

TREATY INTERPRETATION AND THE WTO APPELLATE BODY REPORT IN *US – GAMBLING*: A CRITIQUE

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‘Before the game begins players should agree on a dictionary to use in case of a challenge.’ (from the Official Rules of SCRABBLE®)

ABSTRACT

Treaty interpretation in WTO law continues to represent a topic of highly theoretical and practical importance. The Panel’s and the Appellate Body’s reports in the recent *US – Gambling* dispute have critically turned on ascertaining the meaning of the United States’ GATS Schedule and Article XVI GATS on the basis of the public international law rules of treaty interpretation as codified in the Vienna Convention on the Law of Treaties. The paper’s principal aim is to review the interpretative approach followed in particular by the Appellate Body in reaching its decision in *US – Gambling*. Its main argument is that, although the Appellate Body appears to be trying to emancipate itself from a rigorous textual approach, it has not yet embraced a holistic approach to treaty interpretation, one in which the treaty interpreter looks thoroughly at all the relevant elements of the general rule on treaty interpretation pursuant to Article 31(1) of the Vienna Convention.

INTRODUCTION

Antigua and Barbuda brought a complaint before a WTO panel concerning certain United States federal and state measures that restrict suppliers located outside the United States to remotely supply gambling and betting services to consumers within the United States. Antigua claimed that such restrictions resulted in a ‘total prohibition’ on the cross-border supply of gambling and betting services from Antigua in violation of the obligations of the United States under the General Agreement on Trade in Services (GATS). In particular,

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Antigua asserted that the GATS Schedule of the United States includes specific ‘market access’ and ‘national treatment’ commitments on gambling and betting services and that in maintaining the measures at issue, the United States was acting inconsistently with its obligations under GATS Articles VI (Domestic Regulation), XI (Payments and Transfers), XVI (Market Access) and XVII (National Treatment). The Panel found that the US measures violated Art. XVI GATS,² which prohibits Members, unless otherwise specified in their Schedule, to maintain or adopt any of the market access restrictions listed in Art. XVI:2.³

The Panel agreed with Antigua that (i) the United States’ Schedule under the GATS includes specific commitments on gambling and betting services under sub-sector 10.D; (ii) by maintaining several federal and state laws⁴ the United States had failed to accord services and service suppliers of Antigua treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule, contrary to Article XVI:1 and 2 of the GATS; and (iii) the United States had not been able to

² Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (‘US – Gambling’), WT/DS285/R, circulated on 10 November 2004. While the Panel rejected Antigua’s claim with regard to Article VI GATS, it exercised judicial economy and did not examine Antigua’s arguments with regard to Articles XI and XVII GATS. Ibid, at paras 6.426, 6.437 and 6.442.

³ Article XVI GATS reads as follows:

1. 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. [footnote omitted]
2. 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; [footnote omitted]
 - (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.

⁴ The Federal measures that were found to violate Article XVI GATS were as follows: the Wire Act; the Travel Act; and the Illegal Gambling Business Act (when read together with the relevant state laws). As to the State measures in violation of Article XVI GATS: Louisiana: § 14:90.3 of the La. Rev. Stat. Ann.; Massachusetts: § 17A of chapter 271 of Mass. Ann. Laws; South Dakota: § 22–25A-8 of the S.D. Codified Laws; and Utah: § 76-10-1102(b) of the Utah Code.

demonstrate that its measures were justified under the General Exceptions provision of Article XIV(a) and (c) GATS.⁵

The Panel's determinations were appealed by the United States. The Appellate Body upheld the Panel's findings with regard to both the extent of the United States' specific commitments in gambling and betting services and the United States' violation of Article XVI GATS.⁶ It did so by ascertaining the meaning of the United States' GATS Schedule and of Article XVI GATS on the basis of Article 31 (General rule of interpretation)⁷ and Article 32 (Supplementary means of interpretation)⁸ of the Vienna Convention on the Law of Treaties (Vienna Convention).⁹ The Appellate Body has early on recognized that these two articles represent the 'customary rules of interpretation of public international law' which Article 3.2 of the WTO Dispute Settlement Understanding requires panels and the Appellate Body to apply.¹⁰

With regard to Article XIV GATS, the Appellate Body reversed the Panel's finding concluding that the US measure *was* justified on grounds of public morals protection under subparagraph (a) of Article XIV GATS (referring to problems of money laundering, fraud, compulsive gambling and underage gambling that accompany online gambling) and that the enforcement of the US measures at issue *did* comply, with one relevant exception,¹¹ with the non-discrimination requirement of the chapeau of Article XIV.¹²

The object of this paper is to critically review the Appellate Body's application of the rules on treaty interpretation of the Vienna Convention with regard to the two following issues: first, whether the United States had indeed made commitments in the sector of gambling and betting services (section I); and

⁵ Panel Report, *US – Gambling*, above n 2, paras 7.2.

⁶ Appellate Body Report, *US – Gambling*, WT/DS285/AB/R, circulated on 7 April 2005, para 373.

⁷ Paragraph 1 of Article 31 reads as follows: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

⁸ Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

⁹ Done at Vienna, 23 May 1969 in 8 International Legal Materials (1969) 679.

¹⁰ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS2/AB/R, at 17. It is worth emphasizing that this marks an important change from the looser approach to treaty interpretation in the GATT panel practice dominated by the search for 'general consensus among the trade policy elite – negotiators, academic specialists, practicing diplomats – concerning what the text is really about'. Robert Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence', in Joseph H. H. Weiler (ed), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?* (Oxford, OUP, 2000), at 57–58.

¹¹ The Appellate Body confirmed a form of discrimination based on an authorization in the Interstate Horseracing Act permitting domestic, but not foreign, service suppliers to offer remote betting services in relation to certain horse races. Appellate Body Report, *US – Gambling*, above n 6, para 369.

¹² *Ibid*, at paras 370–72.

second, whether the outright prohibition on the remote supply of gambling services embodied in the US federal statutes under review was caught by the list of prohibited measures of Article XVI GATS (section II). Accordingly, the paper does not address the Appellate Body's analysis of the issue of whether the US measures were justified on grounds of public morals or public order.

The paper's principal aim is not to criticize the ultimate findings of the Appellate Body report in *US – Gambling* (although the paper takes direct issue with its decision on Article XVI GATS), but rather to analyze the interpretative approach followed by the Appellate Body in reaching those findings. The paper main argument is as follows: While the Appellate Body appears to be trying to emancipate itself from a rigorous textual approach, it has not yet embraced a holistic approach to treaty interpretation, one in which the treaty interpreter is looking thoroughly at all the relevant elements of the general rule on treaty interpretation as envisaged by the drafters of the Vienna Convention¹³ and is willing 'to situate its legal analyses within a framework which firmly articulates both the normative and policy considerations and consequences of its decisions'.¹⁴

I. INTERPRETATION OF THE SPECIFIC COMMITMENTS MADE BY THE UNITED STATES IN ITS GATS SCHEDULE

Part of Antigua's case rested on Article XVI of the GATS. Together with Article XVII on National Treatment and Article XVIII on Additional Commitments, Article XVI on Market Access is included in Part III of the GATS on Specific Commitments. Contrary to GATS' General Obligations (such as the principles of Most-Favoured-Nation and Transparency), these provisions are binding on Members only in so far as Members have undertaken specific commitments in their GATS Schedules.

With regard to the Market Access provision, Article XVI:2 identifies, in an apparently exhaustive manner, a number of measures which Members should not maintain or adopt in the sectors where specific commitments have been undertaken. Members remain free to maintain or introduce any of the measures listed in Article XVI:2 subparagraphs (a)–(f) with regard to a given service sector,

¹³ In its commentary to Article 31, the International Law Commission (ILC) noted as follows: 'The Commission, by heading the article "General Rule of Interpretation" in the singular and by underlining the connection between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible and their interaction would give the legally relevant interpretation. Thus [Article 31] is entitled "General rule of interpretation" in the singular, not "General rules" in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.' [emphasis original] *Yearbook of the International Law Commission*, 1966, Vol II, at 219–20. See also, Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press, 1984), at 116.

¹⁴ Henrik Horn and Joseph Weiler, 'European Communities – Trade Description of Sardines: Textualism and its Discontent', in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2002* (Cambridge, CUP, 2005), at 253.

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, equates to the obligation to maintain or adopt none of the measures listed in Article XVI with respect to that sector or sub-sector.¹⁵ More commonly, however, a Member may commit itself to only *partial market access*, whereby that Member, although deciding to subject a particular sector to Article XVI disciplines on market access, reserves the right to maintain or adopt in that sector and with regard to any of the four modes of supply¹⁶ one or more of the measures listed in Article XVI. Thus, in order to determine the level of GATS market access commitments, it is therefore necessary to examine each Member's schedule of specific commitments which will indicate the range of activities covered in each service sector and sub-sector and the limitations on market access entered by Members pertaining to the different modes of supply.¹⁷

Antigua's complaint based on Article XVI GATS thus turned, first of all, on the issue of whether the United States *had* undertaken a market access commitment in its GATS Schedule with regard to gambling and betting services. The relevant section of the United States Schedule of Specific Commitments (US Schedule)¹⁸ is shown in Table 1.

Antigua claimed that by virtue of entry 10.D in its GATS Schedule under sub-heading 'Other Recreational Services (except sporting)', the United States made a full market access commitment at least for the cross-border supply (mode 1) of 'gambling and betting' services (with the entry 'none'). The United States denied such claim, contending that its Schedule makes no such commitment and in particular that gambling and betting services fall within 'sporting services', which are expressly excluded by the US schedule. The interpretative issue that was thus put to the WTO dispute settlement bodies was whether or not the sub-sector 'Other Recreational Services (except sporting)' in the US Schedule covered the sub-sector of 'gambling and betting services' relevant for purposes of the dispute at hand.

Ultimately both the Panel and Appellate Body agreed with Antigua that gambling and betting services are indeed covered by the commitments in the US Schedule. The following two sections critically review the interpretative process

¹⁵ Such full market access commitment is evidenced by inserting the word 'none' in the relevant sector or sub-sector of the schedule of specific commitments.

¹⁶ Article I:2 GATS states that: 'For the purposes of this Agreement, trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.'

¹⁷ Article XX:1 GATS provides that 'Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify: (a) terms, limitations and conditions on market access; [...] (d) where appropriate the time-frame for implementation of such commitments; and (e) the date of entry into force of such commitments.' Cf. Friedl Weiss, 'The General Agreement on Trade in Services 1994', 32 CMLR (1995) 1177 at 1203.

¹⁸ The United States of America – Schedule of Specific Commitments, GATS/SC/90, 15 April 1994.

Table 1. United States GATS schedule

Sector or sub-sector	Limitations on market access
10. RECREATIONAL, CULTURAL, & SPORTING SERVICES	
A. Entertainment Services (including Theatre, Live Bands and Circus Services)	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section
B. News Agency Services	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section
C. Libraries, Archives, Museums and Other Cultural Services	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section
D. Other Recreational Services (except sporting)	1) None 2) None 3) The number of concessions available for commercial operations in federal, state and local facilities is limited 4) Unbound, except as indicated in the horizontal section

on the basis of which the Appellate Body reached such conclusion. It is hereby argued that, despite the apparent move away from a rigid textualist method of interpretation, the Appellate Body's approach to the rules of treaty interpretation seems excessively formalistic and mechanical, in particular with regard to evaluating different contextual elements as well as in examining 'object and purpose'.

A. Moving away from a rigid textualist method of interpretation?

Following the lead of recent jurisprudence,¹⁹ and perhaps as a response to criticism towards the excessive use of dictionaries,²⁰ the Panel and, in particular, the Appellate Body seemed to show a certain skepticism towards dictionary definitions, at least in addressing the issue of whether the United States had included gambling and betting in its GATS Schedule of Commitments. In its

¹⁹ Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (US – Softwood Lumber IV)*, WT/DS257/AB/R circulated on 19 January 2004, para 59; Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft (Canada – Aircraft)*, WT/DS70/AB/R, circulated on 2 August 1999, para 153; and Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC – Asbestos)*, WT/DS135/AB/R, circulated on 12 March 2001, para 92.

²⁰ Most recently, Horn and Weiler, above n 14, at 252 and William Davey, 'The WTO Dispute Settlement System: The First Ten Years', 8 JIEL (2005) 17, at 22. See also Daniel Tarullo, 'The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-dumping Decisions', 34 Law & Policy of International Business (2002) 109, at 124.

interpretation according to Article 31 of the Vienna Convention, the Panel concluded that the dictionary definitions of key terms in the US Schedule were ‘less than conclusive’,²¹ albeit it did find that, on the basis of various dictionary definitions in English, French and Spanish, the ordinary meaning of ‘sporting’ did not include gambling (as had been suggested by the United States).²²

The Appellate Body is even more absolute in discarding the *a priori* usefulness of dictionary definitions:

In order to identify the ordinary meaning, a Panel may start with the dictionary definitions of the terms to be interpreted. But dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue *all* meanings of words – be those meanings common or rare, universal or specialized.²³

The Appellate Body concluded that the Panel’s finding concerning the word ‘sporting’ was premature since, in the abstract, the range of possible meanings of the word ‘sporting’ included both the meaning claimed by Antigua and the meaning claimed by the United States.²⁴

It is not really altogether clear whether the Appellate Body is discarding simply dictionary definitions or more broadly the value of a pure textual interpretation. How else would an interpreter carry out an examination of the text if not principally through dictionary definitions? As it will be fully explored in the next section, the above-mentioned statement may simply emphasize the perhaps uncontroversial, but not always adhered to, proposition that for the purpose of arriving at the *ordinary meaning* of the terms of the treaty in accordance with the customary rules of interpretation, the ‘raw text’ is only *one* piece of the puzzle. Contextual and teleological elements constitute other relevant pieces. As noted above, the general rule of interpretation according to Article 31(1) of the Vienna Convention provides that: ‘A treaty shall be interpreted in *good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*.’²⁵

In any event, the trend in WTO jurisprudence to minimize the hermeneutic relevance of dictionary definitions is believed to be a welcome development. This is particularly so when the object of interpretation is a term in an individual schedule of one of the Members. Interpreting an instrument which is of a *de*

²¹ Panel Report, *US – Gambling*, above n 2, para 6.110.

²² Panel Report, *US – Gambling*, above n 2, para 6.61.

²³ Appellate Body Report, *US – Gambling*, above n 6, para 164 [original footnotes omitted; original emphasis].

²⁴ *Ibid*, para 167.

²⁵ [Emphasis added]. Reporting on the results of the Vienna Conference on treaty interpretation, Sinclair noted that ‘the Commission had had no intention of suggesting that words had a ‘dictionary’ or intrinsic meaning in themselves. The ordinary meanings of terms emerged only in the context in which they were used, in the context of the treaty as a whole, and in the light of its object and purpose’. Ian Sinclair, ‘Vienna Convention on the Law of Treaties’, 19 ICLQ (1970) 61, at 65.

facto unilateral nature (such as the US Schedule under the GATS, in the dispute at hand) is a somewhat different operation than interpreting an instrument which is of a multilateral nature (such as a provision of the GATS, for example).²⁶ It is well accepted that Members' GATS Schedules are an 'integral part' of the GATS (as Article XX:3 explicitly provides) and as such the task of identifying the meaning of a Member's concession, like the task of interpreting any other treaty text, involves identifying the *common intention* of all Members.²⁷ However, the process of identifying members' common intention differs in the two contexts since, instead of focusing on a *single* treaty text, identifying the common intention behind a Member's concession cannot avoid taking into account the *unilateral* origin of such concession as well as the existence of concessions of all other Members. Moreover, contrary to tariff negotiations in the goods area, usually proceeding on the basis of mechanical formulas, negotiations in trade in services under the GATS (at least in the Uruguay Round) proceeded in a country-specific manner where Members enjoyed a broader scope of manoeuvring in selecting their own level of commitments.

This additional layer of complexity is perhaps evidenced in the Appellate Body's reservation about the way in which the Panel determined the ordinary meaning of the word 'sporting' in the US Schedule. According to the Appellate Body, the Panel failed to explain the basis for its recourse to the meanings of the French and Spanish words 'déportivos' and 'sportifs' in the light of the fact that the United States' Schedule explicitly states, in a cover note, that it 'is authentic in English only'.²⁸ Were French and Spanish, though two of the three official languages in the WTO, irrelevant for purposes of identifying the Members' *common intention* with regard to the meaning of the US Schedule (drafted in the English language)? Other Members may have used those other languages to draft their own schedules or assumed that there was a certain commonality of meaning independently of the use of the word 'sporting', 'déportivos' or 'sportifs'. Unfortunately, the Appellate Body did not elaborate much on its specific reservation, and so the question remains open.

²⁶ Illustrative, in this regard, is the work carried out by the International Law Commission (ILC) on Unilateral Acts of States, where the issue of interpretation of unilateral acts has been addressed. See *ILC Report on the work of its fifty-fourth session* (29 April–7 June and 22 July–16 August 2002) General Assembly Official Records Fifty-seventh Session Supplement No. 10 (A/57/10), paras 403–08 and *ILC Report on the work of its fifty-third session* (23 April–1 June and 2 July–10 August 2001) General Assembly Official Records Fifty-fifth Session Supplement No. 10 (A/56/10) paras 227ff. (a draft article prepared by the Special Rapporteur read in part as follows: 'A unilateral act shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the declaration in their context and in the light of the intention of the author State.').

²⁷ Appellate Body Report, *US – Gambling*, above n 6, para 160.

²⁸ *Ibid*, para 166. See the statement of the Appellate Body Report on *EC – Computer Equipment* (quoted by the Panel Report on *US – Gambling*): '[w]hile each Schedule represents the tariff commitments made by one Member, they represent a common agreement among all Members.' Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment (EC – Computer Equipment)*, WT/DS67/AB/R circulated on 5 June 1998, para 109 (cited by the Panel Report on *US – Gambling*, above n 2, para 6.92).

B. ‘Context’ and ‘object & purpose’ versus ‘supplementary means’

Having discarded the text as inconclusive, both the Panel and Appellate Body turned to consider the *context* in which the relevant terms from sector 10 of the US Schedule are situated. Among the contextual elements considered were the remainder of the US Schedule, the provisions of the GATS and of other covered agreements, and the GATS Schedules of other Members. However, the examination of the relevant context focused principally on two documents – W/120 and the 1993 Scheduling Guidelines – that had been prepared and circulated by the GATT Secretariat at the request of parties to the Uruguay Round negotiations for the express purpose of assisting those parties in the preparation of their offers. These two documents were believed to shed light on the meaning of the sections of the US Schedule at issue and to their consideration by the WTO adjudicating bodies the present analysis now turns.

Document W/120, entitled ‘Services Sectoral Classification List’,²⁹ consists of a table in two columns. The left column, entitled ‘Sectors and Sub-sectors’, consists of a list classifying services into 11 broad service sectors, each divided into several sub-sectors (more than 150 in total). The right column, entitled ‘Corresponding CPC’, sets out for nearly every sub-sector listed in the left-hand column a CPC number to which that sub-sector corresponds. The reference to ‘CPC’ is a reference to the United Nations’ Provisional Central Product Classification,³⁰ which is a detailed, multi-level classification of goods and services, consisting of ‘Sections’ (10), ‘Divisions’ (69), ‘Groups’ (295), ‘Classes’ (1,050) and ‘Subclasses’ (1,811). Of the 10 ‘Sections’ of the CPC, only the latter 5 classify services and are referred to in W/120. The relevant section of W/120 is as follows:

SECTORS AND SUB-SECTORS	CORRESPONDING CPC
[...]	
10. RECREATIONAL, CULTURAL AND SPORTING SERVICES (other than audiovisual services)	
A. <i>Entertainment services</i> (including theatre, live bands and circus services)	9619

²⁹ Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1991 (hereinafter the ‘W/120’). Document W/120 followed the circulation of an informal note containing a draft services sectoral classification list in May 1991, as well as the circulation of an initial reference list of sectors (the ‘W/50’) in April 1989 (MTN.GNS/W/50, 13 April 1989). A short cover note to W/120 explains that the document reflects, to the extent possible, comments made by negotiating parties on the May draft, and that W/120 itself might be subject to future modification.

³⁰ Provisional Central Product Classification, Statistical Papers, Series M No. 77, United Nations (1991). The United Nations Central Product Classification has been revised on several occasions. The latest version is the Central Product Classification, Version 1.1, Statistical Papers, Series M No. 77, United Nations (2004).

B. News agency services	962
C. Libraries, archives, museums and other cultural services	963
D. Sporting and other recreational services	964
E. Other	

CPC number 964, corresponding to sub-sector 10.D (Sporting and other recreational services), is broken down in two classes as follows:

964 Sporting and other recreational services
9641 Sporting services
96411 Sports event promotion services
96412 Sports event organization services
96413 Sports facility operation services
96419 Other sporting services
9649 Other recreational services
96491 Recreation park and beach services
96492 Gambling and betting services
96499 Other recreational services n.e.c.

The second relevant document is the ‘Explanatory Note’ circulated on 3 September 1993 by the GATT Secretariat to ensure ‘comparable and unambiguous commitments’ and achieve ‘precision and clarity’.³¹ This document, known as the ‘1993 Scheduling Guidelines’, provided examples as to the types of measures that should be scheduled or need not be scheduled, and covered a variety of issues, including the scope of coverage under each mode of supply, and the relationship between different modes when making commitments on market access. The document also instructed Members as to the language to use when making a specific commitment,³² and included a template indicating the overall structure, and columns and rows that should constitute a Member’s Schedule.³³ Paragraph 16 of the 1993 Guidelines, explaining how to describe committed sectors and sub-sectors, reads in part as follows:

The legal nature of a schedule as well as the need to evaluate commitments, require the greatest possible degree of clarity in the description of each sector

³¹ Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164, 3 September 1993, at p 1.

³² For example, paragraphs 24 to 27 explain that: to indicate a full commitment, a Member should enter ‘NONE’; to make no commitment, it should enter ‘UNBOUND’; and to make a commitment with limitations, the Member should enter a concise description of each measure, ‘indicating the elements which make it inconsistent with Articles XVI or XVII’.

³³ It should be noted that on 23 March 2001 the Council for Trade in Services adopted ‘Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)’ following a revision exercise of the 1993 Guidelines carried out in the Committee on Specific Commitments. A note to the 2001 Guidelines states that: ‘These guidelines shall be applicable as of the date of their adoption. It should be understood that schedules in force prior to the date of this document have been drafted according to [the 1993 Guidelines]’. See document S/L/92, circulated on 28 March 2001.

or sub-sector scheduled. In general the classification of sectors and sub-sectors should be based on the Secretariat's revised Services Sectoral Classification List. [...] Where it is necessary to refine further a sectoral classification, this should be done on the basis of the CPC or other internationally recognized classification (e.g. Financial Services Annex).

[...]

If a Member wishes to use its own sub-sectoral classification or definitions it should provide concordance with the CPC in the manner indicated in the above example. If this is not possible, it should give a sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment.

The Panel and Appellate Body agreed on what could be inferred from the combined reading of the two documents. First, the CPC Class that corresponds to 'Sporting services' (9641) does *not* include gambling and betting services (contrary to the US claim); rather, the sub-class for gambling and betting services (96492) *falls* under the CPC Class 'Other recreational services' (9649) (in line with Antigua's claim).³⁴ Second, despite the fact that it was *per se* not binding on Members, the 1993 Scheduling Guidelines constituted an understanding among negotiating parties that, in order to secure clarity and predictability, the classification of sectors and sub-sectors should be based as far as possible on W/120 and the corresponding CPC numbers.³⁵ In the words of the Appellate Body:

These documents [...] provided a common language and structure which, although not obligatory, was widely used and relied upon. In such circumstances, and in the light of the specific guidance provided in the 1993 Scheduling Guidelines, it is reasonable to assume that parties to the negotiations examining a sector of a Schedule that tracked so closely the language of the same sector in W/120 would – absent a clear indication to the contrary – have expected the sector to have the same coverage as the corresponding W/120 sector.³⁶

However, the Panel and Appellate Body did disagree on whether these two documents were to be treated as *context* for purposes of Article 31(2)(a) of the Vienna Convention (referring to 'any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty') or as *supplementary means of interpretation* pursuant to Article 32(a) of the Vienna Convention (when the interpretation according to Article 31

³⁴ Panel Report, *US – Gambling*, above n 2, para 6.93 and Appellate Body Report, *US – Gambling*, above n 6, para 201.

³⁵ Panel Report, *US – Gambling*, above n 2, para 6.87 and Appellate Body Report, *US – Gambling*, above n 6, para 203.

³⁶ Appellate Body Report, *US – Gambling*, above n 6, para 204.

‘leaves the meaning ambiguous or obscure’).³⁷ The Panel believed they were relevant context, while the Appellate Body, reversing the Panel, concluded that they were in fact supplementary means of interpretation.

While this divergence had no practical consequence on the final outcome of the analysis at hand (both the Panel and Appellate Body reached the same conclusion that gambling and betting services fell within sub-sector 10.D of the US Schedule), there is a certain discomfort with some aspects of the Appellate Body’s reversal.

First of all, the Appellate Body’s refusal to consider W/120 and the 1993 Scheduling Guidelines as evidence of an ‘agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty’ seems to embody an excessively formalistic approach to the rules of treaty interpretation provided by the Vienna Convention. The two documents at issue may not have constituted in their entirety an ‘agreement between the parties’ for purposes of Article 31(2)(a) since, as stated by the Appellate Body, they were drafted by the GATT Secretariat, they were expressly not binding on the negotiating parties and they had not been accepted by the parties as agreements related to the treaty. However, it is not clear why the Appellate Body did not go beyond the mere formal features of W/120 and the 1993 Scheduling Guidelines and inquire whether the two documents constitute *evidence* of an underlying, albeit more limited in scope, consensus among parties that had emerged during the negotiations. This is in any event the conclusion at which both adjudicating bodies eventually arrive: despite the fact that W/120 and the 1993 Scheduling Guidelines were not formally binding, the negotiating parties, in order to ensure unambiguous commitments and achieve clarity, agreed to follow those guidelines as much as possible. Such *agreement* is expressly recorded in the negotiating history, and noted by the Appellate Body, as follows:

There was confirmation of the agreement to base the classification of services sectors and subsectors as much as possible on the Central Product Classification (CPC) list.³⁸

³⁷ The distinction between the primary criteria for interpreting a treaty identified in Article 31 of the Vienna Convention (in particular, text, context, object and purpose, good faith) and the supplementary means of interpretation pursuant to Article 32 of the Vienna Convention (in particular, preparatory work) should be emphasized here. As explained in the ILC Commentary on the draft Vienna Convention, the aim of the distinction was to focus treaty interpretation on ‘the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties [...]’. The word supplementary emphasizes that article [32] does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in article [31].’ *Yearbook of the International Law Commission*, 1966, Vol II at 223.

³⁸ Note on the Meeting of 27 May to 6 June 1991, MTN.GNS/42, para 19 (24 June 1991) (quoted in Panel Report, *US – Gambling*, above n 2, para 3.41 and footnote 117 thereto and in Appellate Body Report, *US – Gambling*, above n 6, para 176 and footnote 210 thereto). The paragraph of this Note is taken from the minutes from a meeting that was held *after* the Secretariat had circulated its first draft classification list, but *before* the final version of W/120 had been circulated.

Thus, the underlying agreement may be said to have been to employ the CPC list (as translated into the GATS context by W/120) as a sort of ‘default model’. If a Member wished to deviate from such a model it had to be clear about the meaning of its entries.³⁹ This reading is in line with the principle of *good faith* which constitutes an overarching element of the general rule of treaty interpretation pursuant to Article 31(1) of the Vienna Convention. Whether the role of good faith is simply to preclude a State from exploiting an ambiguity in the text or more broadly to preclude a State from advancing an interpretation contrary to the shared expectations of the parties,⁴⁰ the case at issue clearly qualified for either of the two scenarios.⁴¹

At a deeper level, the Appellate Body’s decision to treat the two documents as ‘supplementary means’ rather than ‘context’ shows an unusual disregard for certain policy considerations surrounding the use of supplementary means of interpretation pursuant to Article 32 of the Vienna Convention in cases of ‘ambiguous or obscure terms’. Within a litigation context, it may prove quite problematic and controversial for the interpreter to attribute meaning to a treaty term via supplementary means on the basis of Article 32 when such treaty term remains ‘ambiguous’ or ‘obscure’ after having examined (in good faith) its text, context and object and purpose.⁴² Since the very beginning of its mandate, the Appellate Body has been very adamant in strengthening its legitimacy underpinnings (for example, by adopting the very narrow textualist approach to treaty interpretation from which it is now trying to emancipate).⁴³ Similarly, it may be prudent for the Appellate Body to avoid as much as possible recognizing that a term is ambiguous or obscure (after having examined its most important features pursuant to Article 31) and, at the same time, attributing meaning to it through other supplementary means ex Article 32.⁴⁴

³⁹ This conclusion would not preclude the 1993 Scheduling Guidelines and document W/120 from also representing more broadly relevant preparatory work for purposes of Article 32 of the Vienna Convention. For a similar conclusion see Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (EC – Tariff Preferences)*, WT/DS246/R, circulated on 1 December 2003, para 7.88.

⁴⁰ Francis Jacobs, ‘Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference’, 18 ICLQ 318 (1969), at 333.

⁴¹ The Appellate Body itself seem to refer to notions of shared (rather than individual) expectations. See Appellate Body Report, *US – Gambling*, above n 6, para 204 (as quoted in the text at footnote 32).

⁴² Sinclair noted that ‘Recourse to the *travaux préparatoires* of a treaty must always be undertaken with caution and prudence’. Sinclair, above n 13, at 142ff.

⁴³ Claus-Dieter Ehlermann, ‘Six Years on the Bench of the “World Trade Court”’, in Federico Ortino and Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement System 1995–2003* (The Hague/London/New York, Kluwer Law International, 2004), at 509.

⁴⁴ In *Telmex* case, the Panel did not decide whether the 1993 Scheduling Guidelines provide ‘context’ for purposes of Article 31(2) or (3) or ‘supplementary means’ within the meaning of Article 32 of the Vienna Convention. The Panel, however, hinted that it would use the 1993 Guidelines in the latter sense only in order to confirm its understanding of the ordinary meaning of ‘cross-border supply of services’. Panel Report, *Mexico – Measures Affecting Telecommunications Services (Mexico – Telecoms or Telmex)* WT/DS204/R, circulated on 2 April 2004, para 7.44.

Moreover, Article 32 should not be employed as a sort of interpretative mechanism of last resort (if everything fails, a meaning shall be found according to the potentially open-ended list of supplementary means). A question that may be raised in this context is whether a serious ambiguity over a treaty term at the end of an Article 31 examination may constitute the basis for an ‘interpretative’ *non liquet*.⁴⁵ This is perhaps going beyond the scope of this analysis. However, the point worth making here is that, as far as is possible, the legitimacy of the interpreter’s decision would be strengthened if the decision is reached through the general rule of interpretation as provided for in Article 31 *rather than* by the supplementary means of Article 32.⁴⁶

This then leads to a second remark: the analysis of the Appellate Body under the Vienna Convention rules of interpretation seems excessively mechanical in particular with regard to evaluating different contextual elements as well as in examining ‘object and purpose’. As mentioned above, interpretation according to Article 31(1) of the Vienna Convention represents a puzzle comprising several pieces. While it may be necessary to proceed in stages (usually from ‘text’ to ‘context’ and then to ‘object and purpose’), this does not mean that the interpretative process is not one and one only. As recently put by Lennard, ‘while recognizing that [each element of] the Vienna Conventions rules do not represent a number of tests that must be ticked or crossed robotically in a particular sequence, they represent, rather, a disciplined and holistic approach to determining the relevance and weight of materials in interpreting a treaty provision, in whatever order the materials are actually considered.’⁴⁷

As noted before, the Appellate Body did examine other Members’ schedules as proper context. The Appellate Body found that different Members had dealt with gambling and betting services in different sub-sectors of their Schedules. However, its examination also suggested that Members seeking to distinguish the commitments they were making regarding gambling and betting services from other commitments they were making in sub-sector 10.D used *specific*

⁴⁵ On the doctrine of *non liquet* more generally in public international law and in WTO law, see Lorand Bartels, ‘The Separation of Powers in the WTO: How to Avoid Judicial Activism’, 53(4) ICLQ (2004) 861, at 873–76. It may be emphasized in this regard that, contrary to Article 31(1) of the Vienna Convention, Article 32 uses the verb ‘may’ (rather than ‘shall’), thus supporting the view that recourse to supplementary means of interpretation is a discretionary step rather than a mandatory one.

⁴⁶ ‘The word “supplementary” emphasizes that article [32] does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in article [31]’. International Law Commission Commentary on the draft Vienna Convention, *Yearbook of the International Law Commission*, 1966, Vol. II at 222–23.

⁴⁷ Michael Lennard, ‘Navigating by the Stars: Interpreting the WTO Agreements’, 5 JIEL (2002) 17, at 23. See Panel Report, *United States – Sections 301–310 of the Trade Act of 1974 (US – Section 301)*, WT/DS152/R, para 7.22, where the Panel stated that all of the elements of Article 31(1) of the Vienna Convention operate as ‘one holistic rule’.

language and/or CPC codes to indicate this distinction.⁴⁸ Surprisingly, however, the Appellate Body concluded that this context did not provide a definitive answer to the question regarding the meaning of sector 10 in the US Schedule.⁴⁹ On the contrary, Members' approach in scheduling under the GATS does shed light on the common intentions of the Members for purposes of interpreting the meaning of the US schedule. This reading is again supported by the principle of good faith and the related concept of Members' shared expectations.

Even more mechanical appears to be the Appellate Body consideration of the 'object and purpose' of the Treaty. Having concluded that the examination of the context does *not* clearly reveal whether, in the US Schedule, gambling and betting services fall within the category of 'other recreational services' or within the category of 'sporting services', the Appellate Body stated that: 'Accordingly, we turn to the object and purpose of the GATS to obtain further guidance for our interpretation'. What the Appellate Body is doing here looks, unfortunately, a lot like what Lennard referred to as going through 'a number of tests that must be ticked or crossed robotically in a particular sequence'.⁵⁰ Even more crudely put, the Appellate Body's *modus operandi* may be described as follows: since the 'text' and 'context' are not helpful, let us look at the 'object and purpose'. A holistic approach to treaty interpretation would require reaching a conclusion on the ordinary meaning of the term at issue only upon an examination of all the relevant elements, rather than examining each element in turn until the meaning of the term at issue is revealed (as the Appellate Body seemed to indicate in *Gambling*). It is important to emphasize that a holistic approach does not imply that all elements have the same interpretative weight ('text' and 'context' may be said to carry greater hermeneutic value than 'object and purpose' at least in today's WTO dispute settlement). However, all relevant elements should at least be taken into account as part of *one* overall analysis.

Furthermore, the Appellate Body does not seem to attribute much relevance to the object and purpose of the GATS (including the object and purpose of Members' schedules of commitments). While it agreed with the Panel (as well as the previous Appellate Body Report on *EC – Computer Equipment*) that the security and predictability of Members' specific commitments is an object and purpose of the WTO Agreement as well as of its covered agreements (such as

⁴⁸ Appellate Body Report, *US – Gambling*, above n 6, paras 185–86. This squarely accords both with the other contextual element discussed above (i.e., the underlying agreement to use W/120 as the default model), which the Appellate Body, however, discarded as proper 'context'; and with an interpretation of the US schedule 'in good faith', taking into account the legitimate expectations of the broader membership.

⁴⁹ *Ibid*, para 186.

⁵⁰ In a similar manner, after having dismissed the relevance of the object and purpose of the GATS in order to determine where, in the US Schedule, 'gambling and betting' fall, the Appellate Body next sentence read as follows: 'Accordingly, it is necessary to continue our analysis by examining other elements to be taken into account in interpreting treaty provisions.' *Ibid*, para 189.

the GATS), the Appellate Body briefly concluded that these considerations do not provide specific assistance for determining the interpretative question at hand.⁵¹ On the contrary, it is hereby argued that security and predictability is achieved by ensuring as far as possible a common language in drafting Members' schedules of commitments. Deviations from this common language are possible but the burden rests on the deviator to spell them out clearly.

In conclusion, in order to carry out a holistic approach to treaty interpretation, it may not be easy to eliminate altogether a stage-based process, especially when recording such complex activity in the final written report. However, this paper's critique goes to the substance of the Appellate Body's interpretative process shown in *US – Gambling*, which appears to have proceeded in a too-formalistic and mechanical way in particular undermining the hermeneutic value of the contextual and teleological dimensions of treaty interpretation.⁵²

II. THE MEANING OF SUB-PARAGRAPHS (A) AND (C) OF ARTICLE XVI:2 GATS

Having determined that the United States had indeed included gambling and betting in its schedule of commitments (without any limitations or conditions), Antigua's complaint based on Article XVI GATS turned next on identifying whether the US measures under review constitute prohibited 'limitations' for purposes of Article XVI:2. In particular, Antigua referred to sub-paragraphs (a) and (c) of Article XVI:2, which prohibit limitations 'on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test' and 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'.

The hermeneutic choice presented itself as follows: According to the United States, Article XVI:2(a) and (c) constitute two of the prohibitions on *specific forms* of market access limitations set out in Article XVI:2. According to Antigua, Article XVI:2(a) and (c) prohibited any measure having an *effect similar* to that of any market access limitations listed in Article XVI:2, regardless of form. Accordingly, for the United States a ban on the remote supply of gambling and betting services does not fall within the list of prohibited measures under Article XVI since it was not expressed in the form of a numerical quota, while for Antigua, the US ban is caught by Article XVI because it has

⁵¹ Ibid, paras 188–89, citing the Panel Report, *US – Gambling*, above n 2, para 6.108.

⁵² 'Every text, however clear on its face, requires to be scrutinized in its context and in the light of the object and purpose which it is designed to serve. The conclusion which may be reached after such a scrutiny is, in most instances, that the clear meaning which originally presented itself is the correct one, but this should not be used to disguise the fact that what is involved is a process of interpretation.' Sinclair, above n 13, at 116.

the ‘effect’ of a zero quota by limiting to zero the number of service suppliers or their output.

Both the Panel and Appellate Body agreed with Antigua on the proper scope of Article XVI GATS. The Panel found, and the Appellate Body upheld,⁵³ that the US ban is (1) a limitation on the number of service suppliers in the form of numerical quotas within the meaning of Article XVI:2(a) ‘because it *totally prevents* the use by service suppliers of one, several or all means of delivery that are included in mode 1’ and (2) a limitation on the total number of service operations or on the total quantity of service output in the form of quotas within the meaning of Article XVI:2(c) ‘because it ... *results* in a “zero quota” on one or more or all means of delivery include[d] in mode 1.’⁵⁴

Aside from raising serious doubts on the substantive outcome of the decision in *US – Gambling*, the paper once again focuses here on the analysis carried out by the Appellate Body in interpreting the meaning of Article XVI GATS, in particular the scope of subparagraph (a) of Article XVI:2.⁵⁵ A primary concern lies with certain weaknesses in the Appellate Body’s textual analysis of Article XVI as well as with the striking absence of any consideration of the ‘context’ of the provision at issue and the ‘object and purpose’ of the GATS.⁵⁶

A. Textual analysis and the meaning of ‘in the form of’

Much of the Appellate Body’s textual analysis focused on the meaning of the term ‘in the form of’ which, according to the United States, restricts the types of market access limitations caught by the prohibitions of Article XVI:2(a) and (c).

The skepticism towards dictionary definitions, which was noted above in the context of the Appellate Body’s reading of the US schedule of commitments, appears at first sight to permeate the Appellate Body’s analysis of the meaning of Article XVI:2(a). The Appellate Body refers to the ‘degree of ambiguity’ of dictionary definitions referred to by the United States as to the scope of the word ‘form’ in Article XVI:2(a).⁵⁷ However, a closer look shows that the Appellate Body is actually rejecting the strict interpretation of Article XVI:2 suggested by the United States according to which Article XVI:2 simply prohibits specifically defined *forms* of market access limitations. The ambiguity of dictionary definitions is translated by the Appellate Body into the suggestion that the term ‘form’ has a ‘broad meaning’ and ‘must not be interpreted as prescribing a rigid mechanical formula’.

⁵³ Appellate Body Report, *US – Gambling*, above n 6, paras 239 and 252.

⁵⁴ Panel Report, *US – Gambling*, above n 2, paras 6.338 and 6.355 [emphasis added].

⁵⁵ The Appellate Body’s analysis of subparagraph (c) of Article XVI:2 follows broadly the arguments and findings developed with regard to subparagraph (a). See Appellate Body Report, *US – Gambling*, above n 6, paras 246–52.

⁵⁶ To a certain extent, the Panel did a better job in applying the various tenets of the general rule of interpretation set out in Article 31 of the Vienna Convention.

⁵⁷ Appellate Body Report, *US – Gambling*, above n 6, para 226.

The Appellate Body reaches this conclusion by noting that, according to such dictionary definitions, the term ‘form’ covers both the mode in which a thing ‘exists’, as well as the mode in which it ‘manifests itself’. By referring to ‘existence’ and ‘manifestation’, the Appellate Body seems to be hinting that a measure may be considered as a limitation on the number of service suppliers for purposes of Article XVI:2(a) whether it has the *form* or the *effect* of a numerical quota. This is a rather weak argument and it does not really square out with the very dictionary definitions referred to by the United States, which instead appear to emphasize form over substance.

The *New Shorter Oxford English Dictionary*, referred to by the United States in its submission and quoted by the Appellate Body, defines ‘form’ *inter alia* as ‘shape, arrangement of parts, or the particular mode in which a thing exists or manifests itself’, or, in linguistics, ‘the external characteristics of a word or other unit as distinct from its meaning’.⁵⁸ Reference to ‘shape’, ‘arrangement’, ‘mode’ and ‘external characteristics ... as distinct from meaning’ appears to exclude a broad reading of the term ‘form’ which would include notions of substance or effect.

The Appellate Body finds confirmation for its broad reading of the term ‘in the form of’ by looking at the four types of limitations in Article XVI:2(a). The Appellate Body begins with ‘numerical quotas’ and through dictionary definitions arrives at the conclusion that numerical quota means ‘a quantitative limit on the number of service suppliers’.⁵⁹ Thus, given its ‘quantitative’ nature, the Appellate Body concludes that ‘zero’ falls within the definition of ‘numerical quota’. This seems an absolutely uncontroversial conclusion: zero is indeed quantitative in nature and zero quotas are a well-known instrument of trade regulation. However, the fundamental question, which the Appellate Body does not clearly resolve, is whether, for purposes of Article XVI:2(a), a numerical quota includes a ban on the remote supply of gambling services, which has an effect equivalent to a zero quota. This may be the ultimate conclusion that the Appellate Body is hinting at, but it is certainly not what the Appellate Body clearly states or explains.

Even more surprising is the Appellate Body consideration of two other types of limitations listed in Article XVI:2(a): ‘monopolies’ and ‘exclusive service suppliers’. While recognizing that there is no general definition for either term in the GATS, the Appellate Body finds two related definitions in the GATS which suggest that the reference to limitations on the number of service suppliers ‘in the form of monopolies and exclusive service suppliers’ should be read to include limitations that are *in form* or *in effect* monopolies or exclusive service suppliers.⁶⁰

⁵⁸ See footnote 266 of the Appellate Body Report, *US – Gambling*, above n 6.

⁵⁹ If there was ever a time when the Appellate Body should have restrained itself in making use of dictionaries, this was certainly it. After more than fifty years since the GATT entered into operation, looking up the meaning of the term ‘quota’ was indeed a discouraging sign of weakness on the part of the Appellate Body.

⁶⁰ Appellate Body Report, *US – Gambling*, above n 6, para 230.

First, Article XXVIII(h) GATS defines a ‘monopoly supplier of a service’ as ‘... any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service’. Second, Article VIII:5 GATS defines the term ‘exclusive service suppliers’ as ‘where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory’. Both definitions thus expressly refer to both form and substance.

Such analysis is surprising, however, since there appears to be no consideration of the different terminology (‘monopoly’ versus ‘monopoly supplier of a service’) and context (‘exclusive service suppliers’ in Article VIII:5 and in Article XVI:2) of the two relevant terms. For example, the Appellate Body has in the past been very careful in attributing meaning to identical terms situated in different contexts: the Appellate Body found, for instance, that the term ‘like product’ in Article III:2 GATT means something different than the term ‘like product’ in Article III:4 GATT.⁶¹ It is surprising the simplicity with which the Appellate Body is willing to import meaning into the term ‘form’ at issue in *US – Gambling* from terms which are not exactly identical or are situated in different contexts.

At the end of its textual analysis of Article XVI:2(a), the Appellate Body is careful in underlying that the words ‘in the form of’ should not be ignored or replaced by the words ‘that have the effect of’.⁶² However, at the same time, the Appellate Body emphasizes that these terms cannot be read in isolation. Read in conjunction with the words that precede them and the words that follow them, the Appellate Body concludes 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.’⁶³ Again, the Appellate Body is rejecting the strict interpretation of Article XVI:2 suggested by the United States and by implication is hinting that measures, which *de facto* operate as any of the market access limitations listed in Article XVI:2, fall within the prohibition of Article XVI.

B. ‘Context’ and ‘object & purpose’: missing in action?

This is perhaps the weakest (and most disappointing) part of the Appellate Body’s interpretative exercise in *US – Gambling*. The only contextual element that the Appellate Body considers is the chapeau of Article XVI:2(a), from which the Appellate Body correctly concludes that the function of the sub-paragraphs in Article XVI:2 is to define certain limitations that are prohibited unless specifically entered in the Member’s Schedule, including, for example,

⁶¹ Appellate Body Report, *EC – Asbestos*, above n 19, para 90.

⁶² Appellate Body Report, *US – Gambling*, above n 6, para 232.

⁶³ *Ibid*, para 232.

limitations that would impose a maximum limit of above zero. Referring to Article II:1(b) GATT on tariff binding, the Appellate Body finds, furthermore, that if maximum limits of above zero are included in the limitations prohibited by Article XVI:2, certainly also limits set at zero are caught by Article XVI:2. The Appellate Body finds persuasive the following Panel's reasoning:

[t]he fact that the terminology [of Article XVI:2(a)] 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. 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. If a Member wants to maintain a full prohibition, it is assumed that such a Member would not have scheduled such a sector or subsector and, therefore, would not need to schedule any limitation or measures pursuant to Article XVI:2.⁶⁴

This reasoning is not particularly convincing and appears to contradict the Panel's finding that, '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.'⁶⁵ From this latter finding it follows that, if a Member wants to prohibit one means of delivery *only* (remote or online delivery, for example) but not others (face-to-face delivery, for example), that Member would need to use a zero quota-type limitation with regard to that means of delivery in the relevant sector or sub-sector. Thus, the Panel's argument, found persuasive by the Appellate Body (that subparagraph (a) does not foresee a 'zero quota' because subparagraph (a) was not drafted to cover situations where a Member wants to maintain full limitations) does not really explain why subparagraph (a) does *not* in fact foresee a 'zero quota'.

Similarly, 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:2.⁶⁶ 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

⁶⁴ Ibid, paras 233–34 quoting Panel Report, *US – Gambling*, above n 2, para 6.331.

⁶⁵ Panel Report, *US – Gambling*, above n 2, para 6.287.

⁶⁶ 'It seems clear from the 1993 Scheduling Guidelines that the list of limitations in paragraph 2 of Article XVI is an exhaustive list. Thus, the types of measures listed in the second paragraph exhaust the types of market access restrictions prohibited by Article XVI, in particular by the first paragraph of Article XVI.' Panel Report, *US – Gambling*, above n 2, paras 6.298–6.299. See Philip Raworth, *Trade in Services – Global Regulation and the Impact on Key Service Sectors* (New York, Oceana Publications, 2005), at 36–37.

open-ended one, contrary to the Panel's finding that such a list is in fact of an exhaustive nature.⁶⁷

Contrary to the Panel, the Appellate Body does not carry any further the analysis of the relevant context of Article XVI. It seems quite odd that in order to understand the nature and function of Article XVI (for the first time before the Appellate Body), no consideration is given to the Agreement's other general disciplines, in particular Articles VI and XVII. It is argued here that a broader comparative investigation of the main elements of Articles VI, XVI and XVII would have at least supported the conclusion that the provision on Market Access should be read narrowly. In what follows, the paper puts forward the bases for such a conclusion.

Let us examine four GATS provisions (Articles VI:4, VI:5, XVI and XVII) by focusing on two features: (a) 'normative content' and (b) 'objective element'. This subdivision allows for a clearer understanding of each provision by clarifying (a) what each provision actually requires and (b) the types of governmental measures that are caught by each provision.⁶⁸ Table 2 shows the breakdown of the different normative contents and objective elements of the four provisions under review.

Focusing first of all on the normative content, a key difference between Article XVI, on the one hand, and Articles XVII and VI:5, on the other, should be emphasized. While the two latter provisions principally perform a *positive* function, the Market Access provision of Article XVI performs strictly a *negative* function. The national treatment standard of Article XVII and the reasonableness-type standards of Article VI:5⁶⁹ provide in essence for normative criteria which Members must follow when enacting regulation (respectively, 'treatment no less favourable' and 'objectivity, transparency and necessity').⁷⁰ On the contrary, Article XVI prohibits Members from using a set of measures that limit market access ('Members shall not maintain or adopt'). Accordingly, while

⁶⁷ The Appellate Body does not review the issue of whether or not the list of Article XVI:2 is exhaustive 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). Appellate Body Report, *US – Gambling*, above n 6, para 256. However, there may be some indication that the Appellate Body would disagree with the Panel's finding on the exhaustive nature of Article XVI:2 list. The finding of the Appellate Body according to which *both* Article XVI:2(a) *and* Article XVI:2(c) apply to the US measures under review seems to support such view. If the list were really exhaustive in nature, the limitations listed in subparagraphs (a) to (f) would not apply cumulatively. See Joost Pauwelyn, 'Rien Ne Va Plus: Distinguishing Domestic Regulation from Market Access in GATT and GATS', in 4 *World Trade Review* (2005) 131, at 163.

⁶⁸ Cf. Federico Ortino, *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law* (Oxford, Hart Publishing, 2004), at 32–33.

⁶⁹ It should be emphasized that Article VI:5 applies (i) provisionally pending the entry into force of the disciplines developed pursuant to Article VI:4, (ii) in sectors in which a Member has undertaken specific commitments and (iii) conditional upon there being nullification or impairment of specific commitments which could not reasonably have been expected at the time those commitments were made.

⁷⁰ A secondary function of the national treatment and reasonableness provisions is to invalidate any existing discriminatory or unreasonable national measure (this is, in strict terms, a negative function).

Table 2. 'Normative content' and 'objective element' of Articles VI:4-5, XVI and XVII GATS

GATS Provision	Normative Content	Objective Element
Article XVI Market Access (rule)	'shall not maintain or adopt'	'(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'
Article XVII National Treatment (standard)	'treatment no less favourable than that it accords to its own like services and services suppliers'	'all measures affecting the supply of services'
Article VI:5 Domestic Regulation 'provisional' (standards)	'objective and transparent criteria', 'not more burdensome than necessary'	'licensing and qualification requirements and technical standards'
Article VI:4 Domestic Regulation 'future' (disciplines)	'develop any necessary disciplines'	'qualification requirements and procedures, technical standards and licensing requirements'

Articles XVII and VI:5 allow in principle Members to enact any type of regulatory instruments as long as they are non-discriminatory and reasonable, Article XVI more simply prohibits Members from employing certain types of regulatory instruments independently of their non-discriminatory or reasonable nature. In other words, it may be said that in itself the normative content of Article XVI is much stricter and more demanding than the normative content of Articles XVII and VI:5.⁷¹ Equally, the national treatment standard may be said to be less demanding than the reasonableness-type standards of Article VI:5.

Article VI:4 takes a somewhat different approach from the three provisions just mentioned since it does not directly provide for any specific discipline; rather, it grants the authority to the Council for Trade in Service (CTS) to develop any necessary disciplines with regard to qualification requirements and procedures, technical standards and licensing requirements. Article VI:4 specifies that these future disciplines shall aim to ensure that such requirements are *inter alia* based on objective and transparent criteria, not more burdensome than necessary, etc. In effect, Article VI:5 makes these normative standards (objectivity, transparency, necessity) provisionally applicable pending the entry into force of Article VI:4 disciplines.

⁷¹ Compare, for example, a provision prohibiting any measure regulating the environment with a provision requiring that environmental measures be non-discriminatory or reasonable. The former provision is stricter because it simply prohibits a certain type of regulation, while the latter is less demanding since in principle it allows for environmental regulations as long as they conform to the non-discrimination or reasonableness principles. On the distinction between negative and positive integration see Ortino, above n 58, at 17–27.

As of today, the CTS has managed to develop disciplines with regard to the accountancy sector only.⁷²

Focusing on Articles VI:5, XVI and XVII, it should be noted how the difference in ‘normative content’ is reflected in the ‘objective element’ of the provisions under review: Article XVII potentially applies to any national measure affecting the supply of services, whether they restrict market access or regulate services or service suppliers domestically; Article VI:5 applies to licensing and qualification requirements and technical standards in the field of services; Article XVI applies to a *limited* set of measures restricting market access that are exhaustively listed in sub-paragraph (a)–(f) of Article XVI:2. The more lenient the normative content, the broader is the reach of each provision: national treatment standard for any measure affecting trade in services (Article XVII); reasonableness standard for an open-ended set of domestic regulations (Article VI:5); *per se* prohibition for a closed list of market access restrictions (Article XVI).

While it is clear that this contextual analysis may not provide a definite answer to the issue at hand – what is the meaning of Article XVI:2(a) and (c)? – it indicates at a minimum that a *narrow* reading of the ‘objective element’ of GATS’ Market Access provision is in line with the other principal GATS provisions.⁷³ This cautious approach to the scope of application of Article XVI GATS is also in line with the similar approach developed by WTO case law with regard to Articles II and XI GATT dealing with border measures.⁷⁴ While it is true that the dichotomy between ‘border measures’ and ‘internal measures’ developed within the field of trade in goods in order to differentiate the type of discipline used in that context cannot be replicated

⁷² *Disciplines on Domestic Regulation in the Accountancy Sector*, Decision of the GATS Council of 14 December 1998, S/L/64. See Adityaa Mattoo and Pierre Sauvé, ‘Domestic Regulation and Trade in Services: Addressing the GATS Article VI:4 Work Program – A Look at the Issues’, in Adityaa Mattoo and Pierre Sauvé (eds), *Domestic Regulation and Service Trade Liberalization* (Washington, DC: OUP, 2003).

⁷³ For a narrow interpretation of Article XVI see Pauwelyn, above n 67; Markus Krajewski, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (The Hague/London/New York: Kluwer Law International, 2003), at 84; John Jackson, William Davey, and Alan Sykes, *Legal Problems of International Economic Relations* (4th edn, 2002), at 890. One may actually go further and argue that in light of the ‘normative content’ of Article XVI (*per se* prohibition), it is the specific instrument used by a Member (whether a ‘quota’ or a ‘monopoly’) that is prohibited by Art. XVI rather than the ‘effect’ of a Member’s measure. The European Community experience teaches us that even the famous *Dassonville-Cassis de Dijon* jurisprudence of the European Court of Justice transformed a discipline based on a *per se* prohibition (Article 28) into a discipline *de facto* based on reasonableness. See Ortino, above n 68, at 389–402. Cf. Sofie M.F. Geeroms, ‘Cross-Border Gambling on the Internet under the WTO/GATS and EC Rules Compared: A Justified Restriction on the Freedom to Provide Services?’, in European Association for the Study of Gambling, *Cross-Border Gambling on the Internet: Challenging National and International Law* (Zürich, 2005) 145–80.

⁷⁴ In particular, Panel Report, *EC – Asbestos*. WT/DS135/R circulated on 18 September 2000. See Ortino, above n 68, at 55–92; Pauwelyn, above n 67, at 133–35. Article II (together with Article XXVIII bis) GATT provides for the reduction/elimination of a specific type of trade restrictive measure (such as tariffs and other equivalent charges imposed on importation) conditional upon progressive multilateral negotiations. Article XI provides for the *per se* prohibition of non-tariff restriction on importation (such as quotas or import licences).

within the field of trade in services,⁷⁵ it is astonishing that the Appellate Body does not consider at all such contextual elements, which, it is argued here, do shed some valuable light on the meaning of Article XVI GATS.⁷⁶

Also, no mention is made of the *Understanding on Commitments in Financial Services* ('Understanding') which constitutes an alternative approach to that covered by the provisions of Part III of the GATS (namely, Articles XVI, XVII and XVIII) already employed by most industrialized countries (including the EC, the United States and Japan) with regard to financial services. In the Market Access section (lett. B) of the Understanding, which represents by far the biggest section, two provisions should have been noted. Under the subheading 'Commercial Presence', paragraph 5 provides that:

Each Member shall grant financial service suppliers of any other Member *the right to establish or expand within its territory*, including through the acquisition of existing enterprises, a commercial presence. [emphasis added]

Moreover, under the subheading 'Non-discriminatory Measures', paragraph 10 provides that:

Each Member shall endeavour to remove or to limit any significant adverse effect on financial service suppliers of any other Member of [...] (d) other measures that, although respecting the provisions of the Agreement, *affect adversely* the ability of financial service suppliers of any other Member *to operate, compete or enter the Member's market*. [emphasis added]

While paragraph 5 of the Understanding may be characterized as a market access/pre-entry type of provision, paragraph 10(d) undoubtedly makes use of a wide notion of market access (along the lines of the interpretation given by

⁷⁵ Obstacles to service (as well as investment) flows cannot be categorized according to whether they are imposed on the border or within the market as it has historically been done for the flows of goods. This depends on the intangible and personal nature of such flows. The attempt to devise a clear distinction between pre-entry (or pre-establishment) and post-entry (or post-establishment) measures affecting the flows of services (or investments) may become a quite problematic endeavour since it is difficult to distinguish in general terms between national measures which affect pre-entry (i.e., market access measures) and those that affect post-entry (i.e., market regulation measures). In the majority of cases, there is no easy way of determining which measures restrict market entry or simply regulate the market. However, the issue of definition becomes relevant if pre-entry measures are subject to a different legal discipline compared with post-entry measures. In this regard, the solution that appeared to have been adopted by the GATS is as follows: (1) to impose on all measures affecting trade in services the national treatment standard (subject to specific commitments) and (2) to require the elimination of an exhaustive number of specific measures which have a strong effect on market access (subject to specific commitments). In other words, Article XVII and XVI embody two different legal disciplines (non-discrimination versus *per se* prohibition) and two different ways to define the respective scopes of application ('all measures affecting' versus an exhaustive list). However, the Appellate Body seems to have rejected this division of labor and expanded the reach of the market access provision of Article XVI.

⁷⁶ It has also been correctly argued that a broad interpretation of the *per se* prohibition of Article XVI would also prejudice the content of Article VI:4 disciplines as well as make their elaboration largely futile. Pauwelyn, above n 67, at 167.

the panel and Appellate Body in *US – Gambling*) including any measure that affects adversely the ability to operate, compete or enter any Member's market. Here is not the place for a detailed analysis of these, as well as other, very interesting and, at the same time, undefined provisions of the Understanding. The point worth emphasizing is that an analysis of the alternative approach to Part III of GATS provided for in the Understanding may have been helpful (one way or the other) in fleshing out the meaning of Article XVI:2(a) and (c) GATS.

The Appellate Body deals with 'object and purpose' of the Treaty in a similar fashion. While the Appellate Body recalls, in a footnote, the Panel's reference to 'transparency, the progressive liberalization of trade in services, and Members' right to regulate trade in services provided that they respect the rights of other Members under the GATS' as forming the object and purpose of the GATS,⁷⁷ the Appellate Body quickly dismisses the relevance of it affirming that:

the object and purpose of the GATS as stated in its preamble, [does not] readily [assist] us in answering the question whether the reference in Article XVI:2(a) to 'limitations on the number of service suppliers ... in the form of numerical quotas' encompasses the type of measure at issue here, namely, a prohibition on the supply of a service in respect of which a specific commitment has been made.⁷⁸

This is again surprising and to a certain extent quite disappointing. In assessing the scope of application of an important GATS discipline as that encapsulated in Article XVI on Market Access, consideration of the broader objectives underlying the GATS must be playing a part (even if not a crucial one). As noted by Pauwelyn, '[f]ocusing almost exclusively on the text of Article XVI in isolation, [the Appellate Body] completely ignored the delicate balance [...] between market access and domestic regulation' risking to 'seriously endanger the regulatory autonomy of WTO Members to an extent not envisaged by the drafters of the GATT/WTO treaties'.⁷⁹ Extending the *per se* prohibition of Article XVI to measures that have an *effect* equivalent to a quota (whether it be a quota equal to, or greater than, zero) runs a serious risk of *de facto* banning any type of domestic regulation with a restrictive effect on the flow of services, thus tilting the balance in favour of multilateral liberalization to the detriment of domestic regulatory prerogatives. If a ban on the remote supply of gambling services equates to a zero quota (as suggested by the Panel and Appellate Body in *Gambling*), a requirement, for example, to pass an examination in order to provide legal services in country Y may

⁷⁷ Appellate Body Report, *US – Gambling*, above n 6, para 235, footnote 271 quoting Panel Report, *US – Gambling*, above n 2, paras 6.107–6.109, and 6.314–6.317.

⁷⁸ Appellate Body Report, *US – Gambling*, above n 6, para 235 [original footnote omitted].

⁷⁹ Pauwelyn, above n 67, at 158–59 and 168.

similarly be said to equate to a >0 quota, and thus be *per se* prohibited by Article XVI GATS. The existence of an exhaustive list of public policy objectives that can potentially justify a violation of Article XVI cannot constitute the counterbalance to such a rigid approach to Members' domestic regulatory prerogatives.⁸⁰

In addition to ignoring the delicate balance between multilateral liberalization objectives and national regulatory prerogatives expressly delineated in the preamble to the GATS, the Appellate Body has not made any use of an inquiry into the underlying rationale of the specific discipline at issue, which, it is argued here, would have provided further insights on the proper scope of application of Article XVI.⁸¹ Some of the key questions that the Appellate Body fails to ask are the following: why are the measures listed in Article XVI subject to such a rigid discipline (*per se* prohibition)? Does this tell something about the measures themselves? Is it really their 'quantitative' nature that is the reason for the *per se* prohibition?

Without denying the fact that the known aversion toward 'quantitative restrictions' in the field of trade in goods undoubtedly influenced the drafting of Article XVI GATS, it seems that, more than their 'quantitative' nature, the common feature characterizing the measures falling within Article XVI GATS (and Article XI GATT) appears to lie in the *presumed* absence of a legitimate public policy justifying such measures. In light of the rigid discipline to which they are subject (*per se* prohibition), it is indeed plausible that, in the mind of the treaty drafters (and the neo-liberal economists inspiring them in the late 1980s) the underlying rationale of Article XVI is a presumption that the measures listed in sub-paragraph 2(a)–(f) generally lack any legitimate policy justification (in much the same way as quotas and other restrictions on the importation of goods).⁸² Accordingly, in the ideal world envisioned by the drafters of the

⁸⁰ For a discussion on the features of a 'rule versus exception' approach see Federico Ortino, 'From "Non-Discrimination" to "Reasonableness": A Paradigm Shift in International Economic Law?' *Jean Monnet Working Papers* 1/2005, at 53–57.

⁸¹ Krajewski has interestingly noted how the Appellate Body usually refers to object and purpose of specific provisions of WTO agreements more than to object and purpose of the relevant WTO agreement as a whole (citing in particular the Appellate Body Report on *US – Shrimp*). Krajewski, above n 73, at 55–56. Although the emphasis on the object and purpose of specific provisions may not appear to be entirely in conformity with the standards of the Vienna Convention (the reference to object and purpose in Article 31(1) clearly relates to the entire treaty), it is believed that the object and purpose of specific provisions should be seen as constituting part of the object and purpose of the underlying Treaty, thus within the mandate of Article 31 of the Vienna Convention. See Lennard, above n 47, at 28.

⁸² This presumption may also stem from the perception that quantitative restrictions have a discriminatory or protectionist tendency since, by limiting how many suppliers operate within a specific market, they are bound to constitute protection to existing domestic operators (sub-paragraph (f) of Article XVI:2 seems to confirm this view). However, this is not always true, especially with regard to new service fields or products and to developing countries. In these circumstances, Article XVI GATS could even be perceived as a pro-competitive instrument, in so far as it prohibits national governments to protect, not just domestic, but any incumbent service supplier.

GATS,⁸³ the measures listed therein should be in principle prohibited. Nonetheless, since such a presumption is based on a general value-judgment (which may not be applicable in all circumstances), the drafters provided for the possibility that the market access limitations of Article XVI may, in exceptional circumstances, be justified through recourse to Article XIV GATS. In other words, the above presumption is a rebuttable one.

Now, if it is conceivable that the drafters of the GATS viewed formal ‘quotas’ as domestic measures which could not be permitted under WTO law since they lacked a legitimate policy justification, it is unconceivable that they also included within such a category of ‘incriminated’ measures any domestic regulation which has simply an effect equivalent to a quota (i.e., restricting access to national markets). Banning (online) gambling, like imposing an entry exam for lawyers or a minimum capital requirement for banks, undeniably pursues legitimate policy objectives. It seems to follow that, even if these types of measures potentially restrict market access, they should not be subjected to the rigid approach (*per se* prohibition) of Article XVI.

Having recognized that certain ambiguities about the meaning of Article XVI remain,⁸⁴ the Appellate Body clinches its conclusion that limitations amounting to a zero quota are quantitative limitations falling within the scope of Article XVI:2(a) yet again on the basis of the 1993 Scheduling Guidelines as supplementary means of interpretation pursuant to Article 32 of the Vienna Convention.⁸⁵ Among the examples of the limitations falling within the scope of sub-paragraph (a) of Article XVI:2, the Guidelines include the following: ‘nationality requirements for suppliers of services (equivalent to zero quota)’.⁸⁶ According to the Appellate Body, this example ‘confirms the view that measures equivalent to a zero quota fall within the scope of Article XVI:2 (a)’.⁸⁷

⁸³ As previously noted, (similar to tariffs) Article XVI market access limitations are not prohibited immediately because it would not be economically and thus politically feasible to do so. For example, protection of a specific infant service industry might be achieved through one of the quantitative measures listed in Article XVI. However, in the ideal world designed by the GATS these types of justification are only temporary and thus market access restrictions are subject to the progressive liberalization ‘commitments’ in Article XIX GATS.

⁸⁴ The Panel had even concluded that any suggestion that the ‘form’ requirement must be strictly interpreted to refer only to limitations ‘explicitly couched in numerical terms’ leads to ‘absurdity’. Panel Report, *US – Gambling*, above n 2, para 6.332.

⁸⁵ Appellate Body Report, *US – Gambling*, above n 6, paras 236–38.

⁸⁶ See 1993 Scheduling Guidelines, para 6.

⁸⁷ Appellate Body Report, *US – Gambling*, above n 6, para 237. The Appellate Body reaches a similar conclusion with regard to Article XVI:2(c) by pointing at an example of the type of measure covered by subparagraph (c) in the 1993 Scheduling Guidelines as relevant preparatory work pursuant to Article 32(a) of the Vienna Convention. According to the Appellate Body, these Guidelines refer to ‘[r]estrictions on broadcasting time available for foreign films’. Since the example does not mention numbers or units, the Appellate Body concludes that Article XVI:2(c) does not simply cover limitations that contain an express reference to numbered units (as advanced by the United States), but also

Aside from the fact that it is not altogether clear whether the Appellate Body is using supplementary means of interpretation (such as preparatory work) in order to *confirm* the meaning resulting from the application of Article 31 or to *determine* the meaning when the interpretation according to Article 31 leaves certain ambiguity or leads to absurdity,⁸⁸ it is disappointing that the Appellate Body limits its examination of the 1993 Scheduling Guidelines to only one example in one small section of such a document. There is language in the 1993 Scheduling Guidelines as well as in its Addendum⁸⁹ that seems to support a different conclusion from that reached by the Appellate Body. For example, paragraph 4 states that, while the quantitative restrictions listed in Article XVI can be expressed numerically, or through the criteria specified in sub-paragraphs (a) to (d), ‘these criteria do not relate to the *quality* of the service supplied, or to the *ability* of the supplier to supply the service (i.e. technical standards or qualification of the supplier)’.⁹⁰

Reference to the quality of the service and to the ability of the supplier seem to support the view that the underlying rationale of the *per se* prohibition of Article XVI rests on the presumption that the measures listed in Article XVI:2 lack a legitimate policy justification. Consider the case of a license requirement imposed by State A on the opening of a new restaurant in its territory. If the granting of the license in question depends on a pre-established quota (‘only 5 restaurants may operate in the relevant area’) or is based on an economic needs test (‘new restaurant licenses shall be granted only in the case of unsatisfied customers’ demand’), then that requirement falls within the scope of application of Article XVI and is *per se* prohibited (if State A has entered a market access commitment). On the other hand, if the granting of the restaurant license depends on the quality of the service supplied or on the ability of

a total ban as that at issue in the present case. I do not find totally persuasive the jump from rejecting the argument advanced by the United States (subparagraph (c) covers only limitations containing express reference to numbered units) and embracing the finding that a total ban is a ‘quota’ for purposes of Article XVI:2(c). Furthermore, the example referred to by the Appellate Body was *not* present in the 1993 Scheduling Guidelines but it was introduced only with the 2001 revision. Accordingly, that particular example does not represent relevant preparatory work. Compare paragraph 6 of the 1993 Scheduling Guidelines with paragraph 12 of the 2001 Scheduling Guidelines.

⁸⁸ Compare the language in paragraph 236 referring to ‘ambiguity’ and ‘absurdity’ with the last sentence of paragraph 237 (‘confirms the view that’). In any event, the Appellate Body appears more cautious (compared to its previous findings with regard to the US Schedule) to base its interpretation of Article XVI on Article 32(a) of the Vienna Convention.

⁸⁹ *Scheduling of Initial Commitments in Trade in Services: Explanatory Note – Addendum* (‘Addendum’), MTN_GNS/W/164/Add 1. See for example the third question/answer: ‘With regard to market access limitations, such as numerical ceilings or economic needs tests, how detailed should the entries in schedules be? The entry should describe each measure concisely indicating the elements which make it inconsistent with Article XVI. Numerical ceilings *should be expressed in defined quantities in either absolute numbers or percentages*; regarding economic needs tests the entry should indicate the main criteria on which the test is based, e.g. if the authority to establish a facility is based on a population criterion, the criterion should be described concisely.’ [Emphasis added]

⁹⁰ 1993 Scheduling Guidelines, para 4 [emphasis added].

the supplier to supply the service, the measure falls outside the scope of Article XVI (and is potentially subjected to the disciplines of Articles XVII and VI). The difference between the two cases rests on the criteria employed in determining whether or not the license should be granted:⁹¹ while a simple numerical criterion or an economic needs test are presumed to constitute illegitimate grounds upon which to base a limitation on market access, the quality of the service supplied or the ability of the supplier to supply the specific service are deemed to constitute legitimate regulatory policies.⁹²

In conclusion, the absence of any consideration of the ‘context’ of Article XVI as well as the ‘object and purpose’ of the GATS represents a serious weakness in the interpretative exercise carried out by the Appellate Body in *Gambling*. In turn, this shows, once again, an unusual disregard for certain policy considerations surrounding the interpretation of a fundamental and sensitive provision of the GATS. First, when faced with assessing the meaning of a Treaty provision for the first time, a treaty interpreter should avoid taking a too-narrow approach as well as making sure that all the relevant elements of the general rule of interpretation are carefully considered. There is, otherwise, a risk of making a mistake (like the one the panel and the Appellate Body made in interpreting Article XVI too broadly) which it is then difficult to correct. As clearly put by Professor Ehlermann, in exercising its quasi-judicial functions, ‘the Appellate Body has [...] to proceed with extraordinary circumspection and care.’⁹³

Secondly, the broad reading of the scope of application of Article XVI GATS espoused by the Appellate Body in *Gambling* disregards a further fundamental concern. Including within the *per se* prohibition of Article XVI a potentially wide range of domestic regulation pursuing legitimate public policy objectives may give the wrong perception of what are the values underpinning the world trade system. Even if such domestic regulation found to violate Article XVI GATS may be justified on the basis of the general exception of Article XIV (as it was the case in the *US – Gambling* dispute), a rule/exception structure implicitly tends to establish a ranking of values where trade

⁹¹ See also the Addendum to the 1993 Scheduling Guidelines: to the question whether it is ‘necessary to schedule approval procedures or licensing requirements which have to be met in order to supply a service’, the Addendum provides as follows: ‘The requirement to obtain an approval or a licence is not in itself a trade restriction and therefore does not need to be scheduled. However, if the *criteria for granting licenses or approval* contain a market access restriction (e.g., economic needs test) or discriminatory treatment, the relevant measures would need to be scheduled if a Member wishes to maintain them as limitations under Article XVI or XVII.’ [Emphasis added]

⁹² There is also empirical evidence that a measure, which has been found to violate a *per se* prohibition type of discipline (such as Articles II or Article XI GATT), has never been found to be justified on the basis of one of the legitimate public policy objectives listed in the general exception provision (Article XX GATT). The only case where Article XX GATT was successfully employed to justify a violation of Article XI was *US – Shrimp* 21.5. However, the measure at issue in that dispute was the border arm of an internal regulation and thus should have been reviewed on the basis of Article III rather than Article XI GATT. For a fuller discussion of the issue see Ortino, above n 68, at 220–21.

⁹³ Ehlermann, above n 43, at 528–29.

liberalization represents the fundamental policy and other legitimate policy objectives are relegated to the status of secondary or exceptional policies.⁹⁴

CONCLUSION

The main criticism advanced in the paper *vis-à-vis* the *US – Gambling* report focuses on the apparent refusal by the Appellate Body to embrace a holistic approach to treaty interpretation, one which takes into consideration all the relevant elements suggested by Article 31(1) of the Vienna Convention such as text, context, teleology, and good faith. Looking at the various weaknesses that have been pointed out in the paper, one may even raise the suspicion that the application of the rules governing treaty interpretation in *US – Gambling* 'is merely an *ex post facto* rationalisation of a conclusion reached on other grounds or serves as a cover for judicial creativeness'.⁹⁵ More fundamentally, ignoring the contextual and teleological dimensions of treaty interpretation may undermine the legitimacy of WTO reports as well as of the WTO dispute settlement system as a whole. As clearly put by Horn and Weiler:

There is an appreciable difference in the legitimacy of a decision where the decisor is seen to have recognized fully the context (understood here in its broad sense) of the text under interpretation and which is seen to inform its decision whatever the outcome, and a decision in which the decisor seems oblivious to the context of its decision. Likewise, and no less importantly, there is a difference between a decision which is seen to be aware of its consequences, and is seen to have made its hermeneutic choices in full awareness of such consequences. Jurists' prudence is usually a recipe for good jurisprudence, but it is not to be confused with narrow textualism.⁹⁶

This is even more so if the hermeneutic decision is premised on recourse to *travaux préparatoires* as supplementary means of interpretation pursuant to Article 32(a) of the Vienna Convention (as was the case for both interpretative issues in *US – Gambling*). In a certain sense, the highly controversial debate between the adherents of the 'textual' approach and the adherents of the 'intentions' approach over the aims of treaty interpretation⁹⁷ seems to be cropping up in the Appellate Body Report on *US – Gambling*. The attempt of emancipation from dictionary definitions, the unwillingness to fully examine the context and teleology of the Treaty provisions at issue and the heavy reliance on the GATS' preparatory work may indeed lead to an apparent revival of the

⁹⁴ Cf. Ortino, above n 80, at 54–55.

⁹⁵ Sinclair, above n 13, at 114.

⁹⁶ Horn and Weiler, above n 14, at 253.

⁹⁷ The latter assert that the primary aim and goal of treaty interpretation is to ascertain the intention of the parties (this was the minority position at the Vienna Convention led by the United States and Italy). The former assert that the primary goal of treaty interpretation is to ascertain the meaning of the text of the treaty, which is the best expression of the intentions of the parties (this was the majority position led by the United Kingdom and France). Sinclair, above n 25, at 60–64.

‘intentions’ approach to treaty interpretation. This is by itself a reason for criticizing the *US – Gambling* report: serious concerns of certainty, stability and security would be raised by such a shift of emphasis towards the ‘intentions’ of the parties.⁹⁸ One should not forget that reference to customary rules of interpretation in Article 3.2 DSU was aimed precisely at diminishing the extensive reliance that traditional GATT practice had paid to preparatory work.⁹⁹

There is no doubt that the textual approach to treaty interpretation unanimously adopted by the Vienna Convention should be maintained. As noted by Ehlermann, such an approach has contributed to the consistency and coherence of Appellate Body reports as well as to providing security and predictability to the multilateral trading system.¹⁰⁰ However, and this is the argument advanced in this paper, it must be a textuality which is qualified in a variety of important ways, for example, by giving meaning to the terms of the treaty in their context and in light of its object and purpose.¹⁰¹ Any fear that these further elements may create too much flexibility in the hands of the treaty interpreter should be dissipated by the recognition that their consideration should not lead in any event to an interpretation which is contrary to the express terms of the text.¹⁰² For instance, the examination of the teleological features of the treaty provision under consideration (in itself a potentially subjective task) should be constrained by the textual and contextual features of such provision. Following the Appellate Body case-law on determining the ‘protective application’ of a fiscal measure for purposes of GATT Article III:2, second sentence,¹⁰³ the treaty interpreter could, for example, look at the ‘design, architecture and revealing structure’ of the treaty provision at issue in

⁹⁸ Ehlermann, above n 43, at 509; Jacobs, above n 40, at 339–40.

⁹⁹ See Howse, above n 10, at 57.

¹⁰⁰ Ehlermann, above n 43, at 509–10.

¹⁰¹ ‘Interpretation in law is a rational process . . . that “extracts” the legal meaning of the text from its semantic meaning. [. . .] To interpret a text is to choose its legal meaning from among a number of semantic possibilities – to decide which of the text’s semantic meanings constitutes its proper legal meaning.’ Ahron Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005), at 6–7. For a very recent case where the Appellate Body has endorsed a holistic approach to interpretation see Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts (Chicken Cuts)*, WT/DS269/AB/R and WT/DS286/AB/R, circulated 12 September 2005, para 176 (‘Interpretation pursuant to the customary rules codified in Article 31 of the *Vienna Convention* is ultimately a holistic exercise that should not be mechanically subdivided into rigid components.’). Cf also Appellate Body, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea (US – DRAMS)*, WT/DS296/AB/R, circulated 27 June 2005, paras 106–16.

¹⁰² See Jacobs, above n 40, at 338; Sinclair, above n 13, at 118; Eduardo Jimenez de Arechaga, ‘International Law in the Past Third of a Century’, 159-1 *Recueil des Cours* (General Course in Public International Law, The Hague, 1978), at 43–44. See Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, at paras 7.43–7.44, where the Panel noted that ‘Article 31 of the *Vienna Convention* requires that the text of the treaty be read in light of the object and purpose of the treaty, not that object and purpose alone override the text.’

¹⁰³ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages (Japan – Alcohol II)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, circulated 4 October 1996, at 32.

order to discern its object and purpose. This may be a way to ensure that the examination of object and purpose does not become an excessively discretionary or subjective exercise.

Embracing a holistic approach to treaty interpretation, recognizing hermeneutic value to each individual dimension of the general rule encapsulated in Article 31(1) of the Vienna Convention, will moreover allow the necessary flexibility for the WTO adjudicating bodies to accommodate broader policy considerations underlying any interpretative exercise (such as, for example, internal and external legitimacy). The increased relevance of the WTO legal regime within the system of global governance demands such flexibility, particularly in light of the growing interface (within and outside the WTO) between different societal values, such as the promotion of trade and investment, the advancement of labor standards and human rights, the protection of the environment and cultural diversity.