI

Mavroidis adopts a fundamentally different approach and argues that article XVI should be interpreted to address measures that only apply to foreign services and service suppliers. Most commentators seem not to have explicitly examined this possibility, assuming after reading the text of article XVI and the Scheduling Guidelines that article XVI covers both non-discriminatory and discriminatory quantitative restrictions. Delimatsis has explicitly rejected this reading of article XVI.²¹⁶

According to Mavroidis' approach, article XVI is 'nothing but a list of violations of article XVII.' The motivation that drove negotiators to include a specific list in article XVI, even though non-discrimination is already covered in article

214 *US – Gambling* Panel Report, par. 6.432; Wunsch-Vincent 2006, p. 388; Delimatsis 2006b, p. 19. As indicated above (see n 91), Delimatsis provides a description of the concepts of administration and general application, Delimatsis 2006b, p. 20-24.

215 See regarding the requirement contained in paragraph 3, Delimatsis 2006b, p. 31-32 and regarding paragraph 6, p. 47-48.

216 Examples of the earlier are Mattoo 1997, Pauwelyn 2005 and Ortino 2006. As will be discussed below, Krajewski does not address the argument itself but explicitly accepts that article XVI goes beyond non-discrimination, see text at n 232. Delimatsis is explicitly aware of the interpretation of article XVI by Mavroidis and rejects it, Delimatsis 2006a, p. 1063 fn 22.

XVII, would be that the list contains ‘probably just the most frequent occurring violations of national treatment. Thus negotiators included them in article XVI to signal desire to abolish them.’²¹⁷ The consequence would be that when a member ‘has not granted national treatment to foreign suppliers, it cannot impose on them any of the measures featured in article XVI GATS, unless it has indicated so in its schedule of concessions.’²¹⁸

The starting point of Mavroidis’ argumentation is the rejection of the Scheduling Guidelines’ interpretation of article XVI. In an interpretation of article XX:2, the Guidelines state that all measures falling under any of the categories in article XVI:2 must be scheduled, whether or not such measures are discriminatory according to the national treatment standard of article XVII.²¹⁹

The rejection of the Scheduling Guidelines’ interpretation is important. If indeed a textual interpretation of article XVI:2 leads to a different interpretation than the one used in the Scheduling Guidelines, the latter should be rejected as the Guidelines can only support a reading based on the text.²²⁰

The next step in Mavroidis’ argumentation is formed by a textual interpretation of article XVI which indicates that the provision does not address non-discriminatory measures.²²¹ The main textual arguments are the inclusion of the phrase: ‘each Member shall accord services and service suppliers of any *other* Member treatment no less favourable’ (emphasis added) in article XVI:1 and

217 Recall Lang’s statement (see n 79) that the list of market access restrictions included in article XVI:2 GATS is roughly analogous to the border measures traditionally applied in relation to trade in goods. Whether the listed measures were included to abolish the most frequent violations of national treatment or whether they are analogous to border measures does not change the argument forwarded by Mavroidis. It is equally viable to claim that the list was included to abolish the equivalent of border measures applying to trade in goods in the GATS, as border measures apply to foreigners.

As will be discussed below, in my view, while the GATS reaches beyond border measures into the field of domestic regulation, that reach could be said to be embodied in article VI. Whether the move beyond negative integration is also incorporated in article XVI is not altogether clear, as that depends on the acceptance of the argument that the provision applies to non-discriminatory measures as well.

218 Mavroidis 2007, p. 9.

219 Mavroidis 2007, p. 6, Scheduling Guidelines 1993, par. 4. Note that Mavroidis refers to the Scheduling Guidelines 2001, par. 8.

220 Mavroidis 2007, p. 7 fn 18. See regarding the legal status of the Scheduling Guidelines §1.4. Moreover, I suspect that several commentators and possibly the WTO adjudicating bodies have not seriously considered the possibility that article XVI only applies to discriminatory measures after reading the Scheduling Guidelines.

221 Normally an interpretation would begin by examining the text of article XVI. However, Mavroidis tries to convince readers to first drop the Guidelines’ interpretation precisely because it should not be used if a textual interpretation provides a different outcome.

an investigation of the listed measures in article XVI:2 indicating that these limitations only concern foreigners.²²²

Looking into the rationale, or rather the lack thereof, behind the application of the other listed market access restrictions in article XVI to domestic service suppliers, Mavroidis argues that it becomes even more doubtful that the provision was intended to apply to both foreign and domestic suppliers. In my view, it can indeed be questioned why a regulator would want to limit total value of transactions, operations or assets of domestic providers.²²³ Similarly, why would a regulator limit the number of natural persons that may be employed or that a supplier may employ?²²⁴ The same reasoning can be applied to measures that restrict limitations on the number of service suppliers and the total number of service operations or on the total quantity of service output as listed in sub (a) and (c). Applying these measures to domestic suppliers would limit the growth of national companies.²²⁵

Mavroidis raises several supporting arguments based on the Scheduling Guidelines, the nature and form of the GATS agreement, other GATS provisions and policy arguments.²²⁶

222 XVI:2(f) explicitly applies to limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment. Implicitly the same holds true for requirements of constituting a joint-venture as provided in XVI:2(e), Mavroidis 2007, p. 10.

223 As provided in article XVI:2(b) GATS. An explanation offered by Mavroidis is the concentration of power. However, such motives are typically achieved through competition policies, Mavroidis 2007, p. 10 fn 26.

224 As provided in article XVI:2(d) GATS. As Mavroidis points out, limitations of this type are typical for developed countries which have a high unemployment rate. It would be very odd to apply such regulations to domestic suppliers, Mavroidis 2007, p. 10 fn 27.

225 Mavroidis 2007, p. 10. One possible explanation for the application of such measures to domestic service providers is that a regulator wants to control the supply of a service in a certain area, for instance the amount of dentists or pharmacies in certain areas. Controlling supply would normally take the form of limitations indicated in XVI:2(a).

226 Examples of the type of measures listed in sub (b)-(e) of the Scheduling Guidelines only concern examples that are discriminatory, Scheduling Guidelines 2001, par. 12, see Mavroidis 2007, p. 10 fn 28 and p. 13-14; the idea that article XVI regulates market access for domestic suppliers is contrary to the nature of the GATS. The Agreement intends to liberalize trade in services, the purpose being to grant access for foreign suppliers in markets they could not access before. Examining the situation of a country scheduling a commitment that applies also to domestic suppliers provides odd results, such as having to pay compensation to trading partners for damaged in part inflicted on its own domestic service providers, see article XXI on compensation, Mavroidis 2007, p. 10-11. The transfer of sovereignty should only be assumed based on clear and unambiguous transfers of power (*in dubio mitius*), Mavroidis 2007, p. 11. International trade agreements internalize externalities stemming from the unilateral definition of trade and trade-related policies, they do not regulate the internal market itself, Mavroidis 2007, p. 11. The GATS is foremost a negative integration contract, where positive integration

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The consequence of this approach would be that inscribing an article XVI:2 commitment may be seen as a first step towards the adoption of national treatment, abolishing the worst forms of discriminatory measures.²²⁷

Several arguments supporting the opposite reading, that article XVI applies to both non-discriminatory and discriminatory measures, have been put forward in the literature.

Only one of the six listed market access restrictions explicitly applies exclusively to restrictions and only addresses foreign services or service providers, article XVI:2(f), the text of the other five restrictions can also refer to domestic services or service providers. Nevertheless, this still begs the question as to the rationale of imposing these restrictions domestically.²²⁸

While the Scheduling Guidelines cannot be used as a stand alone argument, they provide clear support to a reading that article XVI applies to non-discriminatory measures as well.²²⁹

Mavroidis argues that the GATS is a negative integration contract aimed at liberalizing trade in services and not aimed at opening or regulating domestic services markets, except through article VI. Several authors argue the exact opposite. They claim that the GATS provisions do relate to domestic regulatory measures as a consequence of the type of barriers that restrict trade in services.²³⁰ Their argument indicates, or at least implies, that article XVI:2, just like article VI, is concerned with barriers to trade caused by domestic regulation.²³¹

does take place this should proceed through article VI:4, Mavroidis 2007, p. 11-12. Trade liberalization will be served by restricting the scope of XVI to measures that apply to foreign suppliers only. As indicated by Mattoo, the allocation of quotas in a manner consistent with non-discrimination can pose problems, Mattoo 2001, p. 23. Mavroidis submits that when article XVI only applies to foreigners the problem of a country liberalizing and allocating the extra quota to a domestic provider does not occur, as it can only be offered to foreign suppliers, Mavroidis 2007, p. 12.

227 See for an overview of the consequences for scheduling commitments, Mavroidis 2007, p. 15-16.

228 Article XVI:2(f) addresses limitations on foreign equity participation, see Pauwelyn 2005, p. 148-149. See also Krajewski who states that: '[m]ost of the measures mentioned in Article XVI:2 are typical market restrictions applied in a domestic regulatory context.', Krajewski 2005, p. 430. Delimatsis provides the example that subparagraph (a) refers to the number of service suppliers and not only to the number of foreign service suppliers while subparagraph (f) expressly covers only foreign capital, Delimatsis 2006a, p. 1063 fn 22.

229 Scheduling Guidelines 1993, par. 4 and Scheduling Guidelines 2001, p. 8, Mavroidis 2007, p. 7 fn 18.

230 See §1.3 regarding the use of GATT provisions for analogous interpretation.

231 Krajewski 2005, p. 430-431; as phrased by Delimatsis: 'The GATS provision on market access extends beyond any conventional notion of access for foreign suppliers (tariff bindings in GATT) to embrace all policies (...) which restrict access to a market even in a

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Krajewski explains that the application of article XVI to domestic regulation can be said to reflect an intentional choice by the drafter to specifically liberalize domestic markets for foreign services and service suppliers when these markets are also closed to domestic suppliers.²³² Thus article XVI extends beyond the conventional notion of access to markets.²³³

The argument made by Mavroidis is worthy of examination. It is certainly true that the GATS has moved beyond the traditional notion of a trade agreement and tries to deal with domestic regulation as well. As explained, within the GATT system a similar move is reflected by the SPS and TBT Agreements. While article VI GATS can roughly be seen as the counterpart of these agree-

non-discriminatory manner', Delimatsis 2006a, p. 1062; Wouters & Coppens 2008, p. 216-217; Zleptnig 2008, p. 392.

²³² This argument is advocated by Krajewski based in part on a reading of Trebilcock & Howse 1999, p. 279. However, I do not agree with Krajewski's conclusion drawn from that reference. According to Krajewski, Trebilcock & Howse indicate that the application of article XVI to non-discriminatory measures and the extension of the GATS into the domestic regulatory context is the result of intense lobbying by large US service suppliers in the telecom, finance, logistics and transportations sectors. Moreover, the Reagan administration believed that deregulation and privatization in domestic markets was required to meet market access demands. Krajewski adds that 'this reflects the general spirit of the GATS as an agreement reaching beyond non discrimination and aiming at market access and reducing restrictive (domestic) regulations of services', and that this opinion is in line with the spirit of liberalization and deregulation of the 1980's, Krajewski 2005, p. 430-431.

However, Trebilcock & Howse only indicate that the US initially was interested 'in negotiating whatever changes in countries' domestic regulatory structures might be necessary to allow market access by foreigners'. They continue by stating that it was: 'far from clear to many Contracting Parties that the benefits of liberalization would outweigh the costs of substantially constraining or altering their domestic regulatory approaches'. After indicating that deregulation and privatization entail complex transitional issues and formidable challenges of regulatory redesign they state that: 'It is not surprising, therefore, that even countries with short- or long-term intentions of liberalizing domestic competition in key services sectors did not want their room to manoeuvre fundamentally constrained or pre-empted by a multilateral market access agreement.' Not only do Trebilcock & Howse indicate that the US position met with resistance from other countries, they also state that the US backtracked its original open borders rhetoric during the negotiations, albeit not by rejecting their earlier stance on changes in domestic regulatory structures but through a non-MFN approach to certain topics.

Note that Trebilcock & Howse, without indicating whether this approach was adopted in the GATS, state that extending the Agreement to liberalizing or changing domestic regulation in order to facilitate market access would lead to profound implications for domestic policy sovereignty and that 'contrary to crude 'free market' rhetoric, deregulation and privatization entail complex transitional issues and formidable challenges of regulatory redesign'. See Trebilcock & Howse 1999, p. 279-280 and the most recent edition containing unchanged language Trebilcock & Howse 2005, p. 357-358.

²³³ Delimatsis 2006a, p. 1062.

ments, if one wishes to argue against Mavroidis, one must read article XVI to reflect this move beyond the traditional trade agreement as well.²³⁴

Finally, as conceded by Mavroidis,²³⁵ both the Panel and the Appellate Body in the *Gambling* case implicitly accepted that article XVI covers measures of a non-discriminatory nature. Without expressly ruling on the matter, by accepting that non-discriminatory measures can infringe article XVI the adjudicating bodies left no doubt as to their position.²³⁶

Whichever viewpoint one prefers, the text of article XVI is unsatisfying. Either approach could have easily been expressed more clearly by the drafters of the provision.²³⁷

234 Nicolaïdis & Trachtman compare article VI:5 with the SPS and TBT Agreements. While addressing a different issue, they make an interesting point: '[VI:5] might be viewed as a 'least common denominator,' insofar as the parties could agree not to nullify or impair concessions earnestly made, but could not agree on more pervasive, blanket restrictions on their national regulatory sovereignty. Thus article VI(5) is first and foremost merely a standstill obligation', Nicolaïdis & Trachtman 2000, p. 258-259. Thus, assuming that article XVI:2 applies to non-discriminatory measures as well would mean that Members did restrict their national regulatory sovereignty regarding the six listed measures. While it is true that this would only apply in committed sectors, thus allowing Members to choose whether they want to accept this restriction of regulatory sovereignty, the same is true regarding article VI:5 as that provision also applies only to committed sectors.

Wouters & Coppens also indicate that the SPS and TBT Agreements often serve as a comparator for the GATS provisions on domestic regulations. This is particularly clear in: WTO (WPPS) 1996. They further indicate that the necessity test is a tool for liberalization in WTO non-discrimination provisions such as article 2:2 TBT and 2:2 SPS. They argue that this reflects a shift from fair trade (prohibition of discrimination) to trade and as such reflects the influence of the neo-liberal political agenda of the 1980s referring to Krajewski 2003, p. 59. Note that the necessity test is a concept that might be introduced through article VI:4, again this signals that insofar as a shift from fair trade towards trade as such has taken place in the GATS, it specifically is connected to article VI and not XVI, see: Wouters & Coppens 2008, p. 210. It should be made very clear that this is my reading of the arguments used by Wouters & Coppens and not a restating of theirs. They clearly consider article XVI as an example of a provision that goes beyond discrimination, Wouters & Coppens, p. 217 and fn 52.

235 Mavroidis 2007, p. 2.

236 Mavroidis 2007, p. 9. See regarding the non-discriminatory nature of the three US federal acts and the conclusions that these acts violate article XVI: *Federal Wire Act, US – Gambling* Panel Report par. 6.360 and 6.365, the *Travel Act, US – Gambling* Panel Report, par. 6.366 and 6.373 and the *Illegal Gambling Act, US – Gambling* Panel Report, par. 6.374 and 6.380. The Appellate Body upheld these findings and therefore must implicitly have accepted the same position, that article XVI covers measures of a non-discriminatory nature, *US – Gambling* Appellate Body Report, par. 265.

237 Hence both Mavroidis and Delimatsis use the same argument albeit in support of opposite viewpoints: namely, if the argument opposite to their own were true, why has this not been clarified in the text. Thus Mavroidis argues that article XVI:1 could have contained the term 'domestic supplier' while Delimatsis wonders why only article XVI:2(f) contains

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As indicated above, the Appellate Body in the *Gambling* case considered the Guidelines as supplementary means of interpretation within the meaning of article 32 VCLT.²³⁸ The Scheduling Guidelines therefore can be of decisive help but only if the GATS is silent on a particular issue.²³⁹

As Mavroidis points out, having recourse to the text of the Guidelines is a matter of discretion of the WTO judge. If indeed article XVI should be read to cover discriminatory measures only then should the Scheduling Guidelines interpretation not prevail over the legal text of the GATS itself.²⁴⁰ Depending on the correct reading of the GATS provisions, the Scheduling Guidelines either should be ignored, as it is contradicting the GATS itself or it confirms the reading that article XVI applies to foreign and domestic measures. In my opinion, the discussion can therefore not be settled on the basis of the Scheduling Guidelines as they cannot settle conflicting textual interpretations.

Several of the problems described above simply do not arise when article XVI is interpreted to cover discriminatory measures only. The overlap in scope between article XVI and XVII would no longer cause problems as scheduling article XVI would leave national treatment unbound except for the listed measures. Scheduling a national treatment commitment would apply to article XVI as well, as indicated in article XX:2.

Similarly, a commitment under XVI while leaving XVII unbound would not lead to problems through article VI:4/5. The article XVI commitment clearly would prevail over the unbound inscribed under article XVII. Measures nullifying or impairing the commitment under article XVI in a manner foreseen by article VI:4/5 should not be considered exempted by the fact that national treatment is unbound as that commitment does not apply to the discriminatory measures listed under article XVI.²⁴¹

The discriminatory measures only interpretation also solves the allocation of quotas problem indicated by Mattoo.²⁴² When article XVI only applies to foreigners the problem of a country liberalizing and allocating an extra quota to a domestic provider, thus practically negating the agreed commitment, does not occur. The extra quota can only be offered to foreign suppliers.

the phrase 'foreign' if the entire provision only applies to discriminatory measures, Mavroidis 2007, p. 14, Delimatsis 2006a, p. 1063 fn 22.

238 See §1.4.

239 An example provided by Mavroidis is the meaning of the terms NONE and UNBOUND which are not defined in the GATS, Mavroidis 2007, p. 7 fn 18.

240 Mavroidis 2007, p. 7 fn 18. Naturally, this argument does not alter the discussion itself, it merely claims that the text of the Scheduling Guidelines is not legally binding.

241 See §3.3.2.

242 See n 226.

However, a very practical point cannot be ignored. Whatever the original intention, Members, the Dispute Settlement Bodies and most commentators, have not questioned that article XVI applies to non-discriminatory measures as well. While the Scheduling Guidelines are not an authoritative legal interpretation of the GATS, most Members have in practice based their schedules of specific commitments on the Scheduling Guidelines.²⁴³

In my opinion, it would be interesting to examine the position adopted by Mavroidis further. Most of the problems described in this paper would be solved and the interpretation can be supported by the text of the GATS.

243 For the arguments see: §1.4. As earlier indicated (n 52), Regarding the schedules of commitments, Mattoo considers that if a scheduling practice by Members was based on a certain view then this gives an interpretation according to that view 'a certain credence', Mattoo 1997, p. 110 fn 6, p. 115 and 117.

CONCLUSIONS

After examining the GATS, WTO case-law, various notes and interpretation and the literature, several conclusions can be drawn.

The relationship between articles VI and articles XVI/XVII can best be understood as complementary. Measures can consist of various elements, each potentially addressed by different GATS provisions. Therefore, each respective element of a measure can be dealt with under the relevant provision. However, the overlap between article VI:4/5 and articles XVI/XVII should be addressed in future disciplines as the matter can have significant consequences. If measures falling within the scope of article XVI and XVII are excluded from the application of disciplines on domestic regulation then scheduled measures cannot be scrutinized according to the obligations specified under VI:4 and 5. If measures scheduled under XVI or XVII still have to comply with disciplines on domestic regulation, a conflict could arise as the measure is scheduled under XVI or XVII while it can run afoul of the obligations contained in the disciplines. The current provisional application of these conditions under article VI:5 does not lead to problems as scheduled measures prevent the application of this provision due to the 'reasonably expected' condition contained in VI:5(a)(ii)

Although at first glance, it seems that the various commentators and the Dispute Settlement Bodies are deeply divided in their opinions, the general delineation of article VI and XVI is broadly shared. Article VI addresses qualification requirements which can be overcome by an act of the supplier. Market access restrictions are quantitative in nature and cannot be overcome by the supplier. Measures imposing qualitative restrictions may have quantitative effects but that does not automatically turn them into market access restrictions.

The discussion revolves around the conclusion in the *Gambling* case that measures completely restricting trade in services through a particular mode fall within the scope of article XVI. In my opinion, the feared extension of the scope of article XVI to the detriment of article VI does not follow from the *Gambling* case, however it is currently unclear how the Dispute Settlement Bodies would deal with cases that do not involve a complete ban but leave other options for supply.

The problems relating to the overlap in scope of articles XVI and XVII and conflicting commitments cannot be solved solely by interpreting the text. As commitments are negotiated on the basis of reciprocity, choosing a solution for existing commitments is already problematic. Therefore, as is rightly stressed in the literature, it is all the more important that the matter is resolved before new commitments are undertaken. The same conclusion applies to the problem of overlap between these provisions and the application of article VI to prevent

nullification or impairment of commitments. The solution to this specific problem should be similar to the solution chosen to deal with the conflicting commitments under articles XVI and XVII.

Finally, it is interesting to examine the possibility that article XVI applies only to discriminatory measures. Hopefully, this paper will stimulate the debate started by Mavroidis. The possibility of article XVI only applying to discriminatory measures provides solutions for several of the problems addressed in this paper. However, until now case-law and most of the literature seem to have not considered the possibility at all, leading in practice to the application of article XVI to non-discriminatory measures as well.

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