The Question of Market Access in the Field of Environmental Services: Determining and Defending its Scope

By

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ABSTRACT

There is a growing interaction between international trade and human rights around the world. In the light of this, the case of 'United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services' is of immense importance. In this paper, the author attempts to concentrate on the substantive conclusions of the case and goes on to show that the Appellate Body has done a (largely) commendable job. In that case the Appellate Body held that an total prohibition on remote gambling was "in effect" a `zero-quota' 'hence violative of Article XVI:2. That holding has been widely criticized, especially for what critics refer to as the Appellate Body's "effects test". The AB went further to hold that the Article operates in a mutually exclusive way with regard to Article VI on Domestic Regulations. This blurring of lines between the market access obligation and the concept of domestic regulations is examined in this Article, against the backdrop of one of the most important and contention services today- environmental services.

I. Introduction- The Great Gats-by 84

II. Exploring the Unfortunate Link between Water and International Trade……90

A. Interaction between Trade and Water Rights.....91

B. The Conflict: Privatization vs. Protectionism.....92

C. The problem of Reversibility of GATS commitments.....93

III. The Preliminary Issue: Classification- But does the GATS even apply? 95

A. The "Public Service" debate.....95

B. The issue of outdated classification 98

C. The "Environmental Services" dilemma 99
IV. The Main Issue: All about Market Access.....100
A. The first paragraph: A Separate Obligation under "less favourable treatment"?...101
B. The Second Paragraph.....102
V. The ancillary issue: relationship between Article XVI and Article VI-the *mutual exclusivity* debate.....116
VI. Conclusion 121

I. Introduction: The Great Gats-by

Traditionally, the focal point of WTO jurisprudence has been the international trade in goods. Recently however, academic interest has been strongly drawn to the arena of trade in services as a separate field of study and consequently the WTO has seen fervent debates on the same. The exchange of services in the international context operates in multiple ways and the significance of this can be judged by the fact that services have come to account for more than half of the production from developing countries.[314]In the light of this, it would be interesting to note that while the General Agreement on Tariffs and Trade (GATT) was instituted way back in 1947, a comprehensive understanding on trade in services came only towards the late 1980s. Several efforts of the international community in coming up with uniform rules to govern trade in services finally culminated in the form of the General Agreement on Trade in Services (GATS) which came into effect in 1995 under the auspices of the Uruguay Round.[315]

The initial years of the GATS existence were relatively quiet owing to the fact that

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[314] United States Trade Representative, *2004 Annual Report of the President of the United States on the Trade Agreements Program* (2005), www.ustr.gov (Last Visited: March 14, 2014); World Trade Organisation, Consolidated Tarrifs Schedules (Special Session), *An Assessment of Services Trade and Liberalization in the United States and Developing Economies, Communication from the United States*, p. 2 (2003) TN/S/W/12.

[315]For a greater understanding on the foundations of the GATS, *see*: Juan A. Marchetti & Petros C. Mavroidis, *The Genesis of the GATS (General Agreement on Tradein Services)*, THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, 22(3) (2011).

more attention was being paid to treaties like the GATT. The situation that exists today is vastly different because in recent years the international trade arena has witnessed a fierce debate revolving around the subject of services. The very foundation of the GATS has come under severe fire from critics, several of whom complain that it encroaches too far into the regulatory space of WTO members.[316] Most of this criticism is centered on the fact that the GATS can be exploited and used as a tool to exploit developing countries by pushing them unwillingly towards liberalization.[317]Additionally, it has also been argued that international trade policy-making promotes private sector involvement through progressive liberalization of trade in services[318]. Authors such as Panagiotis Delimatsis and Bernard Hoekman point out several inadequacies[319]and "deficiencies"[320] in the text of the GATS, arising out of, what has been called the "great bargain" of the Uruguay Rounds.[321]

But there is a steady group of trade enthusiasts who seek to defend the foundations of the GATS, arguing that there is enough inherent flexibility in the agreement to prevent over-liberalization of the public sector.[322] This argument may seem fairly reasonable, given that each member nation has the right to *choose* the sectors it wishes to liberalize and also determine the extent to which it wishes to open up these sectors.[323]It is not surprising to note

[316]For a discussion regarding this debate, *see*: WTO, *GATS – Fact and Fiction* (March, 2001), http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm (Last Visited: March 14, 2014) (*Hereinafter referred to as* "GATS (2001)"); World Development Movement, *The GATS Debate* (London: World Development Movement, 2001).

[317] Scott Sinclair & Jim Grieshaber-Otto, *Facing the Facts: A guide to the GATS debate* (Ottawa: Canadian Center for Policy Alternatives, 2002).

[318] Maria Zettel, *The GATS, Privatisation & Water Services*, p. 5 (Working Paper No. 9, Maastricht Faculty of Law, 2006) (*Hereinafter referred to as* "Zettel (2006)").

[319] Panagiotis Delimatsis, *Don't Gamble with GATS- The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the US-Gambling Case*, JOURNAL OF WORLD TRADE, 1060, 40(6) (2006) (*Hereinafter referred to as* "Delimatsis (2006)").

[320] B. Hoekman, *Assessing the General Agreement on Trade in Services*', THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES (Discussion Paper No. 307) (W. Martin and L.A. Winters eds., Washington, D.C.: World Bank, 1995).

[321] S. Ostry, *The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations*, THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC (D.L.M. Kennedy and J.D. Southwick eds., Cambridge: Cambridge University Press, 2002).

[322] David Hartridge, *WTO Secretariat hits false attacks against GATS', The European Services Forum* (Brussels, November 27, 2000) http:// www.esf.be/docs/hartridg.doc (Last Visited: February 21, 2014).

[323]Press Release of Director-General of WTO and Chairman of WTO "*Services negotiations reject misguided claims that public services are under threat"*, June 28, 2002. (PRESS/299) <http:/www.wto.org/>

that historic events and empirical data reveal a fundamental incommensurability of these two positions.

Thus a correct assessment of the benefits and harms of the GATS[324] can only be done by carefully examining the provisions of the agreement and exploring their possible interpretations. This is because the way a particular agreement is interpreted goes a long in determining what effects it will have. The interpretative techniques and modalities used by the WTO judiciary would be crucial in determining whether the agreement will be used to benefit oppressed, struggling nations or whether it will be misused as an instrument for the developed, industrialized nations to continue to assert their dominance. And interpretation is really where the seed of the problem lies.

Even for basic international trade law concepts such as "like services", there exists very limited jurisprudence that the GATS can claim to be of its own.[325] Some principles of non-discrimination have different applications with respect to goods and services[326], but because the *context* of the trade remains the same in most cases (for instance, the "necessity" clause[327]), the GATS borrows copious amounts of literature from its counterpart in goods. As these principles are not completely exclusive in their application, the GATS has sometimes crudely been called "an imitation of the GATT principles in the liberalization of the services sector".[328]

Keeping in mind this problem of limited jurisprudence, it is in our interest to become familiar with and have a thorough understanding of the few GATS-centered case laws that are available to us. For the purposes of this paper the author would like to focus on the (in) famous case of *US-Gambling*[329], which occupies a position unlike any other in terms of the

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(Last Visited: March 11, 2014).

[324] For GATS related research *see*: UNHCHR, *Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights*, Report of the High Commissioner, E/CN.4/Sub.2/2002, (2000).

[325] Mireille Cossy, *Determining "likeness" under the GATS: Squaring the circle?*, (Staff Working Paper, ERSD-2006-08) http://www.wto.org/english/res_e/reser_e/ersd200608_e.pdf (Last Visited: March 19, 2014).

[326] P. Van D Bossche, THE LAW AND POLICY OF THE WTO, 396 (2nd ed, (Cambridge, 2011).

[327] For explanation, *see*: Regan, Donald H. *The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, WORLD TRADE REV., 6,(3), 347-69 (2007).

[328] *Supra* note 11.

[329] Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*,

activism displayed by the WTO judiciary in interpreting the GATS provisions and the extent of criticism leveled against the reasoning provided.[330]This is the fourth WTO dispute case involving the GATS, but is the first where the basic structure of the GATS and several of its important provisions have come up for interpretation. Hence it proved to be one of the most influential cases, not only in the realm of services, but also in the history of the World Trade Organizations.[331]

Notably, this particular case deserves special academic attention for three specific reasons.[332]First, it affected the ability of WTO members to regulate certain activities where, up till now they had unfettered power. Second, it shows that a small country can take on economic and political power in the WTO and win. And third, it is an important test case for determining whether the sanctions available in the WTO give small countries sufficient leverage to bring larger countries into compliance with treaty obligations.

At this point a brief perusal of the facts of the case would help in better understanding the situation. In 2003, a tiny island-nation by the name of Antigua and Barbuda decided to take on a giant in the sphere of international trade, the United States of America. At issue were certain measures undertaken by the US that made it unlawful for suppliers located outside the US to supply on-line gambling and betting services to its consumers over the Internet.

The *US-Gambling* saga occupies a special place in WTO jurisprudence in so far as it redefined the existing notions of regulatory space in the context of international trade. This concept of "regulatory space" can be understood as the amount of relaxation that a sovereign

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WT/DS285/R (April 7, 2005) (*Hereinafter referred to as* "PR, *US-Gambling*"); Appellate Body Report, *United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (adopted 20 April 2005) (*Hereinafter referred to as* "ABR, *UG-Gambling*").

[330] JoostPauwelyn, *Rien ne va plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, WORLD TARDE REVIEW, 131-170 (2005) (*Hereinafter referred to as* "Pauwelyn (2005)").

[331]*See, generally: http://www.citizen.org/documents/Gamblingsummary2007.pdf*(Last Visited: August 5, 2014); http://www.iie.com/publications/papers/wunsch1205.pdf (Last Visited: August 5, 2014) http://www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/brief5_4.pdf (Last Visited: August 5, 2014); Mitchell E. Kilby, *The Mouse That Roared: Implications of the WTO Ruling in US–Gambling*, TEXAS INTERNATIONAL LAW JOURNAL, *235, 44*

nation enjoys with respect to the enforcement of international trade rules. Crucially, this involves a determination of how a country interacts with those international law rules, which curtail or restrict its sovereign freedom. The reason why *US-Gambling* has been chosen for an examination of this concept is because it sheds light on the regulatory space of those nations that form the lower end of the developmental spectrum. The regulatory space of Antigua and Barbuda can be analyzed under Article I of the GATS, which allows developing nations to exclude certain activities from the application of the Agreement because they are "supplied in the exercise of governmental authority". Alternatively, it can be seen in the market-access obligation of Article XVI, where once a liberalization commitment is undertaken, it becomes almost impossible to reverse it.

Thus, I would begin with an evaluation of the "public services" exception under Article I and the market access obligation under Article XVI. As a concluding issue I will go on to examine the complex nexus that exists between Articles XVI and certain other provisions of the Agreement. In particular, I would attempt to shed some light on how the concept of "Domestic Regulations" under Article VI interacts with the market access obligation under Article XVI.

The situation that exists after the *Gambling* saga will be scrutinized against the backdrop of one of the most far-reaching, essential services in the world water distribution and sanitation services. This seemingly strange choice of services for the evaluation of GATS principles actually stems from a variety of solid reasons. Firstly, it provides a perfect framework for better understanding the grievances relating to "over-liberalization" from the perspective of certain developing countries like Bolivia where private firms have taken control of the water distribution and sanitation services and are selling them at exorbitant prices, much to the dismay of the citizens. This further highlights the problem of irreversibility of GATS commitments. Secondly, it provides a suitable lens through which the general interaction of trade and human rights can be viewed. This eventually allows us to open the question of whether such liberalization-centered principles should even be applied

to such essential services. Finally, there is contemporary merit to this issue since there currently exists severe ambiguity with regard to the definition and scope of such "Environmental Services" under the WTO.

The aforementioned ambiguity is probably the most pressing reason why these environmental services deserve close attention. This problem is mainly attributable to the fact that "water distribution" and "sanitation services" have not been expressly classified in any of the sectors prescribed under the GATS system of classifying services. Keeping this in mind, I would briefly discuss the scope of the term "environmental services" in order to demonstrate how such services interact with the market access obligation under Article XVI (which was one of the main provisions interpreted in the *US-Gambling* case).

Several commentators have expressed views regarding this issue[333] and before going into the main discussion regarding *US-Gambling,* I will briefly go on to show "that water distribution and sanitation services" are covered under the ambit of "Environmental Services" and thus the market access obligation is squarely applicable to it.

This enables us to better appreciate both, the environmental services sector and the market access commitment under the GATS. Only when we understand how the commitment reacts to a particular sector, can we delve into the question of *what* the commitment entails for a sovereign WTO member that has agreed to schedule that sector. The other reason for contextualizing GATS provision with the environmental services is that it gives us a real-time picture of how trade agreements are handled by the WTO membership.

II. Exploring the unfortunate link between water and international trade

The inherent importance of any legal debate is that it is bound to raise several moral and

[333] Notably: *Id.*; Federico Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US- Gambling: A Critique*, JOURNAL OF INTERNATIONAL ECONOMIC LAW, Vol. 1, 9 (2006) (*Hereinafter referred as* "Ortino (2006)"); Marcus Krajewski, *Playing by the Rules of Game? Specific Commitments after US-Gambling and Betting and the Current GATS negotiations*, LEGAL ISSUES OF ECONOMIC INTEGRATION, Vol. 4, 32 (2005) (*Hereinafter referred to as* "Krajewski (2005)"; Delimatsis (2006).

policy-related questions. Thus any legal issue for consideration must necessarily be viewed through the prism of the factual circumstances that surround it. Significantly, the number of people affected by a particular instrument or the amount of influence it exerts on the rights of people would go a long way in determining the importance of trade agreement like the GATS. In this sense, it is noteworthy that the GATS has immense bearing on the water rights of people around the world. This is because the latter is affected by how the former treats the suppliers of water.

A. Interaction between Trade and Water Rights

It is undisputed that we cannot afford to forget the immense of importance of water.[334] The fundamental nature of water has led the international community to recognize it as a human right in a number of documents including the *International Covenant on Economic, Social and Cultural Rights*,[335] *General Comment No. 15* of the United Nations Committee on Economic, Social and Cultural Rights,[336] the *Declaration on the Right to Development*[337] and the *Convention on the Elimination of All Forms of Discrimination Against Women*.[338]

Several commentators have already argued whether it is even reasonable for the GATS, which is nothing more than a consensus on international trade, to touch upon matters completely unrelated to trade.[339] However, such an interaction is inevitable given the highly diverse ways in which trade policies affect human rights.[340]

To this extent several authors believe that GATS should indeed establish "binding rules"

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[334] Peter Gleick, *The Human Right to Water*, WATER POLICY, p. 489, 493-4, Vol. 1 (1999).
[335] International Covenant on Economic, Social and Cultural Rights, December 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.
[336]Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15, UNESCOR, 29th Sess., UN Doc. E/C.12/ 2002/11 (2002).
[337]Declaration on the Right to Development, General Assembly Res. 41/128, UN GAOR, 41st Sess., 97th meeting, UN Doc A/Res/41/128 (1986).
[338]Convention on the Elimination of All Forms of Discrimination Against Women, Opened for Signature: December 18, 1979, 1249 UNTS 13 (Entered into Force on September 3, 1981).
[339] Karen Bakker, *Liquid Assets: How We Provide Water Depends on Whether We View Water as a Commodity or as a Public Good*, ALTERNATIVES JOURNAL, Vol. 17, 29 (2003).
[340]Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence*, IDLO VOICES OF DEVELOPMENT, JURISTS PAPER SERIES, Vol. 2(2) (2005).

on the international trade in services.[341] This is the origin of several legal[342] and policy conflicts.[343]

B. The Conflict: Privatization vs. Protectionism

One such area of conflict can be found in the African landscape where many developing nations are fighting a losing battle to save their water. Services like water distribution and sanitation were earlier the exclusive domain of the public (in many cases, provincial) governments, but now they are losing ground due to private involvement in these sectors.[344]

Consider Bolivia's predicament. Under stress from Financial Institutions like the World Bank and IMF, it was required to open up water services to the private sector in 1999. It turned out to be an ugly situation where the people were forced to take to the streets in protest as they could no longer afford their own water.[345]

However, as pointed out by Rebecca Bates, privatization is not a new phenomenon in this area[346] as the private sector was responsible for the first provision of water and sanitation services in Western Europe and North America during the 18th century.[347] This initial endeavor turned out to be disastrous as the private firms were inclined towards favoring wealthy neighborhoods and ignoring the poorer households.[348] This was the cause of much

[341]David Hunter, James Salzman and Durwood Zaelke, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, 1147 (2nd ed., 2002); Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY (2nd ed., 2006).

[342] Elisabeth Türk, Aaron Ostrovsky, and Robert Speed, *GATS and its Impact on Private Sector Participation in Water Services*, FRESH WATER AND INTERNATIONAL ECONOMIC LAW, 143 – 172 (Brown Weiss ed., Oxford University Press, 2005).

[343] Elisabeth Tuerk, Aaron Ostrovsky and Robert Speed, *GATS and Water: Retaining Policy Space to Serve the Poor,* Paper presented at the workshop on Water and International Economic Eaw(Geneva, March 3, 2003.)

[344] For an excellent coverage on this point, *see*: Aaron Ostrovksy, Robert Speed and Elisabeth Tuerk, *GATS, Water and the Implications of the General Agreement on Trade in Services for Water Resources Environment*, CIEL and WWF International Discussion Paper(October 2003) (*Hereinafter referred to as* "CIEL (2003)").

[345]Tim Concannon and Hannah Griffiths, *Stealing our Water: Implications of GATS for Global Water Resources, Briefing, Friends of the Earth*, http://www.foe.co.uk/sites/default/files/downloads/gats_stealing_water.pdf (Last Visited: March 11, 2014)

[346] Rebecca Bates, *The Trade in Water Services: How Does GATS Apply to the Water and Sanitation Services Sector?*, http://sydney.edu.au/law/slr/slr31/slr31_1/Bates.pdf (Last Visited: March 11, 2014).

[347] James Salzman, *'Thirst: A Short History of Drinking Water'*, YALE JOURNAL OF LAW AND THE HUMANITIES, 94, Vol. 18 (2006).

[348] Jessica Budds and Gordon McGranahan, *'Are the Debates on Water Privatization Missing the Point? Experiences from Africa, Asia and Latin America'* ENVIRONMENT & URBANIZATION, 87, Vol. 15 (2003)

grievance and generated heated debates.[349]

Having fairly received the warning sign, governments entered the market and took increasing responsibility for the provision of these essential services.[350]At this point, it is interesting to note that privatization has the potential to be both, a reviving force in the market and at the same time, a catalyst towards havoc. While it can provide much needed investment to 'expand and rehabilitate the infrastructure' without putting an additional burden on public finances and can also improve the quality of the service, [351] there is also the risk that it may shift the focus away from the public interest in favor of profit. This would, once again, leave those unable to pay excluded from the service.[352]

And yet, we find several countries at the crossroad of liberalization and protectionism. The high costs associated with constructing and maintaining water-distribution systems (including reservoirs and pipeline networks) has led to some governments accepting private participation in the sector, which until recently was completely dominated by the public sector.[353]Though this has generated a large amount of academic debate within the international community[354], it remains to be seen whether history will repeat itself.

C. The problem of Reversibility of GATS commitments

Despite wanting to open their sectors to accept the nectar of private funding, several countries are concerned that the same might eventually lead to an overall collapse of their service-sector, and consequently, of their country. Further, those Member states which have undertaken market access obligations under this sector, find it near impossible to remove the private sector as that would be a clear violation of their GATS commitments.

(*Hereinafter referred to as* "Budds and McGranahan (2003)").
[349]Peter H Gleick, Gary Wolff, Elizabeth L Chalecki and Rachel Reyes, *The New Economy of Water: The Risks and Benefits of Globalization and Privatization of Fresh Water: Final Report* (2002).
[350] Budds and McGranahan (2003).
[351] *Private Firms and Public Water: Realising Social and Environmental Objectives in Developing Countries* 7-10 (Nick Johnstone and Libby Wood eds. 2001).
[352]Budds and McGranahan (2003).
[353] Diana Mitlin IIED and David VivasEugui, *Water, Development and the GATS*, ICTSD (September 2003).
[354] Matthew S Tisdale, *The Price of Thirst: The Trend Towards the Privatisation of Water and its Effect on Private Water Rights,* SUFFOLK UNIVERSITY LAW REVIEW, 535, Vol. 37 (2004).

To be sure, the WTO continues to maintain that there are ways to reverse commitments.[355] However, of the four mechanisms it lists, two allow only a temporary suspension of commitments, one is likely to require the payment of compensation and the other is applicable only in extreme circumstances such as endangerment of national security or public morals.[356]Indeed, some fear that a vice-grip like application of the GATS to essential services might infringe upon the human right to water.[357]

To allay these fears, the WTO has maintained that:

'The GATS does not require the privatization or deregulation of any service. In respect of water distribution and all other public services, the following policy options, all perfectly legitimate, are open to all WTO Members:

(i) To maintain the service as a monopoly, public or private;

(ii) To open the service to competing suppliers, but to restrict access to national companies;

(iii) To open the service to national and foreign suppliers, but to make no GATS commitments on it;

(iv)To make GATS commitments covering the right of foreign companies to supply the service, in addition to national suppliers.'[358]

It is not possible to turn a blind eye to the plight of the developing countries but it would be patently unfair to simply allow them to escape commitments that they have undertaken themselves, after much deliberation and thought. By signing up to the GATS countries have indeed committed themselves to 'achieve a progressively higher level of liberalization in

[355] Stephen Thomas & David Hall, *GATS and the Electricity and Water Sectors* (March 2006), http://gala.gre.ac.uk/3614/1/PSIRU_9707_-_2006-03-WE-GATS.pdf (Last Visited: March 19, 2014)
[356]*Id.*
[357] Ellen Gould, *Water in the Current Round of WTO Negotiations on Services,* CANADIAN CENTRE FOR POLICY ALTERNATIVES BRIEFING PAPER SERIES: INVESTMENT AND TRADE, Vol. 4(1); John Hilary, *GATS and Water: The Threat of Services Negotiations at the WTO,* Save the Children Briefing Paper (2003); John Hilary, *The Wrong Model, GATS, Trade Liberalization and Children's Right to Health*; Save the Children Briefing Paper (2001).
[358]GATS (2001).

their service sectors'.[359]

III. The Preliminary Issue: Classification- But does the GATS even apply?

In the light of the aforementioned scenario, several commentators have sought to defend the water rights of the people by questioning the very applicability of GATS should with respect to essential public services like water distribution and sanitation services.[360] Often the WTO has tried to justify[361]by maintaining that one of the main reasons for its existence is the global welfare of people.[362] It is only unfortunate that to date, the question of whether or not water should be covered by the GATS has not figured prominently[363] in the trade and environment discourse.[364]

A. The "Public Service" debate

The aforementioned ambiguity must be resolved by resorting to Article I of the GATS which stipulates that the coverage of the GATS extends to all measures "affecting trade in services". In one of its most famous rulings, the Appellate Body in *EC-Bananas III* concluded that "the ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a broad[365] scope of application."[366]

However in the same vein, the article allows leeway to developing countries by excluding

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[359]Article XIX, GATS: General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, (April 15, 1994); Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATINS, 284 (1999); 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) (*Hereinafter referred to as* "GATS").

[360] For an in-depth analysis of the WTO *see*: Friends of the Earth International, *The World Trade System. How it Works and What's Wrong with it?*(London, 1999).

[361]GATS and Public Services, Letter from David Hartridge to Mike Waghorne, Public Services International (June, 2000), http://members.iinet.net.au/~jenks/GATS_BC2001.html (Visited: 19 Mar, 2014); GATS (2001)

[362]*Id.*

[363] Fuchs, Peter and Elisabeth Tuerk, *The General Agreement on Trade in Services (GATS) and future GATS-Negotiations - Implications for Environmental Policy Makers, Paper prepared for the German Federal Environment Agency* (2001), http://www.umweltbundesamt.de (Last Visited: March 19, 2014).

[364]CIEL (2003).

[365]Ruggiero, *Towards GATS 2000: a European Strategy*, Address to the Conference on Trade in Services. Brussels (June 2 1998), http://www.wto.org/english/news.e/sprr.e/bruss1.e.htm (Last Visited: March 14, 2014).

[366]Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶200, WT/DS27/AB/R (September 9, 1997).

from its ambit 'services supplied in the exercise of governmental authority'.[367]This is because the drafters of the agreement felt that if left unfettered, the GATS would trespass into the forbidden territory of 'public domain'. It is thus possible to make the argument that if developing countries can successfully categorize services like water distribution as "public services" i.e. 'services supplied in the exercise of governmental authority', then the GATS commitments can be excluded.

The provision explains that 'a service supplied in the exercise of governmental authority' means 'any service which is supplied neither on a *commercial basis*, nor *in competition* with one or more service suppliers'.[368]

Before beginning it would be helpful to note that as per its ordinary meaning (under Article 31(1) of the VCLT)[369], "commercial" is a "generic term for almost all aspects of buying and selling."[370] "Commercial" thus refers to the exchange of goods (or services) for money or a monetary equivalent.[371] Here the term "governmental authority" really starts to cause trouble.

Nothing in the main text of the GATS helps us in our endeavor to find out the scope of the term. At best we have the *Annex on Financial Services* which uses the phrase "services supplied under governmental authority".[372] These services are said to include activities like those of central banks and other monetary authorities, statutory social security and public retirement plans and public entities using governmental financial resources.[373] It would seem

[367]Article I:3(b), GATS.
[368]According to the WTO website, examples of such issues are "social security schemes and any other public services, such as health and education, that is provided at non-market conditions": WTO, *The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines*, www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (Last Visited: March 11, 2014).
[369] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (May 23, 1969).
[370]BLACK'S LAW DICTIONARY, 140 (8th ed. 2004); Markus Krajewski, *Public Services And The Scope Of The General Agreement On Trade In Services*, CENTRE FOR INTERNATIONAL ENVIRONMENTAL LAW, , 13 (2001) (*Hereinafter referred to as* "Krajewski (2001)").
[371]*Id.*
[372]Article 1(b), Annexure on Financial Services, GATS.
[373]Elisabeth Tuerk and Markus Krajewski, *The Right to Water and Trade in Services: Assessing the impact of GATS negotiations on Water Regulation*, Paper presented at the CAT+E Conference "Moving from Cancun" (Berlin October 2003), www.ciel.org/publications/GATS_WaterHR_28Oct03.pdf (Last Visited: March 16, 2014) (*Hereinafter referred as* "Krajewski (2003)").

that such services need the "authority" of the government and cannot be supplied by private entities on a commercial basis. Arguably, water and sewage services, supplied by the government on a commercial basis, would fall outside the scope of Article I: 3(b). This narrow interpretation is supported by the specific commitments of countries like Bulgaria[374], Dominican Republic[375] and Hong Kong[376] (which exclude "public services" from GATS' scope).

But there are others who take an altogether different route of argumentation. They believe that "[I]t is unlikely that water and sanitation services would be included within this exception (of public services) for while water markets tend towards a monopoly structure and therefore possess limited opportunities for competition[377], water and sanitation services are generally provided on a commercial basis."[378]

It is however accepted, that the differing nature of water supply and water supply structures means that certain communities will come closer to the definition of art I: 3(c) than others.[379]Any interpreter must remember that an exceedingly broad interpretation would unduly restrict governmental regulations that are aimed at helping the poor access water services.[380] This is because regulations restricting access to environmental benefits or natural resources are a well-recognized means of preserving the natural resources in question.[381]

Others are content with arguing that a narrow would frustrate the goals of the GATS[382] as it would only allow it to cover services which are rendered at market price or which just cover

[374] The Republic of Bulgaria, 21, Schedule of Specific Commitments, GATS/SC/122, (May 21, 1997).
[375] Dominican Republic, 3, Schedule of Specific Commitments, GATS/SC/28, (April 15, 1994).
[376] Hong Kong, 13, Schedule of Specific Commitments, GATS/SC/38, (April 15, 1994).
[377] *Id.*
[378] Rebecca Bates: *The Trade in Water Services: How Does GATS Apply to the Water and Sanitation Services Sector?*, http://sydney.edu.au/law/slr/slr31/slr31_1/Bates.pdf (Last Visited: March 19, 2014).
[379] *Id.*
[380] Andrew Lang, *The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry*, JOURNAL OF INTERNATIONAL ECONOMIC LAW, 814, VOL. 7 (2004) (*Hereinafter referred to as* "Lang (2004) ").
[381] WWF, Enhancing the Environmental Review of the Draft Multilateral Agreement on Investment, Discussion Paper, (January 1998).
[382] And this, they argue, it against the principle of effective interpretation. *See*: Appellate Body Report, *US-Standards for Reformulated and Conventional Gasoline*, ¶249, WT/DS2/AB/R (May 20, 1996).

the cost of supply.[383]

B. The issue of outdated classification

An inquiry regarding classification of services arises because the market access obligation in question, applies only to those sectors and services which have been explicitly carved out in the Members Schedule of Commitments.[384] In other words, it applies[385]"subject to the terms, limitations and conditions set out in the Schedule."[386]

There exists a class of academicians who believe that classification issues do not affect the sectoral scope of GATS at all. They argue that it applies to all sectors with the exception of air transport rights and services "supplied in the exercise of governmental authority".[387]

To be sure, the WTO does allow member nations to elect the extent to which they would like to open their markets.[388] But to that extent, this act of scheduling sectors (and services) operates as a minimum guarantee against the accepting nation.[389]If a Member were to impose limitations, not inscribed in its Schedule, it would be an active violation of the obligation. Though the WTO has tried to maintain that there are ways to reverse commitments, less optimistically, it adds:

'These commitments are "bound": like bound tariffs, they can only be modified or withdrawn after negotiations with affected countries — which would probably lead to compensation. Because "unbinding" is difficult, the commitments are virtually guaranteed conditions for foreign exporters and importers of services and investors in the sector to do

[383]Krajewski, 18 (2001).
[384]B. Hoekman& P. Sauve, *Liberalizing Trade in Services*, Discussion Paper No.243 (Washington, D.C.: World Bank, 1994).
[385]*Id.*
[386]WTO- Trade in Services, MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, 369 (Boston, 2008).
[387] Krajewski (2003).
[388]PANAGIOTIS DELIMATSIS, *Article XIX GATS: Progressive Liberalization*, MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, 427-44 (Rüdiger Wolfrum, Peter-Tobias Stoll, Clemens Feinäugle eds., Leiden/Boston: Martinus Nijhoff Publishers, 2008).
[389]Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), Adopted by the Council for Trade in Services on 23 March 2001, S/L/92, p. 39; A. Mattoo., *National Treatment in the GATS: Corner Stone or Pandora's Box?*, JOURNAL OF WORLD TRADE 110, Vol. 31 (1997).

business.'[390]

Hence, we must examine how, if at all, the Article XVI obligation would interact with Environmental Services like water distribution.

C. The "Environmental Services" dilemma

It is well known that, the environmental industry consists of two main segments, namely, the service segment and equipment segment.[391] There exists a fine line of distinction between environmental goods and environmental services, which at first glance may not be so abundantly clear.

What is of utmost concern is the fact that essential services like "water distribution" and "drinking water" have not yet received any WTO classification.[392] To date, only sewage services have been classified under the general heading of environmental services.

The contentious questions regarding policy choices in the water sector deal with certain forms of a "water service"[393]which can be divided into (at least) four categories: (1) water collection, purification and providing services, (2) water distribution, (3) wastewater treatment (sewage) and (4) services incidental to water services.[394]

The Organization of Economic Cooperation and Development(OECD) has noted that the current GATS classification is very narrow and is not organized according to the provision of services for environmental media like water.[395]To solve this, the EC communications have suggested that services regarding water for human use and wastewater management should be included within the scope of 'environmental services' under GATS.[396]` But this matter

[390]*Id.*
[391]Aparna Sawhney, Rupa Chanda, *Trade in Environmental Services: Opportunities and Constraints, Indian Council for Research on International Economic Relations*, WTO Research Series No.3, http://www.icrier.org/pdf/WTO-3.pdf (Last Visited: March 16, 2014).
[392]Mireille Cossy, *Water Services and the WTO*, FRESH WATER AND INTERNATIONAL ECONOMIC LAW (Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder eds., Oxford University Press, 2005).
[393]Krajewski (2003).
[394]Zettel (2006).
[395]Organization of Economic Cooperation and Development, *Environmental Goods and Services: The Benefits of further global trade liberalization* (Paris, 2001).
[396]Communications from the European Communities and their Member States, GATS 2000, Environmental Services S/CSS/W/38, 22 December 2000.

remains extremely controversial.[397]

In conclusion, it is interesting to note that though, the latest version of the United Nations Central Product Classification List (CPC 2) has included water distribution services under Section 8 which concerns itself with "Business and production services"[398], there is sufficient legal ground to include it in 'Environmental Services' as well. Thus, it can safely be said that such services are not "public services" in the context of the GATS and are squarely covered under its ambit.

IV. The Main Issue: All about Market Access

Once the hurdle of classification has been crossed, we can examine how these services are affected by the market access obligation. The non-discriminatory principle of Market Access is inhabited in Article XVI of the GATS and it stipulates that, in the sectors where a member has undertaken specific commitments, that member cannot maintain any such limitation (as enumerated in XVI:2) that would hinder or restrict the entry (or "access") of an entity into that sector ("market"). It can be found in part III of the text, entitled "Specific Commitments", implying that it does not apply unconditionally and has application only with regard to those sectors where commitments have been *specifically* undertaken.[399]

However, the GATS negotiating history shows that it was the intention of the drafters to construct market access as extending beyond any notion of access for foreign service suppliers. It was intended to include all policies, mostly of a quantitative nature[400], that restrict international trade, even if its application[401] was done in a non-discriminatory way.

[397]Michael Krajewski, *Environmental Services of General Interest in the WTO*, JOURNAL OF EUROPEAN ECONOMIC POLICY AND LAW 13, 112 (2004).
[398] WTO Council for Trade in Services Environmental Services, Background Note by the Secretariat, S/C/W/320, August 20, 2010 (*Hereinafter referred to as* "Background Note (2010)")
[399]Delimatsis (2006).
[400]However, Article XVI: 2 lit. e is not a quantitative restriction, as it refers to the form of a legal entity.
[401] Article XVI: 2 lit. f relates to foreign equity participation and thus, is a discriminatory quantitative limitation.

A. The first paragraph: A Separate Obligation under "less favourable treatment"?

Market access can be sought through the four modes of supply[402] as set out in Article I: 2[403], namely: cross-border supply; consumption abroad; commercial presence; and presence of natural persons. Under the first paragraph of Article XVI, the State is required not to maintain any measures which would discriminate against foreign suppliers[404]. Specifically, the text disallows members from according "less favourable treatment" than was guaranteed in their schedule.

It thus becomes necessary to determine the scope of the phrase "less favourable treatment" i.e. to find out when and how a particular governmental action becomes "less favourable" than it should be. In trade law this concept of "less favourable treatment" is based on the difference in origin of the products (or services) in question.[405] The systemic rationale behind this 'subjective theory' of 'less favourable treatment', recognized primarily by Pauwelyn[406], is to focus on the true basis of differential treatment. In other words, origin is the only prohibited basis for differential treatment.[407]This is known as *de jure* discrimination and international economic law generally treats this as *prima facie* illegal or as creating a presumption of illegality.[408]

Acknowledging the importance of the provision, the Appellate Body in *US-Gambling*

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[402] Note, footnote 8 to Article XVI: 1 aims to protect the movement of capital resulting from the supply of services in a cross-border manner (mode 1) or through commercial presence (mode 3). *see*: D.E. Siegel, *Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements*, AMERICAN JOURNAL OF INTERNATIONAL LAW, 96 (2002).

[403]Article XVI:1, GATS.

[404]Peter Van den Bossche, *The Law and Policy of the World Trade Organization,* Cambridge University Press, 365 (2005).

[405]In contrast, under Article XVII it is the conditions of competition that determine what is "less favorable treatment", *see*: Panel Report, *Korea – Definitive Safeguard Measures on Import of Certain Dairy Products*, 7.24, ¶ 137–38WT/DS98/AB/R (January 12, 2000).

[406]Joost Pauwelyn, *The Unbearable Lightness of Likeness*, GATS AND REGULATION OF INTERNATIONAL TRADE IN SERVICES, 361 (World Trade Forum, Cambridge University Press, 2008).

[407]*Id.*

[408]Howse, L. Robert and Donald H. Regan, *The Product/Process Distinction - An Illusory Basis For Disciplining 'Unilateralism' In Trade Policy*, EUROPEAN JOURNAL OF INTERNATIONAL LAW, 11(2) 11; D.A FARBER AND R.E. HUDEC, *GATT Legal Restraints on Domestic Environmental Regulations*, FAIR TRADE AND HARMONIZATION (Jagdish Bhagwati and Robert HudecEds, 69 MIT Press,1996); Robert Hudec, *GATT/WTO constraints on National Regulation: Requiem for an "Aims and Effects"* Robert Hudec, ESSAYS ON NATURE OF INTERNATIONAL TRADE LAW, 359-395 (Cameron ed., London, May2000).

highlighted that Article XVI:1 ``links a Member's market access obligations in respect of scheduled services to `the terms, limitations and conditions agreed and specified in its Schedule' ''.[409] Indeed, this market access obligation is qualified by the relevant portions of the Member's Schedule.[410]

B. The Second Paragraph

Article XVI: 2 draws from the general obligation found in the first paragraph and lists out six types of limitations which are considered illegal under GATS unless they are scheduled by a Member state.[411]

Viewed from a different angle, WTO Members remain free to maintain or introduce any of the measures listed in Article XVI: 2 subparagraph (a)–(f) with regard to a given service sector, if *no market access* commitment in that sector has been undertaken. A *full market access* commitment in a specific service sector or sub-sector, on the other hand, gives rise to an obligation to maintain none of the measures listed in Article XVI with respect to that sector or sub-sector.[412]

Usually members opt for the *partial market access* approach wherein a member, although allowing itself to be subjected to Article XVI disciplines on market access, gives itself some regulatory space to adopt one or more measures listed in the Article.

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[409] ABR, *UG-Gambling*, ¶235.

[410] Compare Appellate Body Report, *Canada-Diary*, WT/DS103/AB/R.

[411] The prohibited measures are the following: (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; (d) limitations on the total number of natural persons that may beemployed 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; 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.

[412]Such full market access commitments are demarcated by inserting the word "*None*" in the relevant sector or sub-sector.

1. Issue One: The nature of the list: Exhaustive vs. Illustrative

In a finding not reviewed by the Appellate Body, the Panel in *US Gambling* found that the list of limitations mentioned in the second paragraph of the Article is exhaustive and thus rejected the argument that the word "whether" in sub-paragraph (a) implies an illustrative list of limitations, the Panel held that list was exhaustive.[413] Thus the second paragraph was found to complement the first.[414]

The Appellate Body based this reasoning on Para 4 of the 1993 *Scheduling Guidelines* which provides that a member "allows full market access in a given sector and mode of supply when it does not maintain in that sector and mode of supply any of the types of measures listed in Article XVI.".[415]

However, Delimatsi notes that there exist two textual elements which contradict the conclusion of the Scheduling Guidelines.[416] According to the learned author, firstly, "footnote 8 to Article XVI implies *a contrario,* that there are other measures that can inhibit market access, but which are not necessarily mentioned in Article XVI: 2, such as restrictions on capital movements with respect to mode 2 and 4."[417] Next, the author throws light on Article XVIII and argues that "[It] appears to acknowledges that there are measures other than those subject to scheduling under Article XVI (including, but not limited to, measures relating to qualifications, standards, or licensing), which can still affect market access.[418] It is true that such an interpretation would ensure the fine balance between the principle of progressive liberalization and the Member's right to regulate.[419]

But there are others who warn of an overly-liberal interpretation. On the opposite end of

[413] PR, *US-Gambling*, ¶¶6.325, 6.341.
[414] PR, *US-Gambling*, ¶¶ 6.298, 6.318.
[415]GATT (1993), *Scheduling of Initial Commitments in Trade in Services*, Explanatory Note, ¶4, MTN.GNS/W/164 (September 3, 1993.)
[416] Delimatsis (2006).
[417] D.E. Siegel*, Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements*, AJIL, 96 (2002).
[418] Delimatsis (2006).
[419] PR, *US-Gambling*, ¶ 6.313-6.317.

the spectrum, Frederico Ortino has expressed[420] that "the claim that market access limitations for purposes of Article XVI GATS extend beyond a definite set of formal measures to cover *de facto* market access limitations appears to starkly contradict with the exhaustive nature of the list of limitations in Article XVI:2." [421] The author cautions that "[If] the notion of market access limitations (prohibited by Article XVI) is defined on the basis of the potential effect of such limitations, this would make the list of Article XVI:2 an open-ended one, contrary to the Panel's finding that such a list is in fact of an exhaustive nature.[422]

The Appellate Body did not have an opportunity to provide inputs on this issue since Antigua had appealed this finding conditional upon the Appellate Body's reversing the finding of the Panel that certain United States federal and state laws are contrary to Article XVI:1 and Article XVI:2 of the GATS (which the Appellate Body did not).[423]

In conclusion, the correct position of law is aptly stated by Pauwelyn, who maintains that if given a chance, the Appellate Body would disagree with the Panel's finding on the exhaustive nature of Article XVI: 2.[424] This view is bolstered by the finding of the Appellate Body according to which *both* Article XVI:2(a) and Article XVI:2(c) apply to the US measures. If the list were really exhaustive in nature, the limitations listed in subparagraphs (a) to (f) would not apply cumulatively.[425]

2. Issue Two: The Limitations: Numerical Quotas, Monopolies and the rest- But what about Total Prohibitions?

An extensive perusal of the *Gambling* saga reveals that at the heart of the dispute lies one, deceivingly simple-looking question: Can a total prohibition[426] on the cross-border (remote)

[420] Ortino (2006).
[421] *See*: Philip Raworth, TRADE IN SERVICES – GLOBAL REGULATION AND THE IMPACT ON KEY SERVICE SECTORS, 36-37 (New York, Oceana Publications, 2005).
[422] Ortino (2006).
[423] ABR, *UG-Gambling*, ¶256.
[424] Pauwelyn (2005).
[425] *Id*.
[426] Assuming here, that this prohibition is not expressed strictly in numerical terms i.e. it does not contain any express reference to numbered units.

supply[427] of a service, in respect of which a full market access commitment was undertaken (*in casu*, gambling and betting services), be considered to be a market access limitation falling under Articles XVI: 2(a) and XVI: 2(c)?

This question, along with its possible implications, has been the subject of several academic deliberations. The case was in the limelight especially since it was the first dispute where the WTO judiciary had a chance to comprehensively deal with the scope and ambit of market access under GATS.

In this respect, two findings of the Appellate Body require intensive consideration: Firstly, the fact the ``the thrust of sub-paragraph (a) is not on the form of limitations[428], but on their numerical, or quantitative nature''.[429] Second, with regard to sub-paragraph (c), the Appellate Body stressed that all the types of limitations under this are also quantitative in nature. Even with respect to this paragraph, the Appellate Body found it prudent to allow some flexibility and clarified that ``the limitations covered [under sub-paragraph (c)] cannot take a single form, nor be constrained in a formulaic manner''.[430]

After considering a wide array of legal arguments, the Appellate Body accepted that a total prohibition was equivalent to a "zero quota"[431]and that because it is numerical in nature (i.e. it is quantitative), it is inconsistent with Article XVI: 2(a).[432] This can be seen as a rejection of the US's narrow view that the term ``market access limitation'' can only include the precisely defined limitations set out in Article XVI: 2.[433]

The reasoning of the WTO judiciary suggests that because the intrinsic nature of a total prohibition is quantitative, it is a form of a numerical quota for the purpose of Sub-paragraph (a). Thus, one way of determining the true scope of the market access provision is by

[427] It would be safe to say that the same rationale applies equally to other modes of supply of service, like commercial presence under mode 3.
[428]The Appellate Body rationed that the words ``in the form of '' under this subparagraph should not be taken ``as prescribing a rigid mechanical formula'', *see*: ABR, *UG-Gambling,* ¶231.
[429]ABR, *UG-Gambling,* ¶232.
[430] ABR, *UG-Gambling,* ¶247.
[431] In so far as it forbids altogether the market access through mode 1 to service suppliers and thus limits the number (of service and service-suppliers) to zero.
[432] ABR, *UG-Gambling,* ¶227-233.
[433] US appellant submission in ABR, *UG-Gambling,* ¶111.

examining how far the meaning of the phrase "numerical quota" can be stretched.

a. Numerical Quota- Definition, ambit and limits

It is possible to argue that, owing to the expansive scope of the term "*numerical quota*", a total prohibition can be included within it.

The *US-Gambling* judiciary concluded that the phrase limitations "in the form of a numerical quota*"* would encompass limitations which, even if not themselves a number, have the characteristics of a number."[434] This is because the meaning of the word "numerical" includes "characteristic of a number or numbers"[435] whereas a "quota" is understood to be "the maximum number or quantity belonging, due, given, or permitted to an individual or group"; and "numerical limitations on imports or exports".[436]

A "numerical quota" within Article XVI: 2(a) thus appears to mean a quantitative limit on the number of service suppliers.[437] In essence, the question of whether a measure is a numerical quota can be thought of as the question whether the measure is "quantitative" or "qualitative" in nature.[438]

According the Appellate Body, "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".[439]

i. The "effects test" debate- Arguments For

In an attempt to justify its stand, the Appellate Body stated that "a prohibition on the supply of services in respect of which a full market access commitment has been undertaken

[434] ABR, *U.S.—Gambling*, ¶227.
[435] NEW SHORTER OXFORD ENGLISH DICTIONARY, 1955.
[436] *Supra* note 120.
[437] ABR, *U.S.—Gambling*, ¶227.
[438] In any case, the 1993 Scheduling Guidelines clarify that "the criteria [specified in subparagraphs (a) to (d)] do not relate to the quality of the service supplied or to the ability of the supplier to supply the service (i.e. technical standard or qualification of the supplier), *see*: GATT (1993), Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164 (September 3. 1993).
[439] ABR, *U.S.—Gambling*, ¶227.

is a quantitative limitation on the supply of such services."[440]

This would mean that any instrument of the government (including Laws, Regulations etc.) which reduces the number of service-suppliers to zero can be said to have the characteristics of a number i.e. to be numerical and therefore it would be subject to market access disciplines.

In order to support this, the concept of an "effects test" was advocated.[441] On paragraph 230 of its Report, the Appellate Body took the assistance of sheer logic to hold that measures having the *effect* of establishing a numerical quota must also be prohibited. In essence, the test states that if the *effect* of the restriction is the establishment of a numerical quota, the *form* of the measure becomes irrelevant. The reason why this is significant is that, according to this line of reasoning, even if the measure adopted by a member is not expressed in numerical terms or is *incapable* of being expressed in numbers, that would not *ipso facto* lead to a conclusion that it is not a numerical quota. The only determining factor is whether the effect of that measure is that a restriction is put on the number of services or service suppliers. There exist several reasons to support this liberal interpretation.

Firstly, this interpretation is logically tenable because it seeks to prevent an absurd result.[442] The panel provided the following reasoning to justify its stand: [443]"*The fact that the terminology of the Article embraces lesser limitations, in the form of quotas greater than zero, cannot warrant the conclusion that it does not embrace a greater limitation amounting to zero*." If a zero-quota did not qualify as a numerical quota, then the latter (which only limits the number of service suppliers) would be disallowed, but the former (which completely eliminates the service from the market) would be allowed .In other words, it would *disallow* a member nation from putting a *less* restrictive quota of say, five or ten units whereas the same member would be allowed to establish a *complete prohibition*, simply because it would qualify as a "zero quota" instead of "numerical quota". Thus the Appellate

[440]ABR, *U.S.—Gambling*, ¶250.
[441]ABR, *U.S.—Gambling*, ¶230
[442] PR, *U.S.—Gambling*, p. 6.332; ABR, *U.S.—Gambling*, ¶250.
[443] *Id*.

Body must be credited because it was merely trying to prevent a situation where the purpose of the provision would be defeated by a certain interpretation of its text.

Secondly, this reasoning seems to receive legal backing in the form of the 1993 (now 2001) Scheduling Guidelines which use the example of a nationality requirement equivalent to a zero quota.[444] Leroux argues that "[*O]n its face, a citizenship requirement has, in a trade context, no other purpose than to be an arbitrary trade measure limiting the number of foreign service suppliers to zero. In other words, such a measure has the same effect and rationale (or absence thereof) as a quota.*"[445]

Third, the measures stipulated in the Article are more matters of "effect" rather than form anyway. This is confirmed by the definitions of related terms that can be found elsewhere in the GATS.[446] Article XXVIII (h) of the GATS defines 'monopoly supplier of a service' as any person (public or private) which is authorized or established formally *or in effect.* Article VIII: 5 provides that the provision shall apply to a situation where a member establishes or authorizes a monopoly formally *or in effect.*[447]

ii. Middle Ground- The '*Foreseeability' Assumption*

The Panel Report suggested a fourth reason to support this understanding. It attempted to put forth that "Paragraph (a) does not foresee a "zero quota" because paragraph (a) was not drafted to cover situations where a Member wants to maintain full limitations."[448] It attempted to explain away this technical glitch by reasoning that "[I]f a Member wants to maintain a full prohibition, it is assumed that such a Member would not have scheduled such a sector or sub-sector and, therefore, would not need to schedule any limitation or measures

[444]1993 Scheduling Guidelines, ¶6; 2001 Scheduling Guidelines, ¶12.
[445] Eric H. Leroux, *Eleven years of GATS Case Law: What have we learned?*, JOURNAL OF INTERNATIONAL ECONOMIC LAW, 749-793, Vol. 10(4).
[446] Van Den Hende & Herbert Smith LLP, *GATS Article XVI and National Regulatory Sovereignty: What Lessons to draw from US-Gambling*, THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES. 441 (K. Alexander, M. Anderas eds., 2008).
[447]Ortino disagrees since there appears to be no consideration of the different terminology ('monopoly' versus 'monopoly supplier of service') and context ('exclusive service suppliers' in Article VIII:5 and in Article XVI:2) of the two relevant terms. *see*, Ortino (2006), 19.
[448] PR, *U.S.—Gambling*, 6.331.

pursuant to Article XVI: 2."[449]

This line of reasoning was expressly endorsed by the Appellate Body[450] and yet we must reject it. In essence, the Panel seems to suggest that the makers of the GATS *chose to forgo* explicitly mentioning a (total) prohibition because they simply *assumed* that a Member wishing to maintain such a prohibition would not have scheduled the particular sector in the first place.

As argued by Krajewski, this argument seems too intuitive.[451] The author completely rebuts this assumption by bringing to light two inaccuracies: Firstly, that the argument "does not explain, why Article XVI: 2 (a) explicitly mentions other market access restrictions[452] for which the same argument could be made." Secondly, that the assumption does not stand correct in the particular factual-matrix of the case. "Clearly, the US wanted to maintain the prohibition of online gambling. Yet, it made a full commitment to market access."[453]

In conclusion, the author confesses that "[I]t is remarkable that neither the Panel nor the Appellate Body even tried to solve [this] riddle. One possible solution of this riddle could be that – in 1992/1993 – the negotiators simply did not imagine that one day the supply of gambling and betting services would be possible through the Internet (and hence through mode 1). They therefore never expected that the entire realm of online gambling regulation at the federal and the state level could become subject to GATS commitments in the future."[454]

Regan beautifully explains that the basic problem with this argument is that it *begs the question.*[455] The implicit argument seems to be that a Member that wanted a zero-quota would not schedule the subsector because that would prevent it having the zero-quota it

[449] *Id.*
[450] ABR, *U.S.—Gambling*, ¶234.
[451] Krajewski (2005), 433.
[452] To illustrate, the author states the example of public monopolies. "For example, if a Member wanted to maintain a public monopoly in a particular sector, why would it schedule that sector in its commitments? Yet, Article XVI: 2 (a) mentions monopolies as measures which must be abandoned unless they are listed as exemptions.
[453] Krajewski (2005), 434.
[454] *Id.*
[455] Donald H. Regan, *A Gambling Paradox: Why an Origin-Neutral 'Zero-Quota" is Not a Quota Under GATS Article XVI*, JOURNAL OF WORLD TRADE, 1314, Vol. 41(6) (2007).

wants (at least absent a specific limitation). But that presupposes that a zero-quota is forbidden by XVI: 2(a), which is the ultimate question. So, the Appellate Body's argument begs the question.

iii. The "effects test"- Arguments Against: Shaking the centre

What must always be remembered is this debate is that there exists the danger that an expanded interpretation of Article XVI would disturb the balance between liberalization and the right to regulate that is reflected in the GATS.[456]

A restrictive interpretation is supported by several academicians who argue that the GATS provisions which are open for interpretation should be done narrowly and *in dubious mitius* ("in deference to sovereignty").[457] It would be helpful to construct these provisions in a way which leads to the least amount of infringement of a Member's regulatory autonomy.

One of the most stellar critiques available against the *US-Gambling* case (specifically, against the "effects" doctrine) comes from Frederico Ortino.[458]Few of his arguments have already been used to counter claims made by the advocates of the "effects" test. [459]

The author outlines his criticism with the concern that there is a "certain weakness in the Appellate Body's textual analysis of Article XVI " coupled with "the striking absence of any consideration of the 'context' of the provision at issue and the 'object and purpose' of the GATS".

With lucid reasoning, Ortino launches an attack on the judiciary's reasoning and claims that the Appellate Body has incorrectly interpreted the meaning of the term "in the form of" which, according to the US, restricts the types of market access limitations caught by the prohibitions of Article XVI: 2(a) and (c). The Appellate Body did concede that there is a "degree of ambiguity" of dictionary definitions, as provided by the United States as to the

[456]ABR, *U.S.—Gambling*, 222-224.
[457]Krajewski (2003).
[458]Ortino (2006).
[459]*See supra* note 16, 106, 108, 132, 143, 147.

definition of the word "form" in sub-paragraph (a).[460] However, at the end, the Appellate Body rejected the strict interpretation as suggested by the United States and attached a "broad meaning" to the term "form".

It does seem absurd that the mere ambiguity of dictionary definitions should be translated into the suggestion that the term "form" must not be "interpreted as prescribing a rigid mechanical formula" Interestingly, the very dictionary definitions referred to by the United States[461], appear to emphasize form over substance. [462]

At the end of its textual analysis, the Appellate Body underlines the following caveat: "the words 'in the form of' should not be ignored or replaced by the words 'that have the effect of'."[463] Those measure which only happen to have the effect of establishing a numerical quota can also be argued to be excluded from the ambit of Article XVI: 2(a).[464]

In conclusion, there are those who criticize the Appellate Body for blurring the distinction between 'market access' restrictions on one hand, which are *per se* prohibited by XVI, and 'domestic regulation'[465] which receives a less rigid treatment under Article VI and *in case of d*iscriminatory effect, under Article XVII.[466]With immense concern, they declare that following this decision will unduly limit the national legislator's discretion to regulate services[467] and risks WTO intrusion far beyond what was originally agreed in the WTO treaty.[468] It is hoped that a clearer picture will be provided by the WTO, sooner than what would be, too late.

b. Moving past Quotas: The Question of Natural and Public Monopolies

[460] ABR, *U.S.—Gambling*, ¶226.
[461]*Id.*
[462]Ortino (2006).
[463]*Supra* note 147.
[464] S. Zleptnig, *The GATS and Internet-based services: between market access and domestic regulation,* THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES, 381-410 (K. Alexander & M. Andenas eds., Leiden: Martinus Nijhoff Publishers, 2008).
[465]The relation between the two is discussed later on.
[466]Ortino (2006).
[467] *Supra* note 132.
[468]Pauwelyn (2005), 131, 142.

Another way a "total prohibition" can be challenged under this Article is by attempting to classify it as a "monopoly" and arguing that it reduces the number of *foreign* service suppliers (and in essence, service) to zero.

But what if that monopoly is applied in a non-discriminatory way? Imagine a situation where a government allowed a domestic (public) company to provide services, to the exclusion of both foreign *and* domestic service suppliers. This leads us to a different form of inquiry into the very scope of Article XVI.

i. Does Article XVI apply to non-discriminatory measures?

A substantial amount of legal discourse is available which suggests that the market access obligation, should not, in principle be applied to a measure which is applied in a non-discriminatory manner.

In order to better contextualize this, imagine a nation that is faced with two different situations. In the first, it disallows foreign private companies from entering the market while allowing domestic private firms to do the same. In the other, the country restricts *all* private companies (regardless of their origin) from gaining access to the market and allowing only a public company to do the same. We can clearly see that the former can be built as a case for Article XVI violation because a discriminatory effect is attached to the application of the measure. The case isn't quite so clear with respect to the second scenario where the focal point of the distinction is not the origin of the firm, but a particular characteristic that it possesses (i.e. its ownership status).

Assertions have been made to the effect that the only apparent reason for disfavouring numerical limitations is that they can be presumed to be protectionist or economically irrational[469] and that this rationale, does not apply to such "origin-neutral measures".

However now it is quite well settled that the market access obligation applies even in

[469] *Id.*

situations where the application of a measure was done in a non-discriminatory way.[470]This is clarified in the sub-paragraphs of Article XVI. For instance, subparagraph (a) refers to the number of "service suppliers" and not only to the number of "*foreign* service suppliers." Thus, if a measure were to establish a monopoly by allowing only a public company to supply water services and simultaneously debarred domestic *and* foreign private companies, it would still infringe Article XVI.[471]

ii. Natural Monopolies

As I mentioned in the beginning, the GATS treaty has a substantial effect on the water rights of people around the globe. One aspect of the problem (classification of environmental services) has been previously discussed. The interaction of trade and water rights can again be witnessed by examining how the provisions of the GATS treat government-run monopolies on the supply of water and sanitation services. As explained in part II(B), the fear that private sector involvement would raise prices of essential services, lead to many governments taking matters into their own hands. In order to determine how flexible the GATS agreement is, we must determine the scope of the term "monopoly" as provided (and prohibited) by the agreement.

But the curse of limited jurisprudence and legal ambiguity continues to loom over the GATS and this can be evidenced by the fact that the text of the agreement does not even clearly define a basic term like "monopoly". Determining the rights and liabilities under several provisions thus becomes dependent on secondary sources.

Article XVIII (h) defines "*monopoly supplier of service*" as any entity which is authorized or established (again, formally or *in effect*) by a WTO Member as the sole supplier of that service. Some textual support can be garnered from Article VIII: 1 which disallows Members from establishing monopolies inconsistent with specific obligations under XVI. The only requirement of a monopoly is the active participation on part of the domestic,

[470]Emily Reid, *Regulatory Autonomy in the EU and WTO: Defining and Defending Its Limits*, JOURNAL OF WORLD TRADE, 900, Vol. 44(4) (2010).
[471]Article XX: 2, GATS.

importing nation.

What must be emphasized is that certain environmental services, such as sewage services, require special distribution or collection networks and tend towards being *natural monopolies*.[472] The natural monopoly characteristics of such services are acknowledged in a WTO Background Note.[473]

Such a monopoly is said to be established when there are "economic/technological specificities" of a particular sector which impose a quantitative limit on the number of service suppliers that are allowed into the market. These quantitative restrictions owe their origin more to economic conditions than to governmental regulation[474]and it is obvious that such natural monopolies are found to frequently occur in "network services" where geographical and practical considerations make it economically unfeasible to have more than one service-supplier. Since water services depend on extensive infrastructure (pipe systems, distribution channels and collection//storage facilities), natural monopolies in this sphere are common.[475]

Consumer choice and health concerns mandate that water for drinking and sanitation must be clean and reliable. This requires a high standard of reliability on account of the service provider and since mixing water from different sources in one pipe makes accountability a problem, one service supplier is more desirable than many.[476]

Hence, monopolies over water distribution services are a natural consequence of prevailing economic conditions and modalities, and some believe that this is sufficient reason to refuse application of the GATS.[477]

Despite this, large lobby-organizations like water corporations are increasingly pushing for more market access in the water sectors. Zettel concedes: "exactly what benefits foreign

[472]For a thorough discussion on the interaction between GATS and Public/Natural Monopolies, *see*: Zettel (2006).
[473] Background Note (2010).
[474]Krajewski (2003).
[475]Lang (2004).
[476]*Supra* note 24.
[477]Lang (2004).

service suppliers will receive from market access commitments remains a question."[478] One possible incentive for private players is the fact that, despite extenuating economic factors, a natural monopoly is likely to involve profitable governmental concessions or licenses.[479]

iii. Public Monopolies

The GATS has a very obvious, direct impact on the domestic regulatory space of member states. This extends to the ability of the regulator to impose public monopolies[480] and can be manifested in several ways. For instance, it can affect a government's ability to define the geographical limits in which it can impose a monopoly.

On a peripheral reading of the text of Article XVI, one may be convinced to consider the proposition that the GATS allows a member to define geographical boundaries along social, economic or need based lines. However, a careful perusal of Article I reveals that this is very far from the truth, because it actually grants very limited flexibility.[481]

Art. I defines the "scope and definition" of the services agreement by specifying that the measures it covers are those taken by "central, regional or local governments" or "non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities".[482] This can be interpreted to suggest that, in setting up a monopoly (i.e. in utilizing a "measure") a Member must define regional subdivisions along these lines.

Certain research points out that it may be possible for a Member to define geographical boundaries for monopolies beyond the narrow ambit of Article I.[483]This is encouraging since

[478]Zettel (2006).
[478]WTO Council for Trade in Services Environmental Services, 31, Background Note by the Secretariat, S/C/W/320, August 20, 2010).
[479]*Supra* note 77.
[480] The best known is the fact that full market access commitment rules out limitations on the number of services suppliers, including monopolies.
[481]*Supra* note 25.
[482]Zettel (2006).
[483]*Supra* note 25.

it would be in sync with the GATS' dual goal of "liberalization of trade in services"[484] and recognizing the right of Members to regulate".[485]This can be evidenced from the bare reading of Article VIII, which seems to restrict only monopoly boundaries in situations where abuse of the monopolies hurts competition in an area where (according to the Member's commitments- competition is supposed to happen.[486] However, such research is far from widely accepted.

In conclusion, it does seem that such a total prohibition can be a market access limitation because it can has the effect of establishing a numerical quota and can, in the alternative, be classified as a monopoly.

V. The ancillary issue: relationship between Article XVI and Article VI -the *mutual exclusivity* debate

During the *US-Gambling* dispute, the Panel and Appellate Body were burdened with the duty to examine the scope of Article XVI largely deals with the issue of the protectionist measures like quotas. However, the WTO judiciary understood that it was common for protectionism in the services sector to emerge out of *domestic regulations* rather than tariffs at the border.[487]

As learned author Jackson explains, "[T]he receding waters of tariff and other overt protectionism uncovers the rocks and shoals of nontariff barriers."[488]

"Domestic regulations are extensively covered under Article VI, yet they do not have a precise definition .Hence, it was felt that Article VI of the GATS would give some necessary guidance[489] and thus the two judicial bodies attempted to determine:

a) Whether there exists a conflict between Article XVI and Article VI?

[484] Article VIII:1, GATS.
[485] *Id.*
[486] Zettel (2006), 33.
[487] Delimatsis (2006), 1062.
[488] John H. Jackson, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (2nd ed., MIT Press, 2010).
[489] The Panel considered Article VI to be the appropriate context to view the market access obligation.

b) Whether this conflict renders the concurrent application of the two Articles impossible?[490]

This ambiguity between the two needs to be resolved since there are marked differences in the way the two Articles affect Members.[491] The friction between the two Articles is actually nothing more than a manifestation of the long-drawn debate between trade liberalization and a Member's regulatory autonomy. Whereas Article VI provides Member states some regulatory space to control the quality of the services present in their territory, Article XVI curbs that freedom by mandating the type of restrictions that cannot be adopted.

Commentators have noted that this debate must be concluded keeping in mind that the third recital of the GATS Preamble requires the agreement to give "*due respect to national policy objectives*" and the fourth recital recognizes the "*the right of Members to regulate, and to introduce new regulations, on the supply of services within the territories in order to meet national policy objectives* (…)" and "*the particular need of developing countries to exercise this right.*"[492]

In a finding not reassessed by the Appellate Body[493], the Panel suggested that "Articles VI: 4 and VI: 5 on the one hand and XVI on the other hand, are mutually exclusive'".[494]On the face of it, this proposition seems reasonable since the former belongs to part II of the agreement (regarding General Obligations) whereas XVI belongs to part III of the text which concerns itself with Specific Obligations.[495]

Those who support the Panel's reasoning highlight that the GATS makes important

[490]In other words whether the two Articles are mutually exclusive.
[491]Importantly, The burden of proof under Article VI rests on the complainant to demonstrate that the measure is not necessary for its stated objective as they are presumed to be serving a legitimate purpose, *see*: Note by the Secretariat, Article VI: 4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services, S/C/W/96, ¶4 (March 1, 1999) (*Hereinafter referred to as* "Secretariat Note (1999)").
[492] Jan Wouter & Dominic Coppens, *GATS and Domestic Regulation: Balancing The Right To Regulate and Trade Liberalization*, THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES, 441 (Kern Alexander and Mads Andenas eds., 2008).
[493]ABR, *U.S.—Gambling*, ¶250: "It is neither necessary nor appropriate for us to draw, in the abstract, the line between quantitative and qualitative measures".
[494]PR, *U.S.—Gambling*, 6.305.
[495]PR, *U.S.—Gambling*, 6.310.

distinctions between the types of government policies that may restrict trade. Regardless, there can be three possible ways to justify the conclusion of the Panel.

Firstly, the types of measures that are covered by the two articles differ greatly. Article XVI seeks to remove *quantitative* restrictions like numerical quotas, whereas Article VI seeks to regulate *qualitative* measures. Such qualitative measures relate to the quality[496] of the service or the ability of the service supplier.[497]In other words, Article XVI addresses those measures which are adopted specifically to restrict trade[498], whereas Article VI regulates *how* the service is to be provided.[499]There seems to be an emerging consensus in the WPDR (Working Party on Domestic Regulations) that disciples on domestic regulations should not apply to measures covered by Article XVI and XVII.

Secondly, it can be argued that the very text of the GATS supports this mutual exclusivity. This can be viewed through the prism of Article XVIII which allows members to negotiate future commitments. It states that these commitments can be undertaken with respect to measures *not subject to market access article*, including those regarding *qualifications, standards* etc. Thus, the GATS itself draws the dividing line between the applicatory scope of the two Articles.

And finally, the essence of the two articles is different. In other words, Article XVI targets discriminatory measures like numerical quotas and monopolies which permit the market to exist, but exclude some would-be participants. As there is some scope for discretion on part of the domestic government, such measures can be abused for protectionist purposes. This is not the case with origin-neutral (non-discriminatory) measures under

[496] Note by the Secretariat, The Relevance of the Disciplines of the Agreements on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Article VI.4 of the GATS, S/WPPS/W/9, ¶4 (September 11, 1996); Secretariat Note (1999), ¶3.
[497]Pauwelyn (2005),
[498]Proponents of this theory stress that a distinction must be drawn between, on one hand, prohibitions that have a clear and apparent public policy concern and prohibitions that seemingly have no other purpose than to impose quantitative limitations.
[499]Pauwelyn argues that similar to the GATT structure, non-discriminatory domestic regulations address the quality of services and the qualifications of service providers and therefore are in principle allowed. *see*: Pauwelyn (2005), 136.

Article VI. One could easily be lead to the conclusion that,[500] as the scope of application of these two articles is different; any overlap between them would create legal uncertainty.[501] This seems to be bolstered by two legal documents: the *Scheduling Guidelines* of 2001 which mandate that the new disciples under VI:4 must not overlap with existing obligations under Article XVI, and the decisions of the Working Party on Professional Services Report on Accountancy.[502]But there is a distinct line of academic reasoning which argues that the *reason* for the possible overlap between the two Articles is that *both* can cover non-discriminatory measures.[503]

In conclusion, it would be helpful to note that Article XVI seeks to impose *maximum limitations/maxim limits* on the number of service suppliers (or service) and on the other hand, Article VI seeks to allow members to impose *minimum requirements* that would ensure quality with regard to practical training and experience requirements.[504]

However, this position has been severely tested by critics who point out that not only was the Panel's conclusion legally untenable, it was also logically flawed. What the WTO judiciary tried to do, was to prohibit a concurrent application of the two Articles.

But some WTO Members acknowledge that the two Articles are complementary because a measure can lead to a simultaneous violation of both these articles.[505] This is supported by Article VI: 1 which illustrates that it is largely a procedural article, ensuring

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[500] *See*: WTO, CTS (Special Session), Report of the Meeting Held on 5, 8 and 12 October 2001, S/CSS/M/12.

[501]A. Mattoo, *Shaping future GATS rules for Trade in Services* (June 2000), http://econ.worldbank.org/files/1716_wps2596.pdf (Last Visited:March 19, 2014); Krajewski (2003).

[502]Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), S/L/92.

[503]Delimatsis (2006), 1070.

[504]*Supra* note 184.

[505]WTO, Report on the Meeting Held on 4 December 2002, S/WPDR/M/19.

See: WTO, WPDR (2004), 2. Indeed, the United States was correct to underline in its appeal that ``the text of Article VI does not support the Panel's interpretation of mutual exclusivity. Specifically, it does not state that any measure covered by Articles VI: 4 and VI:5 is automatically exempt from any other Article of the GATS". *See*: US appellant's submission in *US-Gambling*, ¶¶ 132-133. An interpretation that would opt for the complementarily of these provisions is also confirmed by Article VI:1, which provides that the Members shall ensure that, in sectors where they undertook specific commitments, the administration of all measures of general application affecting trade in services is reasonable, objective and impartial; in other words, if a Member decides to liberalize a service sector by making a commitment in the market access column of its Schedule, any measure which falls under Article XVI will be also scrutinized under Article VI with respect to its administration.

that the *administration* of all measures is reasonable, impartial etc. There is neither textual basis, nor policy reasons for refusing the concurrent application of the two Articles. Thus, the quantitative effect of a measure can be checked under Article XVI and its procedural elements can be addressed under Article VI.

In support of this, Delimatsis gives the instance of case of a domestic licensing system under which the quantitative restrictions (i.e. on the number of service suppliers) or its discriminatory effects (in the form of different procedures for foreign service suppliers) will be assessed under Articles XVI and XVII, respectively, assuming commitments have been undertaken, while its regulatory/ procedural elements pertaining to transparency, administration, or objectivity will be evaluated under Article VI.[506]

Pauwelyn correctly notes that as GATS nothing similar to the *Ad Note* to Article III of GATT, the requirements governed by Article VI may also be market access restrictions prohibited in Article XVI.[507] It would actually seem that the 1993[508] and 2001 (Revised) Scheduling Guidelines clearly describe Article XVI as a provision that continues to apply notwithstanding Article VI: 4/5.[509]

Though a compelling debate,[510] it seems that the measure at issue in the case of *US-Gambling* was correctly identified as a market access violation under Article XVI as a "total prohibition" can never be said to be an attempt to improve the quality of a service and hence cannot possible be covered under the ambit of Article VI. This is because, as noted earlier, paragraph 4 of Article VI refers to minimum requirements that aim to ensure quality. By defining a *maximum* limit (in the urgent case, zero), a total prohibition or a zero-quota escapes the purview of a domestic regulation. None of the US laws in question defined a minimum technical requirement/standard that was to be followed by a service-supplier in order to get into the market. Rather, a joint reading of the laws shows that it attempted to

[506] *Supra* note 192.
[507] Pauwelyn (2005).
[508] 1993 Scheduling Guidelines.
[509] Pauwelyn (2005), 1156-1157.
[510] *Ibid,* 162.

fine (and in some cases punish) *all* those who indulged in remote gambling.

In conclusion, the author would like to retaliate that, "[T]o exclude the supply of gambling and betting services through mode 1 in order to protect minors, morality or public order, or to avert fraud does not ensure the quality of the service itself, but simply forms part of a legitimate national policy which is to be treated under the exceptions laid down in Article XIV GATS."[511] Thus, such a measure must be seen under the lens of Article XVI and in the alternative, the article's application is not excluded by the mere application of Article VI i.e. by classifying the measure as a domestic regulation.

VI. Conclusion

The Article has tried to shed light on the non-discriminatory principle of market access which can be found under Article XVI of the GATS. This examination was conducted in the context water distribution and sanitation services in developing countries. One major source of influence for this piece has been the case of *US-Gambling* and I have provided analysis on its arguments and its critique.

On the matter of the scope of the GATS, it can safely be said that these services are included within the ambit of "Environmental Services" as the present system of classification of services is archaic. In any case, in most cases domestic governments provide these services in the absence of competition and not on a "commercial basis". This is especially the case because GATS commitments operate on a non-reversibility basis. It remains to be seen how the EC and OECD Communications regarding the same will be received by the international community.

On the matter of the scope of Article XVI, it seems that a "total prohibition" on the supply of a service, would lead to a direct violation of the market access obligation. This is because it would be illogical not to include such a prohibition as a numerical quota or a monopoly. In this sense, the "effects test" finds immense academic support.

[511] Delimatsis (2006), 1071.

Finally, there does not seem to be any good reason to support the *US-Gambling* Panel on its reasoning that Articles XVI and VI are mutually exclusive. There is neither textual basis, nor policy considerations for refusing a concurrent application of the two Articles.