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**GIVING LEGAL EFFECT TO THE RESULTS OF THE DOHA ROUND:
AN ANALYSIS OF THE METHODS OF CHANGING WTO LAW**

Background paper for ACWL Members and LDCs

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I. INTRODUCTION

1. The Doha Ministerial Declaration provides that "the conduct, conclusion and entry into force of the outcome of negotiations shall be treated as parts of a single undertaking".¹ The declaration does not, however, indicate how this "single undertaking" is to be incorporated into the WTO legal framework and hence to become enforceable through the WTO dispute settlement system. The choice between the various methods by which the results of the Doha Work Programme ("Doha Round") might be given legal effect is a difficult one, as each has advantages and disadvantages. The purpose of this paper is to assist ACWL Members and least-developed countries ("LDCs") in making that choice by analysing, comparing and assessing the main methods available.

2. The multilateral treaties constituting the world trade order have not been amended during the past 40 years.² This can be attributed to the extremely complex amendment procedures included in those treaties. The Contracting Parties³ to the General Agreement on Tariffs and Trade 1947 ("GATT 1947") tried to avoid the difficulties of amending GATT 1947 through decisions superseding aspects of GATT 1947, such as the Enabling Clause and the 1979 Dispute Settlement Understanding, and through the Tokyo Round agreements, which were plurilateral agreements binding only those contracting parties that had accepted them. The decision to include new obligations in plurilateral agreements separate from the GATT 1947 led to the creation of a two-tier legal system, under which fewer than one third of the contracting parties assumed obligations that, as a result of the most-favoured-nation clause of the GATT 1947, had to be applied to the trade of all other contracting parties. During the Uruguay Round, therefore, it was decided to replace both the GATT 1947 and the Tokyo Round agreements with a single new agreement that had to be accepted as whole and that created benefits only for those participants that had accepted it: the Agreement Establishing the World Trade Organisation ("WTO Agreement").

*A draft of this paper was discussed at a seminar held at the ACWL on 8 June 2006. We would like to thank all participants for their participation and constructive comments during that seminar. We would also like to thank Professor John H. Jackson for presenting detailed comments at the seminar and Professor William J. Davey for many helpful written comments.

¹Doha Ministerial Declaration, WT/MIN(01)/DEC/1, Adopted on 14 November 2001, para. 47.

²The last such amendment being the introduction in 1966 of Part IV on Trade and Development into the General Agreement on Tariffs and Trade 1947. The Protocol Amending the General Agreement to Introduce Part IV on Trade and Development (572 UNTS 320) was done at Geneva on 8 February 1965 and entered into force on 27 June 1966.

³The GATT 1947 defines the contracting parties acting jointly as "CONTRACTING PARTIES" written in capital letters (see Article XXV:1). In this paper the contracting parties acting jointly are referred to as "Contracting Parties".

3. The amendment of the WTO Agreement and the multilateral trade agreements annexed to it (the "WTO agreements")⁴ is subject to even greater procedural obstacles than the amendment of the GATT 1947. Currently, the option of replacing the WTO agreements with a new agreement (incorporating the existing WTO agreements and the changes agreed in the Doha Round) does not appear to be under serious consideration. William Davey is of the view that "such an approach seems like a 'nuclear option' and would probably be completely unpalatable to the membership".⁵ If that is so, the Members of the WTO will need to examine whether the procedural obstacles to amendments can be overcome at the end of the Doha Round and to what extent legal methods for changing WTO law can be used that involve neither the amendment nor the replacement of the WTO Agreement.

4. This paper attempts to contribute to that examination by providing an analysis of the following methods of changing WTO law:

- (a) *Amendments of the text* of the WTO agreements;
- (b) *Modifications of schedules of concessions and specific commitments* annexed to the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the General Agreement on Trade in Services ("GATS");
- (c) *Decisions of the Ministerial Conference* supplementing or modifying the WTO agreements, in the form of waivers, authoritative interpretations and other decisions; and
- (d) *Incorporation of new agreements into WTO law*, including multilateral trade agreements binding all Members, plurilateral trade agreements binding only some of them, and agreements accepted through entries in schedules of concessions or specific commitments.

5. The Doha Round could conclude with agreements to increase the level of obligations of Members in such areas as market access, export subsidies, domestic support and trade facilitation; to reduce the level of certain obligations of Members, for instance the obligations currently assumed by the LDCs in the field of intellectual property; and to change the institutional structure and decision-making procedures of the WTO, for instance in the area of dispute settlement. This paper, therefore, examines to what extent each of the methods listed above can be applied: (i) to increase the level of obligations of Members; (ii) to reduce that level; and (iii) to bring about institutional and procedural changes. The paper also outlines the procedures to be followed under each of the methods examined and evaluates their advantages

⁴Unless otherwise indicated, the references to "WTO agreements" in this paper should be understood to include the WTO Agreement and the multilateral trade agreements annexed to it.

⁵William Davey, 'The WTO: Looking Forwards', 9 JIEL 3 (2006), at 25 and footnote 98.

and limitations. The paper concludes by comparing the methods and identifying practical considerations that may affect the choice among them when giving legal effect to the results of the Doha Round.

6. The term "WTO law" is used in this paper to describe the norms that are legally binding on Members and can be enforced or given effect through the WTO dispute settlement system. This excludes norms that are not meant to be legally binding (declarations of intent, commitments to consider actions, etc.) and norms incorporated into legal instruments that cannot be invoked as the basis of a legal claim or defence before a panel and the Appellate Body. According to Article 1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), the DSU applies only to disputes concerning the rights and obligations under the WTO Agreement, the multilateral trade agreements annexed to it, and the plurilateral trade agreements listed in Appendix 1 of the DSU (collectively, the "covered agreements"). Article 7.1 of the DSU further limits a panel's terms of reference to the examination of the matter referred to it in light of the provisions of the "covered agreements" cited by the parties. This means that the results of the Doha Round could be the basis of a legal claim in a proceeding under the DSU only if they are made part of a "covered agreement".

II. AMENDMENTS

A. SCOPE OF APPLICATION

7. WTO law may be changed pursuant to the amendment procedures set out in Article X of the WTO Agreement.⁶ It should be noted that an amendment within the meaning of this provision is a change to the *text* of the WTO agreements. Therefore, the adoption of a legal norm superseding a provision in one of those agreements that does not involve a change in the text of the original agreement (for instance, the adoption of a waiver) is not an amendment within the meaning of Article X, even though it may have legal effects similar to those of an amendment. An amendment can increase or reduce the level of obligations of Members as well as bring about institutional changes and is, therefore, the method of changing WTO law with the widest scope of application.

⁶ The addition a new multilateral trade agreement into WTO law would require an amendment of Annex 1A or Article II:2 of the WTO Agreement, as discussed in Part V.A of this paper.

B. GENERAL AMENDMENT PROCEDURES

8. The procedures for amending the WTO agreements are extraordinarily complex. Paragraphs 1 and 3 of Article X of the WTO Agreement, which set out the general procedures applicable to amendments,⁷ provide in pertinent part as follows:

Amendments

1. Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. . . . If consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance. . .

3. Amendments . . . shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

⁷The principles described below also apply for amendments to Parts I, II and III of the GATS, see Article X:5 of the WTO Agreement.

9. Thus, this provision creates the following procedural obstacles that must be overcome before the text of the WTO agreements can be changed:

- The Ministerial Conference⁸ must receive a proposal for an amendment by a Member or one of the three specialised Councils.
- The Ministerial Conference is given a period of at least 90 days to try to reach consensus on the proposal.
- If the attempt to reach a consensus fails, the Ministerial Conference may decide by a two-thirds majority of Members to submit the proposal to Members for acceptance in accordance with their ratification procedures.
- The amendment takes effect after two thirds of Members have deposited an instrument of acceptance.⁹

10. An amendment takes legal effect only for those Members that have ratified it.¹⁰ The Ministerial Conference may, however, decide that an amendment "is of such a nature that any Member which has not accepted it within a period specified ... shall be free to withdraw from the WTO or remain a Member with the consent of the Ministerial Conference".¹¹ However, the Ministerial Conference may adopt a decision to that effect only by a three-fourths majority of the Members. This diplomatically-formulated provision gives the Ministerial Conference the power to expel any Member refusing to accept an amendment that has entered into effect. The GATT 1947 gave the Contracting Parties a similar authority, which they never used.¹²

C. SPECIAL AMENDMENT PROCEDURES

11. There are a number of situations in which special procedural requirements apply. These situations are discussed below.

⁸The General Council is granted the authority to conduct the functions of the Ministerial Conference in the intervals between meetings pursuant to Article IV:2 of the WTO Agreement. Unless otherwise indicated, references to the Ministerial Conference in this paper should be understood to include the General Council.

⁹Article X:7 of the WTO Agreement.

¹⁰This appears to reflect the general rule in international law that amendments to a multilateral treaty do not bind a Member state that does not ratify the amendment, see Vienna Convention on the Law of Treaties, Article 40(4) read with Article 30(4)(b).

¹¹Article X:3 of the WTO Agreement.

¹²Article XXX:2 of the GATT 1947.

1. Amendments to provisions reflecting basic WTO principles

12. Article X:2 of the WTO Agreement provides that amendments to specified provisions of certain WTO agreements shall only take effect upon acceptance by all Members. These provisions are the most-favoured-nation provisions of Article I of GATT 1994, Article II:1 of the GATS and Article 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), as well as the provisions relating to schedules of concessions contained in Article II of GATT 1994.

13. The unanimity requirement for amendments to basic provisions of the WTO agreements could be easily circumvented if an amendment to the decision-making procedures set out in Article IX, or to the amendment rules in Article X, of the WTO Agreement could take effect upon acceptance by a two-thirds majority of the Members. Consequently, amendments to Articles IX and X of the WTO Agreement also take effect only upon acceptance by all Members.

2. Amendments that do not alter the rights and obligations of Members

14. Article X:4 of the WTO Agreement provides that amendments to provisions that "would not alter the rights and obligations of the Members" shall take effect for all Members upon acceptance by two thirds of the Members.¹³ The reference in Article X:4 to "rights and obligations *of the Members*" suggests that the provision applies to amendments of a purely institutional and procedural nature that alter only the rights and obligations of the WTO or one of its organs, but not of its Members. The WTO can only have one institutional structure and its organs can only have one set of decision-making procedures. If the rule according to which an amendment binds only those Members that have accepted it were applicable to amendments of an institutional or procedural nature, these amendments could effectively only be adopted upon acceptance by all Members. Article X:4 of the WTO Agreement avoids that consequence. Article X:1 of the WTO Agreement provides that amendments will be presumed to be of a nature that would alter rights and obligations (*i.e.*, subject to the general amendment procedures of Article X:3) "unless the Ministerial Conference decides by a three-fourths majority of the Members that the provisions of paragraph 4 shall apply".

15. In a similar manner, Article X:5 of the WTO Agreement provides that amendments to the institutional provisions in Part V of the GATS shall take effect for all Members upon acceptance by two thirds of the Members. Amendments to Part IV (Progressive Liberalisation) and Part VI (Final Provisions) of the GATS also take effect for all Members upon acceptance by two thirds of the Members.

¹³Article X:4 of the WTO Agreement.

3. Amendments to the DSU and the TPRM

16. Amendments to the DSU do not require the deposit of instruments of acceptance with the Director-General of the WTO. A consensus decision approving the amendment is sufficient.¹⁴ Similarly, amendments to the Trade Policy Review Mechanism ("TPRM") do not require the formal deposit of instruments of acceptance by Members as they take effect once approved by a decision of the Ministerial Conference.¹⁵

4. Amendments pursuant to Article 71.2 of the TRIPS Agreement

17. The Council for TRIPS may decide by consensus to propose to the Ministerial Conference an amendment to the TRIPS Agreement designed to incorporate into the TRIPS Agreement higher levels of protection of intellectual property rights that have already been accepted by all Members under other multilateral agreements.¹⁶ As in the case of amendments to the DSU and TPRM, the deposit of instruments of acceptance is not required.

D. ADVANTAGES AND LIMITATIONS

18. Of all the methods of changing WTO law examined in this paper, amendments have the widest possible scope of application: they can be used to permanently increase or reduce the level of obligations of Members and to bring about institutional changes. However, amendments take legal effect only if at least two thirds of the Members have deposited formal instruments of acceptance with the Director-General.¹⁷ This requirement can result in considerable delays. As indicated in the conclusions of this paper, the limited GATT and WTO experience with amendments indicates that the ratification and entry into force of amendments can take considerable time.

19. Changing WTO law through the amendment procedures can have the unintended effect of creating a two-tier system of WTO obligations. Article X:3 of the WTO Agreement, the provision that would govern the majority of amendments, provides that:

Amendments ... shall take effect for Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it.

20. This provision reflects a principle that can also be found in the rules on amendments of multilateral treaties contained in Article 40(4) of the Vienna Convention on the Law of

¹⁴Article X:8 of the WTO Agreement.

¹⁵Article X:8 of the WTO Agreement.

¹⁶Article 71.2 of the TRIPS Agreement read with Article X:6 of the WTO Agreement.

¹⁷Article X:7 of the WTO Agreement.

Treaties, which provides that an amendment "does not bind any State already a party to the [multilateral] treaty, which does not become a party to the amending agreement".

21. An amendment pursuant to Article X:3 of the WTO Agreement would thus become effective only after two thirds of the Members (currently 100 Members) have accepted it, and then *only for those Members that have accepted it*. As a result, it could happen that the 100 or more Members that have accepted an amendment incorporating the results of the Doha Round would be bound by that amendment even though the remaining Members would not yet be bound. The difference in obligations would not be negotiated but an unintended consequence of delays in the process of ratification and acceptance of individual Members. The difference in obligations could be perpetuated if one or more of the remaining Members were to decide subsequently to refuse the acceptance of the amendment. This could easily happen because the most-favoured-nation clauses in the GATT and the GATS may oblige the Members that have accepted the amendment to accord the benefits of the amendment to the goods, services and service suppliers of the Members that have not accepted it. The GATT Secretariat had already noted as far back as 1954 that amendments entail "some risk that there may be an indefinite period during which two thirds or more of the contracting parties will be governed by the new set of rules and the others by the old."¹⁸

22. It should be noted that, while amendments *increasing* the Members' level of obligations can become operative upon their acceptance by two thirds of the Members, amendments *reducing* the level of obligations can effectively become operative only after they have been accepted by all Members. To illustrate: Suppose an amendment of the Agreement on Agriculture expanding the range of subsidies not subject to the domestic support commitments enters into effect after two thirds of the Members have accepted it. The remaining third of the Members would continue to be entitled to the benefits of the existing provisions on domestic support. The amendment, therefore, could not be implemented effectively. This example illustrates that amendments reducing the level obligations of Members will, in most circumstances, be practicable only if accepted by *all* Members.

23. One way out of this dilemma is to combine the amendment under Article X of the WTO Agreement with a decision under Article IX of that Agreement waiving the obligations under the provision to be amended until the amendment has been accepted by all Members. This appears to have been the aim of the Ministerial Conference when it decided to propose an amendment of the TRIPS Agreement eliminating certain obligations under paragraphs (f)

¹⁸The Review of the Agreement: Some Advance Notes from the Secretariat, Addendum, GATT document L/189/Add.1, 6 July 1954, at 3.

and (h) of Article 31 of that agreement while maintaining a waiver to the obligations under those provisions until the amendment has entered into effect.¹⁹

III. MODIFICATION OF SCHEDULES

A. SCOPE OF APPLICATION

24. WTO law can be changed through modifications of concessions and commitments in Members' schedules of concessions annexed to the GATT 1994 ("goods schedules") and schedules of specific commitments annexed to the GATS ("services schedules"). As goods schedules are an integral part of the GATT 1994²⁰ and services schedules are an integral part of the GATS,²¹ the concessions and commitments they contain are part of the "covered agreements". Consequently, the failure to accord the treatment contemplated in those schedules can be raised as a claim in DSU proceedings.²² By modifying concessions and commitments in goods and services schedules, Members can increase or reduce their rights and obligations in WTO law. The modification of schedules, therefore, provides one method of giving legal effect to certain results of the Doha Round.

25. The range of obligations that can be assumed through entries in schedules is, however, subject to two significant limitations.

¹⁹See Decision on Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540, adopted on 30 August 2003, and Decision on Amendment of the TRIPS Agreement, WT/L/641, adopted on 6 December 2005.

²⁰The Appellate Body has held that "all the Schedules of the Members of the World Trade Organisation ("WTO"), are an integral part of the GATT 1994 as well as the WTO Agreement, by virtue of Article II:7 of the GATT 1994". See Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1, adopted 27 September 2005, para 145; see also Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, para. 84. Furthermore, Article II:2 of the WTO Agreement provides that the agreements contained in the annexes to the WTO Agreement, which includes GATT 1994, are integral parts of the WTO Agreement. On this basis, it has been ruled that "on the basis of Article II:7 and Article II:2 of the WTO Agreement, concessions contained in the EC Schedule are treaty terms of the GATT 1994 and the WTO Agreement". See Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Thailand*, WT/DS286/R, adopted 27 September 2005, para. 7.6. Article 3.1 of the Agreement on Agriculture specifically provides that the commitments contained in Part IV of each Member's goods schedule are an integral part of GATT 1994.

²¹Article XX:3 of the GATS.

²²For example, a failure to "accord to the commerce of [another Member]" the treatment specified in a goods schedule is a breach of Article II of the GATT, while the provision of "support to domestic providers" or "export subsidies in respect of [specified] agricultural products" in excess of the limits specified in a goods schedule amounts to a breach of Article 3 of the Agreement on Agriculture. Similarly, a failure to "accord services and service suppliers of any other Member" the treatment specified in a services schedule is a breach of Articles XVI:1 and XVII:1 of the GATS.

26. The first is that a Member cannot include concessions or commitments in its goods or services schedule that fall outside the legal framework of the GATT and the GATS. Under Article II:1 of the GATT, Members assume obligations only in respect of the treatment they accord to "the commerce of [other Members]". A claim based on a concession unrelated to "commerce", such as a concession affecting *exclusively* the treatment of investors, therefore, could not be based on this provision. Similarly, Article I of the GATS provides that the GATS applies only to measures by Members affecting "trade in services", which it defines as the supply of a service through specified modes of supply (other than services "supplied in the exercise of governmental authority"). A claim related to a specific commitment falling outside this definition of "trade in services", such as a scheduled commitment related *exclusively* to intellectual property rights, therefore, could not be based on Articles XVI, XVII or XVIII of the GATS.²³

27. The second limitation is that a Member cannot reduce its obligations under the WTO agreements through an entry in its schedule. In *United States – Restrictions on Importation of Sugar* ("Sugar Headnote"), the United States argued that as Article II:1(b) of the GATT contemplated the possibility of making tariff concessions "subject to terms, conditions or qualifications", contracting parties could validly reserve the right to impose quantitative restrictions that would otherwise be prohibited by Article XI:1 of the GATT. The panel rejected this argument, noting that:

Article II gives contracting parties the possibility to incorporate into the legal framework of the General Agreement *commitments additional* to those already contained in the General Agreement and to qualify such commitments, *not however to reduce their commitments* under other provisions of that Agreement.²⁴

28. The Appellate Body made clear in *EC - Bananas III* that the Sugar Headnote principle:

is equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994. The ordinary meaning

²³Under the market access and national treatment provisions of Articles XVI and XVII of the GATS, Members assume obligations only in respect of the treatment they accord to "services and service suppliers". Article XVIII permits Members to inscribe in their schedules additional "commitments with respect to measures affecting trade in services" that are not covered by Article XVI or XVII, but these cannot extend beyond "trade in services".

²⁴GATT Panel Report, *United States Restrictions on Imports of Sugar*, adopted 22 June 1989, BISD 36S/331, para. 5.3 (emphasis added).

of the term "concessions" suggests that a Member may *yield rights* and grant benefits, but it *cannot diminish its obligations*.²⁵

The Appellate Body confirmed this principle in *European Communities – Measures Affecting Importation of Certain Poultry Products*,²⁶ *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*,²⁷ and *European Communities – Export Subsidies on Sugar*.²⁸

29. GATT and WTO jurisprudence thus clarifies that Members may use entries in their goods schedules to add concessions they individually agree to assume in those schedules, as well as to qualify those additional concessions, but not to diminish the obligations they all must observe under the GATT and the Agreement on Agriculture. Thus, a Member could make a tariff concession on apples subject to the following qualification: "This tariff concession shall apply only to apples imported between 1 January and 31 July". In this case, the Member would merely have qualified an additional concession it has individually assumed under its schedule. However, if the Member added the qualification: "This tariff concession shall apply only to apples originating in South Africa", it would effectively have qualified not an additional concession but its obligation under Article I of the GATT to accord most-favoured-nation treatment to all Members. That qualification in its schedule would be an attempt to diminish its obligations under the GATT and, therefore, would be determined to have no legal effect.

²⁵Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 154 (emphasis added). See also paras. 153-158.

²⁶Appellate Body Report, *European Communities – Measures Affecting Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 17 January 1998, para. 98. The Appellate Body stated:

In *United States – Restrictions of Import of Sugar*, the panel stated that Article II of the GATT permits contracting parties to incorporate into their Schedules acts yielding rights under the GATT, but not acts diminishing obligations under that Agreement. In our view, this is particularly so with respect to the principle of non-discrimination in Articles I and XIII of the GATT 1994. In *EC- Bananas*, we confirmed the principle that a Member may yield rights but not diminish its obligation and concluded that it is equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994. The ordinary meaning of the term concessions suggests that a Member may yield or waive some of its own rights and grant benefits to other Members, but that it cannot unilaterally diminish its own obligations.

²⁷Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002.

²⁸Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265, 266, 283/AB/R, adopted 19 May 2005, para. 272.

30. The rationale underlying the Sugar Headnote principle also applies to entries in schedules attempting to reduce obligations in WTO agreements other than the GATT and the Agreement on Agriculture, including obligations under the GATS. One can therefore expect that the Appellate Body would extend this jurisprudence to all WTO agreements.

B. PROCEDURES FOR MODIFYING SCHEDULES ANNEXED TO THE GATT

1. Protocols to the GATT

31. In previous rounds of multilateral trade negotiations, changes to schedules were effected through "protocols".²⁹ In the context of the GATT 1947, such a protocol typically provided that the schedules annexed to it shall enter into force on a specified date, for those contracting parties that had accepted it by that date, and on the date of their acceptance, for the contracting parties accepting it subsequently. There were often clauses in those protocols designed to ensure reciprocity, the most common being a clause according the right to withhold or withdraw all or part of the concessions with respect to any product for which the principal supplier's schedule had not yet come into effect.³⁰ In this manner, the protocols ensured that the results of negotiations were incorporated in the schedules of key participants. Like amendments, protocols enter into effect after the deposit of instruments of acceptance. Unlike amendments, however, protocols have entered into effect when fewer than two thirds of the contracting parties to the GATT 1947 or Members of the WTO have accepted it.

32. The term "protocol" is used to refer not only to amending treaties,³¹ but also to self-standing treaties.³² This raises the question of whether the protocols used in past trade rounds are: (a) amendments within the meaning of Article X of the WTO Agreement and the amendment provisions set out in Article XXX of GATT 1947; or (b) self-standing treaties separate from the WTO Agreement and the GATT 1947. It could be argued that, as the procedures for amendments under Article X of the WTO Agreement and Article XXX of the GATT 1947 have not been followed for protocols, they cannot be considered to be amendments. For example, the protocols to GATT 1947 typically provided that the annexed

²⁹For example, the Annecy Protocol (1949), the Torquay Protocol (1951), the Sixth Protocol of Supplementary Concessions (1956), the Protocol Embodying the Results of the Tariff Conference 1960-61, the Geneva Protocol (1967), the Geneva Protocol (1979) and the Marrakesh Protocol to GATT 1994. Noting that in relation to the Tariff Conference 1960-61 and the Tokyo Round there were additional supplementary protocols.

³⁰For example, the Marrakesh Protocol, para. 4; Geneva Protocol (1979), para. 3; Geneva Protocol (1969), para. 3.

³¹"Although an amendment to a treaty is often called a 'protocol', the title is not legally significant", Antony Aust *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press 2000) 221.

³²"Although a self-standing treaty is sometimes called a Protocol, it is more common to use that name for an amending or subsidiary treaty", Antony Aust *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press 2000) 333.

schedules shall enter into force on a specific date for those contracting parties that had accepted it by that date.³³ In contrast, according to Article XXX of the GATT 1947, amendments could generally become effective only if at least two thirds of the contracting parties accept them. Therefore, as the procedures for giving effect to these protocols did not comply with the requirements for amendments, they have to be regarded as self-standing treaties.

33. This raises the legal question of how obligations assumed under a separate protocol can modify Members' obligations under schedules deemed to be integral parts of the GATT or the GATS. There is no provision that explicitly regulates this matter. Mary Footer has noted that the practice of supplementing obligations under schedules through protocols "is not specifically regulated in the WTO Agreement". In her view, "these Protocols are subsequent or supplemental agreements, which have their basis in the residual rules on amendments in [general] treaty law and practice".³⁴ One WTO panel has suggested that Article XXVIII*bis* of the GATT, relating to further multilateral tariff negotiations, provides the legal authority for Members to modify schedules through protocols as it "provides a legal basis for Members to reduce and bind tariffs on a mutually advantageous (i.e. multilateral) basis".³⁵ The legal question nonetheless remains as this provision does not set out procedures for incorporating the results of tariff negotiations into schedules through protocols.

34. Neither the Contracting Parties to the GATT 1947 nor the Members of the WTO considered it necessary to resolve this legal issue. There is now a long-standing practice of using protocols to add multilaterally negotiated concessions and commitments to goods and services schedules. One can therefore reasonably expect that the use of this procedure to give legal effect to changes in schedules negotiated in the Doha Round would not be called into question.

2. Modifications pursuant to Article XXVIII of the GATT

35. Article XXVIII of the GATT provides that a Member "may, by negotiation and agreement ... modify or withdraw a concession included in the appropriate schedule annexed to this Agreement". While protocols have generally been used to *add* tariff concessions to the goods schedules by Members after *multilateral* negotiations, the procedures of Article

³³The Marrakesh Protocol provided that a Member's schedule would take effect "on the day on which the WTO Agreement enters into force for that Member".

³⁴Mary Footer, *An Institutional and Normative Analysis of the World Trade Organization* (Amsterdam: Martinus Nijhoff 2006) 221- 230.

³⁵Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, para 10.68.

XXVIII of the GATT have tended to be used to *modify or withdraw* tariff concessions by Members on their *individual* initiative.³⁶

36. The procedures under Article XXVIII require negotiations on the modification or withdrawal of tariff concessions with the Members with whom the concession was initially negotiated (Members with "initial negotiating rights") and with any Member that has a "principal supplying interest", as well as consultations with any Member that has a "substantial interest" in the concession.³⁷ In those negotiations, Members must "endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations". However, Article XXVIII makes clear that, if the negotiations fail to lead to an agreement on compensation that would maintain a general level of concessions not less favourable to trade, the Member "which proposes to modify or withdraw the concession shall, nevertheless, be free to do so".³⁸ Thus, Article XXVIII permits Members to modify their schedules, albeit with the risk that Members entitled to compensation may then withdraw substantially equivalent concessions initially negotiated with the modifying Member.³⁹ Additional detailed procedures for the negotiations under Article XXVIII of the GATT were adopted by the GATT Contracting Parties on 10 November 1980.⁴⁰ These procedures are part of the GATT 1994, which has been defined to include the decisions of the GATT Contracting Parties.⁴¹

37. As noted above, by virtue of Article II:7 of the GATT, goods schedules are an integral part of the GATT. In the early 1950s, it was argued that the modification of these schedules therefore requires an amendment to the GATT in accordance with its amendment procedures.⁴² The modification of schedules would, therefore, require the formal deposit of instruments of acceptance. One could reasonably question the persuasiveness of this

³⁶Occasionally, protocols have envisaged treatment less favourable in the new schedules than the old. On these occasions, the protocols have explicitly specified that those modifications were deemed to be taken under Article XXVIII of the GATT. For example, paragraph 7 of the Marrakesh Protocol to the GATT 1994 permitted Egypt, Peru, South Africa and Uruguay to modify their schedules downwards on the basis that they "shall be deemed to have taken appropriate action as would have otherwise been necessary under the relevant provisions of Article XXVIII of GATT 1947 or 1994".

³⁷Article XXVIII:1 of the GATT.

³⁸Article XXVIII:3 of the GATT.

³⁹That withdrawal must be applied to all Members and may therefore give rise to further negotiations with third Members affected by the withdrawal.

⁴⁰Procedures for Negotiations under Article XXVIII, Guidelines Proposed by the Committee in Tariff Concessions, C/113 and Corr. 1, 27S/26, 3 November 1980.

⁴¹Paragraph 1(b)(iv) of the GATT 1994.

⁴²The argument is outlined, but not endorsed, in John H. Jackson, *World Trade and the Law of the GATT* (Charlottesville, VA: The Bobbs-Merill Company Inc. 1969) 75.

argument given the specific procedures for the modification of schedules contained in Article XXVIII of the GATT. Arguably, these more specific procedures prevail over the general amendment procedures according to the *lex specialis* principle.⁴³ The Contracting Parties nevertheless decided in 1955 to propose an amendment to the GATT 1947 according to which "amendments to the schedules ... shall become effective on the 30th day following certification" provided certain conditions were met.⁴⁴ This certification procedure avoided the need for the formal deposit of instruments of acceptance and the associated risk of delays.⁴⁵

38. The proposed amendment never entered into force. Nevertheless, the contracting parties began a practice of certification, later codified in the 1980 Decision on Certification Procedures, which provides in relevant part:

Changes in the authentic texts of Schedules annexed to the General Agreement which reflect modifications resulting from action under Article II, Article XVIII, Article XXIV, Article XXVII or Article XXVIII shall be certified by means of Certifications.

...

The draft containing the changes ... shall be communicated by the Director-General to all the contracting parties and shall become a Certification provided that no objection has been raised by a contracting party within three months on the ground that... the draft does not correctly reflect the modifications...⁴⁶

39. These certification procedures continue to be used by Members wishing to modify their schedules pursuant to Article XXVIII of the GATT.

40. In recent years, certification procedures have been used not only to modify and withdraw concessions in goods schedules pursuant to Article XXVIII of the GATT but also to

⁴³Jackson, above note 42, at 75 notes that "when Schedule changes result from the application of various GATT 'renegotiation' clauses, it can be argued that those clauses establish authority themselves for the changes in Schedules".

⁴⁴Protocol Amending Part I and Articles XXIX and XXX of the GATT 1955, Section D, in Jackson, above note 42, at 75.

⁴⁵See Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices* (Cambridge: Cambridge University Press 2001) 112-115.

⁴⁶Procedures for Modification and Rectification of Schedules and Tariff Concessions, L/4962, 26 March 1980.

give legal effect to a wide variety of changes to schedules,⁴⁷ including those resulting from amendments to the Harmonised System nomenclature, the incorporation of information on other duties and charges, certain technical changes, as well as the "clean up" of certain matters left open at the conclusion of the Uruguay Round.⁴⁸

41. Certification procedures have also been used to give legal effect to various *improvements* to concessions in goods schedules, including autonomous improvements,⁴⁹ bilaterally negotiated improvements (such as those between the United States and the EC concerning trade in distilled spirits⁵⁰), and plurilaterally negotiated improvements (such as those for pharmaceutical products⁵¹ and information technology products⁵²). The extent to which the 1980 Decision on Certification Procedures applies to *improvements* to concessions in schedules is, however, unclear as the decision explicitly limits certification to "modifications resulting from action under Article II, Article XVIII, Article XXIV, Article XXVII or Article XXVIII".⁵³

3. Modifications of export subsidy and domestic support commitments

42. Article XXVIII of the GATT permits Members to "modify or withdraw a concession". Agricultural export subsidy and domestic support "commitments" are legally distinct from "concessions" and therefore fall outside the ambit of Article XXVIII of the GATT. This was confirmed by the panel in *EC – Sugar Subsidies*, which stated that:

contrary to tariff concessions, export subsidy commitments are
not renegotiable under Article XXVIII of the GATT 1994.

⁴⁷ See generally Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices* (Cambridge: Cambridge University Press 2001) 117; and William Davey, 'The WTO: Looking Forwards', 9 JIEL 3 (2006), at 26.

⁴⁸ These clean-up matters concerned a number of concessions and commitments that were circulated, verified and approved in 1994 but did not come into force as the legal instruments that were intended to bring them into force did not come into legal effect, namely the Geneva (1994) Protocol and the Supplementary Protocol to the Marrakesh Protocol. See Committee on Market Access, Background Information on Certain Uncertified Commitments, Note by the Secretariat, JOB(05)167 of 1 August 2005. See also Committee on Market Access, Situation of Schedules of Members, Note by the Secretariat, G/MA/W/23/Rev.2, 27 September 2005.

⁴⁹ All modifications and improvements to goods schedules given legal effect through certifications are circulated in the WT/LET document series available on the WTO Members' website at: http://members.wto.org/ddf/mas_new/certifications_E.htm.

⁵⁰ *Ibid.*

⁵¹ Pursuant to the European Communities' communication on behalf of the WTO Members concerned, Trade in Pharmaceutical Products, G/MA/W/18, 13 November 1998.

⁵² Pursuant to the Ministerial Declaration on Trade in Information Technology Products, WT/MIN(96)/16, 13 December 1996.

⁵³ Procedures for Modification and Rectification of Schedules and Tariff Concessions, L/4962, 26 March 1980.

Therefore, export subsidy commitments are different from tariff and other market access concessions.⁵⁴

43. The objective of the distinction between "concessions" that may be modified in accordance with Article XXVIII and "commitments" that can be changed only with the consent of other Members in accordance with the amendment procedures was to ensure that the level of permitted subsidisation was *not increased*. The distinction has, however, the unintended side-effect that commitments to *reduce* the level of subsidisation cannot be assumed in accordance with the Article XXVIII procedures for the modification or withdrawal of concessions.

44. This complication raises the question of how commitments on agricultural export subsidies and domestic support contained in a Member's goods schedule could be modified or withdrawn. This question is likely to arise because the Hong Kong Ministerial Declaration contemplates the elimination of all export subsidies, in a progressive manner, by the end of 2013,⁵⁵ and effective cuts in "trade-distorting domestic support" by the end of the negotiations.⁵⁶

45. As domestic support and export subsidy commitments are an integral part of GATT,⁵⁷ and may not be modified in accordance with Article XXVIII of the GATT, only two legal options remain for their modification. The first would be to modify the commitments in accordance with the generally applicable procedures for amendments of Article X of the WTO Agreement. This, however, requires acceptance by two thirds of the Members and entails the risk of delays. The second might be to apply the practice of modifying schedules through protocols to the modification of domestic support and export subsidy commitments. However, there is no practice or decision in the goods area confirming that commitments (in contrast to concessions) inscribed in schedules can be modified in this manner.

46. It would theoretically be possible to inscribe in a schedule a "concession" to reduce the level of domestic support or export subsidies below the level set out in the "commitments" inscribed in the same schedule. The obligation to reduce the level of support would then arise from Article II of the GATT rather than the Agreement on Agriculture. However, this approach may give rise to considerable legal uncertainty. The co-existence of the subsidy

⁵⁴Panel Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/R, WT/DS266/R, WT/DS283/R, adopted 19 May 2005, para 7.158.

⁵⁵Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, adopted on 18 December 2005, para. 6.

⁵⁶Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, adopted on 18 December 2005, para. 5.

⁵⁷Article 3.1 of the Agreement on Agriculture provides: "The domestic support and export subsidy commitments in Part IV of each Member's Schedule constitute commitments limiting subsidisation and are hereby made an integral part of GATT 1994".

rules in the Agreement on Subsidies and Countervailing Measures and in the Agreement on Agriculture has already given rise to substantial legal problems; adding a third source of legal obligations on subsidisation could not but exacerbate the complexity of the legal situation.

C. PROCEDURES FOR MODIFYING SCHEDULES ANNEXED TO THE GATS

1. Protocols to the GATS

47. Following the practice under the GATT, Members have added commitments to their services schedules using protocols. These protocols have ensured reciprocity through clauses such as: "This protocol shall enter into force on the 30th day following its acceptance by all Members concerned, and if not accepted by all Members concerned by [date] those Members which have accepted it before that date may decide on its entry into force".⁵⁸ Given the long-standing practice of using protocols to add concessions to goods schedules, and the more recent use of various protocols to modify schedules in a services context, one would expect that Members would not object to the use of protocols to add further specific commitments to services schedules negotiated in the Doha Round.

2. Modifications pursuant to Article XXI of the GATS

48. Much like the procedures of Article XXVIII of the GATT, the procedures of Article XXI of the GATS permit individual Members to modify or withdraw commitments in their services schedules.⁵⁹ Article XXI procedures appear to be targeted at the *modification or withdrawal* of commitments rather than the *addition of new commitments* to liberalise trade in services. The WTO Secretariat has noted that, in contrast to the Doha Round negotiations on services which aim to supplement services schedules with additional commitments, "commitments in old schedules could not normally be undermined at the conclusion of the current negotiations without recourse to Article XXI".⁶⁰

49. Any Member whose benefits would be affected by such a modification or withdrawal pursuant to Article XXI (an "affected party") has the right to request negotiations with a view to reaching compensatory adjustment.⁶¹ Mirroring the objective of negotiations under Article XXVIII of the GATT, the objective of negotiations under Article XXI of the GATS is to

⁵⁸See for example, the Second Protocol to the General Agreement on Trade in Services, S/L/11, 24 July 1995 and the Fifth Protocol to the General Agreement on Trade in Services, S/L/45, 3 December 1997.

⁵⁹ Article XXI of the GATS permits the modification or withdrawal of any commitment in a Member's services schedule at any time after three years have elapsed from the date on which that commitment entered into force, see Article XXI:1(a) of the GATS.

⁶⁰Note by the Secretariat, Incorporation of Commitments Resulting from Current Services Negotiations into Members' GATS Schedules, S/CSC/W/33, 3 June 2002, para. 8.

⁶¹Article XXI:2(a) of the GATS.

"endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in schedules of specific commitments prior to such negotiations".⁶² In contrast to Article XXVIII of the GATT, however, Article XXI of the GATS accords the affected Member the right to resort to arbitration if no agreement on compensation is reached.⁶³ If no arbitration is requested, the modifying Member is free to implement the proposed modification or withdrawal.⁶⁴ If arbitration is requested, the Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitrator.⁶⁵ If the Member nevertheless implements its proposed modification or withdrawal without complying with the findings of the arbitrator, the affected Member may modify or withdraw "substantially equivalent benefits in conformity with those findings".⁶⁶

50. As with the modification of goods schedules, it could be argued that, as services schedules are an integral part of the GATS, their modification requires an amendment to the GATS pursuant to the amendment procedures of Article X of the WTO Agreement. The Council for Trade in Services has addressed this matter by adopting a certification procedure similar to that followed for modifications to goods schedules. In 1999, the Council for Trade in Services adopted the Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (Modification of Schedules), which provides that:

Modifications in the authentic texts of Schedules annexed to the GATS which result from action under Article XXI, shall take effect by means of Certification... [and that at] the end of the 45 day period, if no objection has been raised, the Secretariat shall issue a communication to all Members to the effect that the Certification procedure has been concluded, indicating the date of entry into force of the modifications.⁶⁷

51. Certification procedures have been used in the GATS context not only to modify and withdraw services commitments pursuant to Article XXI of the GATS, but also to give legal effect to *improvements* in services commitments. The Council for Trade in Services adopted procedures in 2000 clarifying that improvements to commitments in services schedules outside the framework of Article XXI of the GATS could also be undertaken by certification. Those procedures provide that:

⁶²Article XXI:2(a) of the GATS.

⁶³Article XXI:3(a) of the GATS.

⁶⁴Article XXI:3(b) of the GATS.

⁶⁵Article XXI:4(a) of the GATS.

⁶⁶Article XXI:4(b) of the GATS

⁶⁷S/L/80, 29 October 1999, para. 20.

Modifications in the authentic texts of Schedules annexed to the GATS not resulting from action under the procedures for the implementation of Article XXI of the GATS (modification of schedules) ... which consist of new commitments, improvements to existing ones ... shall take effect by means of certification.⁶⁸

D. ADVANTAGES AND LIMITATIONS

52. Modifications or withdrawals of concessions and commitments in Members' schedules can create or modify a broad range of rights and obligations of WTO law. There are essentially only two limitations: first, the new concession or commitment must remain within the realm covered by the GATT ("commerce") or the GATS ("trade in services"); and second, entries in schedules cannot reduce obligations under the WTO agreements.

53. The concessions and commitments in Members' goods and services schedules can vary between Members. This permits Members to adjust their scheduled obligations under the GATT and the GATS to their circumstances and interests.⁶⁹ Moreover, Members may renegotiate their concessions and commitments if their circumstances or interests change.

54. In the past, improvements to concessions and commitments in schedules have been given legal effect through protocols and, most recently, certifications. Improvements effected through protocols offer the advantage over amendments that they may take legal effect even if fewer than two thirds of the Members have accepted them. Certifications offer the advantage that acceptance is implied unless formally objected to and therefore avoid the risk of delays associated with formal acceptance requirements. There may be national requirements, however, that would have to be met and could delay the certification process.⁷⁰

⁶⁸Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, S/L/84, 18 April 2000, para 1.

⁶⁹The so-called Sutherland Report notes that scheduling allows "commitments [to be] built from the bottom up; they are made and 'scheduled' in a manner and speed that squares with development and other national policy priorities". The Future of the WTO: Addressing the Challenges of the Next Millennium 2005 (Report of the Consultative Board to the Director General Supachai Panitchpakdi) (hereinafter the "Sutherland Report") at 66. The flexibilities created through the use of schedules is also explored in Hunter Nottage, 'Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment', 6(1) JIEL 23 (2003) at 35-37.

⁷⁰ See also Davey, above note 5, at 26.

IV. DECISIONS OF THE MINISTERIAL CONFERENCE

A. WAIVERS

1. Scope of application

55. Article IX of the WTO Agreement confers on the Ministerial Conference the right to accord waivers releasing Members from legal obligations under the WTO agreements. Waivers provide a legal defence to a claim of a violation of an obligation under the WTO agreements. To illustrate: in *EC – Bananas III*, the panel upheld the claim that the tariff preferences granted by the EC to non-traditional ACP bananas were inconsistent with the requirements of Article I:1 of the GATT 1994. Nonetheless, the panel held that the Lomé Waiver permitted the EC to grant tariff preferences to ACP countries on non-traditional bananas and was, therefore, a defence to a claim of violation of Article I:1 of the GATT 1994.⁷¹ The panel held that "to the extent that the EC's preferential tariff treatment of non traditional ACP bananas is inconsistent with its obligations under Article I:1, those obligations have been waived by the Lomé Waiver."⁷²

56. The decision according a waiver may specify terms and conditions that the Member to whom the waiver was granted must fulfil. If a Member acts inconsistently with those terms or conditions, it can no longer invoke the waiver as a defence. The terms and conditions set out in the waiver decision thus do not constitute self-standing obligations that the Member to whom the waiver was granted must observe in addition to its obligations under the WTO agreements. For this reason, waivers cannot be used for the sole purpose of imposing additional legal obligations on WTO Members.⁷³

2. Procedures

57. Waivers are granted by the Ministerial Conference pursuant to Article IX:3 of the WTO Agreement. Articles IX:3 and IX:4 specify that waivers should only be granted in "exceptional circumstances" and that any decision granting a waiver should state those

⁷¹See Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, ("EC-Bananas III") WT/DS27/R/ECU, WT/DS27/R/GTM/HND, WT/DS27/R/MEX, and WT/DS27/R/USA, paras. 7.131 – 7.134.

⁷²Panel Report, *EC-Bananas III*, para. 7.399.

⁷³Waivers granted pursuant to Article IX:3 of the WTO Agreement are not explicitly designated as covered agreements and would for that reason appear to be unenforceable as the basis of a claim. We note, however, that it can be argued that in light of paragraph 3 of the *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994* (the "Understanding on Waivers"), obligations imposed under waivers from the GATT 1994 may be enforced through WTO dispute settlement proceedings.

exceptional circumstances, any relevant terms and conditions, and "the date on which the waiver shall terminate".

58. Requests for waivers concerning the multilateral trade agreements in Annexes 1A, 1B and 1C must initially be submitted to the relevant sectoral Council⁷⁴ for consideration during a period not exceeding 90 days. After this period, the relevant Council must submit a report to the Ministerial Conference or General Council.⁷⁵ Requests for waivers from obligations under the GATT must specify the measures that the Member proposes to take, the specific policy objectives that the Member seeks to pursue, and the reasons that prevent the Member from achieving its policy objectives by measures consistent with its obligations under the GATT.⁷⁶

59. Article IX:3 of the WTO Agreement provides that, in the absence of consensus, any waiver decision may be taken by a vote of three fourths of the Members. However, waivers for extensions of transition periods or periods of staged implementation require consensus.⁷⁷

60. While waiver decisions were adopted by a vote under the GATT 1947, all waivers have been adopted by consensus under the WTO. The General Council follows the practice outlined in a statement by the Chairman of the General Council on decision-making procedures under Article IX of the WTO Agreement. This statement indicates a preference for consensus decisions when dealing with requests for waivers.⁷⁸ It contemplates the adoption of waivers by consensus, even if there are fewer than three fourths of the Members present at the meeting, and that "if any Member has a particular problem with a proposed decision regarding a request for a waiver or an accession to the WTO, it should ensure its presence at the meeting in which this matter will be considered [as the] absence of a Member will be assumed to imply that it has no comments on or objections to the proposed decision on the matter."⁷⁹ The Ministerial Conference has not adopted an analogous decision, but reference was made at the Doha Ministerial to the General Council's practice when the Ministerial Conference adopted various waiver decisions by consensus without a formal vote.⁸⁰

⁷⁴The Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS.

⁷⁵Article IX:3(a) of the WTO Agreement.

⁷⁶Understanding on Waivers, above note 73, para. 1.

⁷⁷Footnote 4 of the WTO Agreement.

⁷⁸Statement by the Chairman as Agreed by the General Council on 15 November 1995, *Decision-Making Procedures under Articles IX and XII of the WTO Agreement*, WT/L/93, 24 November 1995.

⁷⁹*Ibid.*

⁸⁰Davey, above note 5, at 69, footnote 99.

61. Any waiver granted for a period of more than a year is subject to annual review. During the annual review, the Ministerial Conference examines whether the exceptional circumstances justifying the waiver continue to exist and on the basis of this review can "extend, modify or terminate the waiver".⁸¹ Any such extension, modification or termination can be decided by a simple majority of Members.

3. Advantages and limitations

62. The grant of a waiver is a simple and flexible method for releasing a Member from its WTO obligations. The waiver decision becomes legally effective as soon as it is adopted by the Ministerial Conference.

63. Waivers can operate as a defence to existing obligations but cannot create obligations additional to those set out in the WTO agreements. Moreover, waivers are to be granted only on a time-bound basis and can be modified or terminated by a simple majority of the WTO membership during annual reviews. This means that Members seeking a permanent and definitive reduction of their obligations cannot rely on waivers.

B. AUTHORITATIVE INTERPRETATIONS

1. Scope of application

64. Article IX:2 of the WTO Agreement accords the Ministerial Conference and the General Council the "exclusive authority to adopt interpretations" of the WTO agreements.⁸² These interpretations are binding on all Members (including the Members that voted against it). Panels are required to follow authoritative interpretations and, consequently, cannot treat them merely as guidelines.⁸³

65. The final sentence of Article IX:2 reads:

This paragraph shall not be used in a manner that would undermine the amendment provisions of Article X.

⁸¹Article IX:4 of the WTO Agreement.

⁸²Only one request has so far been made for an authoritative interpretation. This request was made by the EC to resolve the "sequencing dispute" and related to Articles 3.7, 21.5, 22.2, 22.6, 22.7 and 23 of the DSU. See Communication from the European Communities, WT/GC/W/133, 25 January 1999 and Communication from the European Communities, WT/GC/W/143, 5 February 1999. The EC's request was discussed at the General Council meetings held on 15 and 16 February 1999 but the matter was not put to a vote. Instead, the Chairman of the General Council referred the matter to the Dispute Settlement Body so that it could be taken up in the DSU review process. See WT/GC/M/35, 30 March 1999 at 13-32.

⁸³See Claus Dieter Ehlerman and Lothar Ehring, 'The Authoritative Interpretation under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements', 8 JIEL 803 (2005), at 807.

66. In 1999, the United States objected to the consideration of a request for an authoritative interpretation submitted by the EC, on the ground that the EC's request amounted to an amendment "which would alter rights and obligations".⁸⁴ The United States stressed that "the plain language of Article 22 [of the DSU] precludes the interpretation of that article sought by the EC"⁸⁵ and that the EC "seeks ... to add words, phrases and procedures which were not put there by the drafters".⁸⁶ The United States' position implies that a change in the rights and obligations of Members cannot be accomplished through Article IX:2. This conclusion is supported by Article X:3 of the WTO Agreement, which specifies that amendments that "alter rights and obligations" can bind only those Members that accept the amendment. If interpretations could go beyond the clarification of the existing obligations, the objective of Article X:3 would be frustrated because a Member's rights and obligations could then be altered without its consent.⁸⁷

2. Procedures

67. Under Article IX:2, the Ministerial Conference is to exercise its authority to adopt an authoritative interpretation on the basis of a recommendation of the body overseeing the functioning of the agreement concerned. In most cases, therefore, requests for an authoritative interpretation must first be considered by the relevant sectoral Council.⁸⁸

68. The Ministerial Conference's decision to adopt an interpretation must be taken by a three-fourths majority of Members. Consensus procedures similar to those applied to waivers have not been adopted for interpretations.

3. Advantages and limitations

69. Authoritative interpretations can only be used to clarify the scope of existing commitments. They cannot, therefore, be used as a substitute for amendments.⁸⁹ However,

⁸⁴WT/GC/W/144, at 2.

⁸⁵*Ibid.*

⁸⁶*Ibid.*

⁸⁷Ehlermann and Ehring argue that authoritative interpretations can "modify" WTO law. They cite "implicit" support from the Appellate Body's statements in footnote 127 of its report in *US-FSC*. Ehlermann and Ehring do not however explain how permitting authoritative interpretations to "modify" rights and obligations of WTO Members who vote against those authoritative interpretations can be reconciled with the safeguards contained in Article X:3 of the WTO Agreement. See Ehlermann and Ehring, above note 83, at 808-811.

⁸⁸This requirement applies only to authoritative interpretations in respect of Annex 1 Agreements. It would not apply to authoritative interpretations in respect of agreements outside Annex 1 such as the DSU.

⁸⁹This principle is also recognised in general international institutional law. See Felix Amerasinghe, *Principles of the Law of International Organisations* (Cambridge: Cambridge University Press 2005 2nd Edn) 460 ("Interpretation may legitimately fill in gaps and take care of situations which were not anticipated at the

there are many provisions in the WTO agreements that are open to more than one interpretation. A decision that removes the resulting legal uncertainty can have effects comparable to those of a clarifying amendment. Authoritative interpretations could also be used to modify or reverse interpretations of the Appellate Body. Authoritative interpretations can be adopted without a complex acceptance process and are immediately binding on all Members, panels and the Appellate Body.

C. OTHER DECISIONS

1. Scope of application

70. There are many provisions in the WTO agreements that authorise a WTO body to take decisions. From a legal perspective, the most important examples are decisions relating to waivers taken pursuant to Article IX:3 of the WTO Agreement and decisions on authoritative interpretations taken pursuant to Article IX:2 of the WTO Agreement. Other examples are decisions to submit a proposed amendment to the membership for acceptance pursuant to Article X, decisions to approve the accession of a country to the WTO pursuant to Article XII, decisions to adopt an estimated annual budget and financial regulations pursuant to Article VII:3, decisions relating to extensions of transitional periods pursuant to Article 66.1 of the TRIPS Agreement, Article 27.4 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") and Article 5.3 of the Agreement on Trade-Related Investment Measures ("TRIMS Agreement"), and decisions permitting time-limited exemptions for developing countries pursuant to Article 12.8 of the Agreement on Technical Barriers to Trade ("TBT Agreement") and Article 10.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"). In the situations listed above, the WTO body is clearly authorised to change (or interpret) WTO law. Accordingly, its decision must be deemed to be an integral part of the agreement under which it is taken and part of the law that panels and the Appellate Body must apply.

71. This section analyses a separate category of decisions that are of potential relevance to an analysis of the methods of giving legal effect to the results of negotiations in trade rounds, namely decisions based on a provision that specifies neither the nature of the decision or its legal effects. These are decisions taken by the Ministerial Conference pursuant to its general

time the texts were formulated. However where it changes a text radically this is amendment. An example of such radical change would be where an interpretation purports to permit an organization to do what the constitutional text expressly prohibits. Or where a constitutional text clearly places an obligation on an entity, there being no question of gaps or lack of anticipation, an interpretation which permits the entity to avoid that obligation would amount to amendment of the text. ... the principle cannot be denied that interpretation and amendment are two distinct processes and the former should not be used to circumvent the process appropriate for the latter").

decision-making power in Article IV:1 of the WTO Agreement, which provides the Ministerial Conference with "the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member". These decisions will be referred to in this paper as "Other Decisions".⁹⁰ Article IX:1 of the WTO Agreement indicates that these decisions can be taken by simple majority of votes cast.⁹¹

72. This section will address whether Other Decisions be used to give legal effect to the results of the Doha Round. Traditionally, this question has been of limited relevance. The overwhelming majority of Other Decisions adopted by the Ministerial Conference do not contain clauses that purport to impose enforceable obligations on Members or otherwise modify WTO legal obligations. These Other Decisions rarely contain binding language, and even when they do, they usually envisage further steps to give legal effect to the legal changes contemplated. However, there are exceptions.

⁹⁰So far the WTO Ministerial Conference and General Council have adopted at least 12 instruments which can be classified as "Other Decisions". These are:

- (i) The Singapore Ministerial Declaration, WT/MIN(96)DEC, Adopted on 13 December 1996.
- (ii) The Ministerial Declaration on Trade in Information Technology Products, WT/MIN(96)/16, adopted on 13 December 1996.
- (iii) The Geneva Ministerial Declaration, WT/MIN(98)/DEC/1, Adopted on 20 May 1998.
- (iv) The Declaration on Global Electronic Commerce, WT/MIN(98)/DEC/2, Adopted on 20 May 1998.
- (v) The Decision on Implementation-Related Issues and Concerns, WT/L/384, Adopted on 15 December 2000.
- (vi) The Doha Ministerial Declaration, WT/MIN(01)/Dec/1, Adopted on 14 November 2001.
- (vii) The Declaration on TRIPs and Public Health, WT/MIN(01)/Dec/2, Adopted on 14 November 2001.
- (viii) The Decision on Implementation-Related Issues and Concerns, WT/MIN(01)/17, Adopted on 14 November 2001.
- (ix) The Decision on Procedures for Extensions under Article 27.4 for certain developing country Members, G/SCM/39, Adopted on 14 November 2001.
- (x) The Cancun Ministerial Statement, WT/MIN(03)/20, Adopted on 14 September 2003.
- (xi) The July Package Decision, WT/L/579, Adopted on 1 August 2004.
- (xii) The Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, Adopted on 18 December 2005.

It is worth noting that only two of these instruments explicitly refer to Article IV:1 of the WTO Agreement as their legal basis. These are the two decisions on Implementation Related Issues and Concerns of 15 December 2000 and 14 November 2001.

⁹¹ Article IX:1 of the WTO Agreement indicates that decisions shall be taken by simple majority of votes cast "unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement".

73. The Hong Kong Ministerial Declaration contains two striking examples of clauses that *do* purport to impose direct obligations and exemptions on the WTO membership.⁹² Paragraphs 36 and 47, read with proposal 36 in Annex F of the Hong Kong Ministerial Declaration, impose an *obligation* on developed countries to grant duty free and quota free market access to products from LDCs by 2008 or no later than the start of the implementation period. Similarly, paragraph 36, read with the second paragraph of Proposal 84 in Annex F of the Hong Kong Ministerial Declaration, appears to provide LDCs with an additional *exemption* from Article 2 of the TRIMs Agreement. This exemption would allow LDCs to introduce new TRIMs or maintain TRIMs that were not in force on the date of entry into force of the WTO Agreement.

74. It is uncontroversial that Other Decisions can be relevant to the *interpretation* of the provisions of the WTO agreements.⁹³ However, it is not clear whether a commitment set out in an Other Decision of the Ministerial Conference can be invoked as the basis of a legal claim or defence in a WTO dispute settlement proceeding. Academic opinion on this issue is somewhat tentative. For instance, Pieter Jan Kuijper has stated that "only time and the practice of the organization will tell whether decisions taken under Article IV.1 will be considered binding".⁹⁴ Likewise, Steve Charnovitz finds that "the legal status of the Doha Declarations is ambiguous".⁹⁵ Mary Footer concludes her detailed examination of subsidiary rule making in the WTO with the observation that "it is also premature at this stage to be able

⁹²Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, adopted on 18 December 2005. Less prominent examples of exemptions could be: (1) Decisions adopted by the Council for Trade in Services which permitted Members, in certain conditions, to include MFN exemptions in their schedules in a manner inconsistent with Article II of the GATS and to modify their schedules without adhering to the procedures of Article XXI of the GATS (S/L/8, 21 July 1995; S/L/9, 21 July 1995; S/L/50, 12 December 1997); and (2) Decisions adopted by the General Council permitting the retaliatory withdrawal of concessions beyond the deadlines specified in Article XXVIII:3 of the GATT (See e.g., WT/GC/89, adopted by the General Council on 28 February 2005, at 17).

⁹³If Other Decisions are considered as subsequent agreements or as subsequent practice under Article 31(3) of the Vienna Convention on the Law of Treaties, they should be taken into account along with the context. Moreover, at a minimum, Other Decisions can be used as supplementary means to confirm an interpretation or resolve an ambiguity. In *US – Shrimp*, the Appellate Body cited the Singapore Declaration in support of its finding that the United States' measures unjustifiably discriminated between exporting countries seeking certification within the meaning of the chapeau of Article XX of the GATT. See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 168. In *EC – Tariff Preferences* the Appellate Body cited the Doha Declaration in support of the special status of the Enabling Clause. See Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, para. 108.

⁹⁴Pieter Jan Kuijper, 'Some Institutional Issues presently before the WTO' in Daniel Kennedy and James Southwick (eds.), *The Political Economy of International Trade Law* (Cambridge: Cambridge University Press 2002) 82.

⁹⁵Steve Charnovitz, 'The Legal Status of the Doha Declarations' 5 *JIEL* 207 (2002) at 211.

to draw any real conclusions as to the effects that subsidiary rule-making may have on normative developments in the WTO".⁹⁶

75. The Contracting Parties to the GATT used decisions to alter rights and obligations.⁹⁷ The best-known example is the so-called "Enabling Clause" which, *inter alia*, permitted developed countries to depart from Article I of the GATT in order to provide preferential treatment to imports from developing countries and committed them to apply the principle of non-reciprocity in trade negotiations with developing countries. It is not clear from the text of the Enabling Clause, its negotiating history or GATT jurisprudence whether the Enabling Clause was a "waiver in disguise" (combined with a restatement of legal principles already contained in Part IV of the GATT) or an agreement among all contracting parties cast in the form of a decision that superseded the GATT 1947.⁹⁸

76. Every GATT panel that addressed the Enabling Clause proceeded on the assumption that it could be invoked as the basis of a claim or defence.⁹⁹ The mandate of a GATT panel typically was to examine the matter before it "in the light of the relevant GATT provisions". Therefore, the GATT panels that based their rulings on the Enabling Clause implicitly treated the provisions of the Enabling Clause as "relevant GATT provisions" rather than as provisions of a separate agreement. The question of whether the GATT panels were entitled to do so was never examined. By virtue of paragraph 1(b)(iv) of the GATT 1994, the Enabling Clause has now become part of the treaty text of the GATT 1994.¹⁰⁰ The question of whether the provisions of the Enabling Clause are provisions of an agreement covered by the mandate of a panel therefore no longer arises.

⁹⁶Mary Footer, *An Institutional and Normative Analysis of the World Trade Organization* (Amsterdam: Martinus Nijhoff 2006) 326.

⁹⁷See Oliver Long, *Law and its Limitations in the GATT Multilateral Trade System*, (Amsterdam: Martinus Nijhoff 1985) 18 ("In appropriate cases, decisions by the Contracting Parties can elaborate on or supplement GATT provisions. This likewise obviates the need to resort to the formal amendment procedure").

⁹⁸The GATT Secretariat was of the view that a unanimous declaration by the GATT Contracting Parties could be a method of incorporating the results of the UNCTAD generalised system of preferences negotiations into the GATT legal framework. The relevant Secretariat note states: "The logic of this method is that the CONTRACTING PARTIES are master in their own house, and can agree that they will concur in temporary derogations from Article I in order to promote the objectives set out in Article XXXVI." See Spec (70) 6, 5 February 1970, at 5.

⁹⁹See GATT Panel Report, *EEC – Member States' Import Regimes for Bananas*, 3 June 1993, unadopted, DS32/R, para. 369; GATT Panel Report, *EEC – Import Regime for Bananas*, 11 February 1994, unadopted, DS38/R, para. 162, GATT Panel Report, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, adopted 19 June 1992, BISD 39S/128, paras. 6.15-6.17; GATT Panel Report, *United States – Customs User Fee*, adopted 2 February 1988, BISD 35S/245, para. 122.

¹⁰⁰See Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, footnote 192.

77. The question of the legal status of Other Decisions taken by the Ministerial Conference, however, remains open. In a DSU proceeding, all legal claims and defences must be based on the provisions of a "covered agreement".¹⁰¹ This follows from the mandate of panels to examine the matter before them in the light of the relevant provisions of the covered agreements cited by the parties to the dispute.¹⁰² Consequently, a Member basing a legal claim or defence on an Other Decision of the Ministerial Conference must establish that the claim is based on the provisions of a "covered agreement". However, there is no reference to decisions of the Ministerial Conference in the list of covered agreements in the DSU.

78. In contrast to decisions made by the GATT Contracting Parties, which are deemed to be part of the GATT 1994 according to paragraph 1(b)(iv) of the GATT 1994, Other Decisions taken by the Ministerial Conference are not expressly made part of any covered agreement. Article 1 of the DSU refers to disputes regarding rights and obligations under "the provisions of the Agreement Establishing the World Trade Organization". This is distinct from the "Agreement Establishing the World Trade Organization *and decisions made pursuant to that Agreement*". Likewise, it is not apparent that a reference to "the WTO Agreement" in Appendix 1 to the DSU can be read as a reference to "the WTO Agreement *and decisions made pursuant to that Agreement.*" The omission of decisions made under the WTO Agreement from the list of covered agreements might be regarded by a panel or the Appellate Body as deliberate or consequential. A Member seeking to enforce Other Decisions of the Ministerial Conference would have to argue that these decisions are part of a covered agreement by implication.¹⁰³ This argument is difficult to sustain based on a textual analysis.¹⁰⁴

¹⁰¹See Articles 1, 3.2, 7.1, 11, 19.2 and 23 of the DSU.

¹⁰²Article 7 of the DSU. See also Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, para. 56 indicating that the WTO dispute settlement system cannot be used "to determine rights and obligations *outside the covered agreements*".

¹⁰³The July Package Decision states that "[t]he General Council agree that this Decision and its annexes shall not be used in any dispute settlement proceedings under the DSU and shall not be used for interpreting the existing WTO Agreements", see WT/L/579, 1 August 2004, para. 2. It might be argued that, by implication, this statement supports the view that Other Decisions can be invoked in WTO dispute settlement proceedings.

¹⁰⁴See in support of this view Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge: Cambridge University Press 2005) 56 ("Other acts of WTO organs ... are definitely sources of WTO law and must be taken into account by panels and the Appellate Body. However, they do not provide for rights and obligations which can be enforced through the dispute settlement system. No claim of violation can be based on these acts."). See also Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press 2003) 45 ("acts of a WTO organ must respect and are subject to their constituent WTO treaty instruments. They cannot change them. ... Only claims under the WTO covered agreements, not claims under acts of WTO organs, fall within [the substantive jurisdiction of WTO panels]). However, Pauwelyn implies that acts of WTO organs can be the basis of a defence.

79. The overall context of the decision-making procedures applicable to Other Decisions set out in Article IX:1 of the WTO Agreement suggests that the Ministerial Conference can change the rights and obligations of Members only if it is expressly authorised to do so. As a general rule, its Other Decisions can be approved by a *simple majority* of votes cast. In contrast, amendments that "alter the rights and obligations of Members" require approval by *two thirds* of Members and do not bind the Members that have not accepted them. Waivers also require approval by *three fourths* of Members and involve annual reviews and time limitations. If Other Decisions approved by a *simple majority* could alter the rights and obligations of Members, the overall scheme of decision-making set out in the WTO Agreement could not achieve its purpose because:

- An Other Decision taken by a simple majority of the votes cast could achieve the same practical result as an amendment or a waiver, which require approval by two thirds or three fourths of the Members; and
- A simple majority of Members could alter the rights and obligations of *all Members*, including those voting against the Other Decision.¹⁰⁵

80. These consequences normally do not occur because, in practice, the Ministerial Conference takes its Other Decisions by consensus. However, they could arise were an individual Member to request a vote. That possibility would need to be taken into account in addressing the question of the legal status of the Other Decisions of the Ministerial Conference in a DSU proceeding.¹⁰⁶

81. There are a number of arguments that could be advanced to support the view that Other Decisions *can* be invoked as the basis of a claim or defence in a DSU proceeding.

¹⁰⁵The United States would presumably disagree with such an interpretation of the WTO Agreement. See *Statement of Administrative Action, Agreement Establishing the World Trade Organisation*, in H.R. DOC. 316, 103 d Cong., 2 d Sess., vol. 1, at 659 ("However, should a vote be taken on a matter in the WTO, the improved procedures written into the WTO Agreement will ensure that there can be no change in U.S. substantive rights and obligations without the agreement of the United States").

¹⁰⁶Claus Ehlermann, a former member of the Appellate Body, and Lothar Ehring have recently stated that:

Panels and the Appellate Body must be entitled to assess the validity of an act adopted by the WTO if this act matters for the decision of a given dispute. According to the doctrine that *ultra-vires* acts are invalid, this validity of the act depends on its consistency with the applicable requirements of a substantive and procedural nature. Thus an invalid waiver or authoritative interpretation can have no legal effect on the outcome of the dispute in question.

See Ehlermann and Ehring, above note 83, at 809-810. This argument implies that panels and Appellate Body could declare certain decisions to be *ultra-vires* and refuse to give legal effect to them on the ground that the appropriate process to impose new rights or obligations on WTO Members is an amendment.

Some authors take the view that defences or exemptions as opposed to claims invoked in a DSU proceeding need not necessarily be based on a covered agreement.¹⁰⁷ If one accepts this position, which is controversial,¹⁰⁸ then Other Decisions could be the basis of a defence even though they are not part of a covered agreement.

82. It could further be argued that giving legal effect to a *consensus* decision by the Ministerial Conference does not entail a shift from a qualified majority to a simple majority and the creation of obligations for a Member without its consent. Giving legal effect to a consensus decision, therefore, would not undermine the scheme of decision-making set out in the WTO Agreement. Accordingly, panels and the Appellate Body should not set aside the collective will of the membership merely because it expressed that will in a decision.¹⁰⁹ It could also be argued that the Members that joined the consensus are estopped from alleging the invalidity of the decision in a DSU proceeding.¹¹⁰

83. Finally, it might be argued that a decision by the Ministerial Conference taken by consensus can constitute a "subsequent agreement between the parties regarding interpretation of the treaty or the application of its provisions" within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties, and that such a subsequent agreement can even prevail against the terms of the prior treaty text. It appears that this position has been accepted in practice for certain other multilateral treaties.¹¹¹

84. These arguments must be weighed against the fact that there is a presumption in public international law that decisions of international organisations do not have binding force and

¹⁰⁷See *e.g.*, Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press 2003) 459-473, especially 470-471.

¹⁰⁸See Joel Trachtmann, 'Book Review: Conflict of Norms in Public International Law' 98 AJIL 855 (2004), at 857. Of course, as described earlier in this paper, jurisprudence confirms that waivers can operate as a defence.

¹⁰⁹In this regard, Felix Amerasinghe, *Principles of the Law of International Organisations* (Cambridge: Cambridge University Press 2005 2nd Edn), 215 states that:

"... generally procedural defects would not result in the invalidity of a decision, unless they result in the adoption of a wrong decision or a miscarriage of justice."

¹¹⁰See Felix Amerasinghe, *Principles of the Law of International Organisations* (Cambridge: Cambridge University Press 2005 2nd Edn), 206 arguing that the right to object to an act on the ground that it is *ultra-vires* may be lost by acquiescence.

¹¹¹Antony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press 2000) 191-93 (providing several examples but urging caution in the use of this technique) 213-214 (providing the example of the Convention on Trade in Endangered Species, 1973). For a contrary example, see ECJ, Case 43-75 *Garielle Defrenne v. Sabena* [1976] ECR 455, paras. 57-60, where the European Court of Justice ruled that a subsequent resolution could not modify a time-limit fixed in the treaty, as that would require an amendment made in accordance with the amendment procedures of the treaty.

cannot alter rights and obligations unless their constitutions expressly so provide.¹¹² The WTO Agreement does not expressly provide that Other Decisions can alter the rights and obligations of Members. Whenever the drafters of the WTO Agreement authorised a WTO body to alter WTO law they made this explicit.¹¹³

85. If a panel or the Appellate Body wanted to rule that Other Decisions could alter rights and obligations it would have to develop distinctions that are not made in the WTO Agreement. For instance, the WTO Agreement does not attribute different consequences to decisions taken by consensus and decisions adopted after a vote. Likewise, the DSU does not distinguish between Other Decisions that can form the basis of a claim and Other Decisions on which a defence can be based. On the contrary, Article 7 of the DSU implies that both the claims of the complainant and the defences of the respondent must be based on covered agreements. As a consequence, any ruling that a Ministerial decision can alter rights and obligations would involve a certain amount of judicial activism. For these reasons, one may have doubts that Other Decisions can form the basis of a claim or defence in WTO dispute settlement proceedings. However, it cannot be excluded that the desire to develop mechanisms whereby WTO law can be adapted quickly to changing circumstances, together with a reluctance to set aside the consensus of the WTO membership on technical grounds, may tilt panels or the Appellate Body in the direction of giving legal effect to Other Decisions *taken by consensus*.

2. Procedures

86. Article IX:1 of the WTO Agreement sets out the general rule that if consensus cannot be reached, Other Decisions can be taken by the Ministerial Conference by a majority of votes cast. So far, no Other Decision has been adopted by a vote.

¹¹²See Henry Schemmers and Niels Blokker, *International Institutional Law* (The Hague: Martinus Nijhoff 2003) Section 1320 ("As a general rule of modern institutional law it has been accepted that international organisations cannot take binding external decisions unless their constitutions expressly so provide"). See also Felix Amerasinghe, *Principles of the Law of International Organisations* (Cambridge: Cambridge University Press 2005 2nd Edn), 172 ("It may be stated as a general principle that unless there is a specific and express provision in the constitutional instruments or an ineluctable implication arises from the provisions of such instruments, acts of organs do not have binding or similar effects in the operational field. The reason for this is that international organisations are created by the agreement of states and consent to be bound by their acts or to permit them to impose obligations and confer rights by their acts is not to be presumed").

¹¹³Article X:8 of the WTO Agreement allows for alteration of the DSU by a consensus decision of the Ministerial Conference and alteration of the Trade Policy Review Mechanism by way of a majority decision of the Ministerial Conference.

3. Advantages and limitations

87. It is far from clear whether and, if so, under what circumstances Other Decisions can create new rights and obligations for Members. Pending clarification of this issue through a ruling of the Appellate Body or an authoritative interpretation by the Ministerial Conference,¹¹⁴ attempts to create new rights and obligations for Members through Other Decisions will remain fraught with legal uncertainty.

V. INCORPORATION OF NEW AGREEMENTS INTO WTO LAW

A. MULTILATERAL TRADE AGREEMENTS

1. Scope of application

88. The Doha Round could result in new multilateral trade agreements, such as an agreement on trade facilitation. The scope of WTO law that can be changed through the addition of a new multilateral trade agreement is virtually unlimited. An additional multilateral trade agreement could create new rights and obligations for Members, as well as exemptions from the obligations of WTO law set out in the existing multilateral trade agreements. A new multilateral trade agreement could not, however, create exemptions from obligations under the WTO Agreement because Article XVI:3 of the WTO Agreement provides that a provision of WTO Agreement prevails in the event of a conflict with a provision of a multilateral trade agreement annexed to it.

2. Procedures

89. Article II:2 of the WTO Agreement provides:

The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members

90. A new multilateral trade agreement could, therefore, be incorporated into WTO law by amending the list of Multilateral Trade Agreements in Annexes 1, 2 or 3 of the WTO Agreement, or by referring to the new agreement directly in Article II:2 of the WTO

¹¹⁴The Ministerial Conference could adopt an authoritative interpretation or even amendment of the term "covered agreements" in the DSU and Article IV of the WTO Agreement to clarify that Other Decisions taken by consensus should be considered as part of the "covered agreements" and the extent to which these decisions could modify the current treaty text. The Ministerial Conference could also decide on procedural safeguards, such as a requirement of adequate notice and a special quorum for meetings at which such decisions are adopted.

Agreement. The new multilateral trade agreement would then become an "integral part" of the WTO Agreement "binding on all Members".

91. The procedure for amending the WTO Agreement would depend on the substantive content of the multilateral trade agreement. If the provisions of the new agreement "alter the rights and obligations" of the Members, the generally applicable procedures for amendments would apply according to which the new agreement would take effect upon acceptance by two thirds of the Members, and then only for those Members that have accepted it.¹¹⁵

3. Advantages and limitations

92. As with all changes to WTO law that require an amendment, the addition of a new multilateral trade agreement would become effective only after two thirds of the Members have accepted the amendment and then only for those Members that have accepted it. This means that at least 100 of the 149 Members of the WTO must support the new "multilateral" trade agreement. These Members must also accept that the most-favoured-nation rules may force them to observe the new obligations it contains with respect to up to 49 other Members that may not deposit instruments of acceptance. More generally, the membership of the WTO must be ready to accept the possible introduction of a two-tier system of obligations into WTO law. Even if all Members eventually accept the amendment to incorporate the new agreement, a two-tier system is bound to exist, at least temporarily, because the length of the domestic ratification process varies considerably between Members.¹¹⁶

93. Furthermore, if the multilateral trade agreement includes provisions reducing the level of obligations of Members, those provisions would have no legal effect for the Members that have not accepted the amendment incorporating the new agreement. Hence, in practice, the introduction of any new multilateral trade agreement with provisions intended to reduce obligations under the existing multilateral trade agreements will only be practicable if accepted by all Members.

B. PLURILATERAL TRADE AGREEMENTS

1. Scope of application

94. The Tokyo Round generated nine trade agreements that were accepted only by a limited number of the GATT contracting parties. These agreements covered a wide range of

¹¹⁵Articles X:3 and X:5 of the WTO Agreement, discussed in Part II.B of this paper.

¹¹⁶William Davey notes that in the case of the WTO Agreement, some GATT parties deposited their acceptances only after the GATT had ceased to exist, and that the same problem of delays had occurred in the services negotiations as not all of the signatories to the financial services and telecommunications protocols ratified within the established period to do so. See Davey, above note 5, at 28.

subject-matters: anti-dumping, customs valuation, import licensing, subsidies, technical barriers to trade, government procurement, as well as trade in civil aircraft, dairy products and meat.¹¹⁷ The first five of these policy areas are now covered by multilateral trade agreements, which all Members must accept; the latter four were covered by plurilateral agreements listed in Annex 4 of the WTO Agreement. Of these agreements, the agreements on dairy products and meat were terminated in 1997, but the agreements on government procurement and trade in civil aircraft remain in force.¹¹⁸

95. Article II:3 of the WTO Agreement makes clear that "[t]he Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them".¹¹⁹ This provision clarifies that the general principle of international law according which "a treaty does not create either obligations or rights for a third State without its consent" applies to the plurilateral trade agreements.¹²⁰ This clarification was necessary because the first sentence of Article II:3 declares the plurilateral trade agreements to be part of the WTO Agreement for those Members that have accepted them. Thus, a plurilateral trade agreement binds only those Members that have accepted it and does not affect the rights of other Members under the multilateral trade agreements, in particular their rights under the most-favoured-nation clauses in the GATT, the GATS and the TRIPS Agreement.¹²¹

96. In that respect, there is no difference between the plurilateral agreements included in Annex 4 of the WTO Agreement and any other trade agreement concluded between Members outside the legal framework of the WTO. The main legal effect of the inclusion of a trade agreement among certain Members of the WTO as a plurilateral trade agreement in Annex 4

¹¹⁷BISD 26S/8-188.

¹¹⁸The Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement. The International Dairy Agreement and the International Bovine Meat Agreement are both listed in Annex 4 of the WTO Agreement but terminated at the end of 1997.

¹¹⁹Article II:3 of the WTO Agreement.

¹²⁰Article 34 of the Vienna Convention on the Law of Treaties.

¹²¹Some commentators on the draft of this paper expressed the view that Article II:3 of the WTO Agreement permits a Member to refuse to extend advantages granted pursuant to the plurilateral agreement to Members that do not accept the plurilateral agreement on the ground that Article XVI:3 of the WTO Agreement provides that, in the event of conflict, Article II:3 prevails over the most-favoured-nation clauses in the GATT, the GATS and the TRIPS Agreement. However, Article II:3 deals with rights conferred by *plurilateral agreements* and does not deal with rights conferred by the *multilateral trade agreements* (including the rights conferred under the most-favoured-nation clauses in the GATT, the GATS and the TRIPS Agreement). A Member claiming that its goods, services or service suppliers be accorded the treatment accorded by another Member to the signatories of a plurilateral agreement makes that claim on the basis of the most-favoured-nation provisions of the GATT and the GATS, not on the basis of the plurilateral agreement. Accordingly, it may be difficult to argue that there is a conflict between the most-favoured-nation clauses in the multilateral trade agreements and Article II:3. For these reasons, it would seem extremely risky for a Member to accept a plurilateral agreement on the assumption that Article II:3 authorises it to withhold the advantages resulting from the application of that agreement from Members that have not accepted it.

of the WTO Agreement is that it is incorporated into the *institutional* framework of the WTO and can consequently be serviced by the WTO Secretariat. Furthermore, disputes under a plurilateral trade agreement can be referred to the judicial organs of the WTO if it is included in the list of plurilateral trade agreements in Appendix I of the DSU.

2. Procedures

97. Pursuant to Article X:9 of the WTO Agreement, the addition of a plurilateral trade agreement to Annex 4 of the WTO Agreement requires a consensus decision of the Ministerial Conference. The procedures for any amendment to that agreement are governed by the plurilateral trade agreement.¹²² If WTO Members wish the new plurilateral trade agreement to be enforceable through the DSU, they would also need to amend the DSU to include that agreement in the list of plurilateral trade agreements in Appendix I of the DSU.¹²³

3. Advantages and limitations

98. One advantage of plurilateral trade agreements is that they allow a subset of Members to further liberalise in situations in which not all Members are ready to cooperate. For this reason, the Sutherland Report supports a re-examination of the use of plurilateral trade agreements. It notes that, given the increasing number of states that participate in the multilateral trading system, the universal acceptance of new agreements will become increasingly elusive.¹²⁴ The report observes that "[t]aking the plurilateral route ... would permit willing groups of Members to take commitments on specific dossiers where no agreement of meaningful substance is likely on a universal basis" and that "the plurilateral approach would enable sets of WTO Members wishing to negotiate more ambitious commitments to do so".¹²⁵ According to John Jackson, plurilateral trade agreements provide "an approach where certain innovation could occur with smaller groupings rather than the whole", and therefore the "mantra" of the single undertaking should be revisited.¹²⁶

99. At the same time, the Sutherland Report underlines that plurilateral trade agreements should be seen as a second-best solution compared to multilateral commitments. It warns that

¹²²Article X:10 of the WTO Agreement.

¹²³As noted above, the amendment of the DSU demands special amendment procedures requiring a consensus decision approving the amendment. Such an amendment could be adopted alongside the consensus decision to add the plurilateral agreement to Annex 4 of the WTO Agreement.

¹²⁴Sutherland Report, above note 69, at 62.

¹²⁵Sutherland Report, above note 69, at 66.

¹²⁶John H. Jackson, 'The WTO 'Constitution' and proposed reforms: Seven 'Mantras' revisited', 4 JIEL 67 (2001), at 75.

such agreements are "a divisive approach that would enshrine a multiclass membership structure"¹²⁷ and that "re-establishing two or more classes of membership in the WTO is not always an optimal solution".¹²⁸

100. Plurilateral trade agreements are a suitable instrument to create new WTO law when a limited number of Members of the WTO are ready: (i) to accept a level of obligations higher than that accepted by other Members; (ii) to apply those obligations to the trade of the other Members to the extent required by the most-favoured-nation rules; and (iii) to enforce those obligations through DSU procedures.

101. The Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement are the only remaining plurilateral trade agreements. Only a very limited number of Members of the WTO produce aircraft. In the case of the Agreement on Trade in Civil Aircraft, therefore, the requirement to extend the benefits of that agreement to non-parties in accordance with the most-favoured-nation rules of Article I of the GATT had limited practical consequences. The most-favoured-nation and national treatment rules of the GATT do not apply to government procurement.¹²⁹ Hence, the parties to the Agreement on Government Procurement are not required to extend the benefits of that agreement to non-parties. Experience thus suggests that a plurilateral trade agreement is an acceptable instrument to create new obligations in situations in which: (a) the benefits of those obligations accrue to a small number of Members; (b) WTO law does not require the extension of those benefits to non-parties; or (c) the number of Members accepting the obligations is so large that the problem of free-riding is minimised.

C. AGREEMENTS ACCEPTED THROUGH ENTRIES IN SCHEDULES ("REFERENCE RULES")

1. Scope of application

102. Most of the entries in goods and services schedules consist of *Member-specific* concessions and commitments related to specific products or services sectors. There is nothing, however, that prevents Members from including in their schedules concessions and commitments *common to a group of Members* and setting out generally applicable rules of

¹²⁷Sutherland Report, above note 69, at 66.

¹²⁸Sutherland Report, above note 69, at 65.

¹²⁹Article III:8(a) of the GATT exempts government procurement from the scope of Article III. Article I:1 of the GATT states that it applies to "all matters referred to in paragraphs 2 and 4 of Article III". Given that Article III:8(a) excludes government procurement from the scope of paragraph 4 of Article III, this matter is also excluded from the scope of Article I of the GATT. This reading is confirmed by Article XVII:2 which establishes with respect to government procurement merely the obligation to accord "fair and equitable treatment" to the trade of other Members.

conduct. The common concessions or commitments would be negotiated in advance and set out in a separate document. That document would have the function of providing "reference rules". A Member could refer to it in an entry in its schedule declaring that it accepts the provisions set out in the document as binding. Such an entry would be an integral part of the GATT or the GATS, and hence a "covered agreement" enforceable through the DSU.

103. There are two agreements that have become effective in this manner: the Reference Paper Regarding Telecommunications Services (the "Reference Paper") and the Understanding on Commitments in Financial Services (the "Understanding").

104. The Reference Paper was adopted because certain Members were of the view that effective market access of their telecommunication service suppliers could be undermined through governmental measures not regulated by the GATS. They therefore negotiated common regulatory principles and competition disciplines, including detailed rules on interconnections, that would apply in addition to the provisions of the GATS.¹³⁰ The result of the negotiations was set out in the Reference Paper.¹³¹ The Reference Paper has no legal status *per se*. It binds only those Members that have incorporated it in their services schedules.

105. At a meeting of the Negotiating Group on Basic Telecommunications, this approach was described as follows:

In a discussion of the reference paper the point was made that it had no legal status and was to be used as a guideline for the scheduling of additional commitments. The observation was also made that there would be no binding commitment arising from the paper "per se"; only that which was explicitly inscribed in the schedule of commitments would be of a legally binding nature ... The Chairman concluded that the paper would retain its present status as a non-paper, to be used as a guideline for the scheduling of commitments.¹³²

¹³⁰For example, the competition provisions of the Reference Paper differ from Article VIII of GATS in that they apply to "major suppliers", whereas Article VIII limits its application to monopolies. Furthermore, the interconnection provisions of the Reference Paper differ from Article VI:2 of GATS, in that they provide recourse regarding actions of non-governmental entities, whereas Article VI:2 limits recourse to the actions of government. In addition, the Reference Paper proposes that governments make arrangements so that private parties can bring disputes with "major suppliers" about interconnection before an independent and impartial domestic agency: a court, tribunal or a regulatory body.

¹³¹The negotiating history leading to the Reference Paper has been described in full in: Additional Commitments Under Article XVIII of the GATS, Note by the Secretariat, S/CSC/W/34, 16 July 2002, at 4.

¹³²Negotiating Group on Basic Telecommunications, Report on the Meeting of 22 March 1996, S/NGBT/14, 29 March 1996, para. 5.

106. Many Members' schedules simply refer to the Reference Paper; others incorporate its text in its entirety. The Reference Paper has enabled a subset of Members to liberalize more quickly than other Members on the basis of common disciplines.

107. Similarly, in the financial services sector, additional commitments have been undertaken by a subset of Members through reference to, or incorporation of the text of, the Understanding on Commitments in Financial Services. Like the Reference Paper, the Understanding contains commitments additional to those in the GATS. For example, the Understanding's provisions on monopoly rights, which apply to activities conducted by a public entity for the account, with the guarantee or using the financial resources of the government, would normally fall outside the scope of the GATS, as they are "services supplied in the exercise of governmental authority".¹³³ Furthermore, the Understanding's provisions on financial services purchased by public entities would normally fall outside the scope of GATS, as Article XIII of the GATS excludes obligations on market access and national treatment with respect of the "procurement by governmental agencies of services purchased for governmental purposes ...".¹³⁴

108. As with the Reference Paper, the Understanding has no legal status *per se*, and the disciplines that it contains become binding on Members only by virtue of their incorporation into their services' schedules.¹³⁵ The Understanding refers to the innovative nature of such an approach, noting that "Members have been enabled to take on specific commitments with respect to financial services under the GATS on the basis of an alternative approach to that covered by Part III" of the GATS.

2. Procedures

109. Members have incorporated the Reference Paper and the Understanding into their schedules either in their totality or by reference. With respect to the Reference Paper regarding telecommunications services, Members have tended to incorporate a comment in the fourth column of their services schedule (relating to Additional Commitments) to the effect that the Member "undertakes the obligations contained in the reference paper attached

¹³³Article I:3(b) of the GATS excludes from the definition of "services" those "services supplied in the exercise of governmental authority".

¹³⁴The WTO Secretariat has concluded that "with respect to the obligations on monopolies and government procurement ... Members having adopted the Understanding have in fact undertaken specific commitments on issues outside the scope of GATS". Additional Commitments Under Article XVIII of the GATS, Note by the Secretariat, S/CSC/W/34, 16 July 2002, paras. 74-76.

¹³⁵In contrast to the Reference Paper, the Understanding was included in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Agreements, but is not formally part of the covered agreements.

hereto". Members have then included the full text of the Reference Paper as an attachment to the schedule.¹³⁶ The Fourth Protocol to the General Agreement on Trade in Services provides that the modification to schedules of specific commitments concerning basic telecommunications would come into force "provided it has been accepted by all Members concerned";¹³⁷ that is, all Members that had annexed their schedule of specific commitments to the Protocol. The Protocol further provides that "[i]f by 1 December 1997 the Protocol has not been accepted by all Members concerned, those Members which have accepted it by that date may decide, prior to 1 January 1998, on its entry into force".¹³⁸

110. With respect to the Understanding, in general Members have simply incorporated a comment at the beginning of Part II.7 of their Schedule of Specific Commitments to the effect that "Commitments in this subsector are undertaken pursuant to the alternative approach to scheduling commitments set forth in the Understanding on Commitments in Financial Services (the Understanding) which is incorporated by reference into this schedule". Generally, Members have not reproduced the text of the Understanding as an attachment to their schedule.¹³⁹ Reciprocity was ensured because the Understanding was negotiated prior to the conclusion of the Uruguay Round. Therefore, interested Members that wished to undertake commitments based on the Understanding included those commitments in their schedules of specific commitments, which underwent a verification process and were then attached to the Marrakesh Protocol.

3. Advantages and limitations

111. Entries in goods schedules are enforceable only to the extent that they affect "commerce" as provided for in Article II:1 of the GATT and entries in services schedules only to the extent that they affect "trade in services" as defined in Article I of the GATS. Consequently, agreements made effective through entries in schedules have to remain in the realm of the GATT or the GATS, which means that they can only be used to regulate measures affecting commerce or trade in services. Furthermore, agreements made effective through entries in schedules cannot reduce obligations under the WTO agreements.

¹³⁶ See, *e.g.*, United States' Schedule of Specific Commitments, Supplement 2, GATS/SC/90/Suppl.2, 11 April 1997. The European Communities' and their Member States' Schedule of Specific Commitments, GATS/SC/31/Suppl. 3, 11 April 1997 provides in its fourth column that "The European Communities and their Member States undertake additional commitments as contained in the attachment, all parts of which are equally binding" and includes the full text of the reference paper as the attachment to their Schedule.

¹³⁷ Fourth Protocol to the General Agreement on Trade in Services, S/L/20, 30 April 1996.

¹³⁸ *Ibid.*, para. 3.

¹³⁹ See, for example, United States' Schedule of Specific Commitments, GATS/SC/90, 15 April 1994, and European Communities' and their Member States' Schedule of Specific Commitments, GATS/SC/31, 15 April 1994. Some Members, however, have included the full text of the Understanding as an attachment, see for example, Australia Schedule of Specific Commitments, GATS/SC/6, 15 April 1994.

112. While the use of reference rules to supplement the rules of the GATS has become an accepted practice, detailed rules supplementing the GATT have always been incorporated in separate agreements, originally in the Tokyo Round Agreements, and later in the WTO's multilateral and plurilateral trade agreements. However, there are significant procedural obstacles to the addition of further multilateral and plurilateral trade agreements to the WTO Agreement. The acceptance of agreements through entries in schedules could be used to overcome those obstacles not only in the field of services but also in the field of goods. To illustrate: The GATT rules governing export restrictions leave many gaps and there are no rules governing internal taxes discriminating against sales for export. The provisions of the GATT, therefore, provide no assurances against the impairment of export tariff bindings through non-tariff measures. Thus, if Members wanted to negotiate export tariff bindings, they would need to develop disciplines on export controls that go beyond those of the GATT.¹⁴⁰ These disciplines could be incorporated into a document setting out rules governing export concessions that would be made binding through entries in the schedules of the Members that agreed to bind export tariffs.

113. The legal consequences of reference rules made effective through entries in schedules are akin to those of a plurilateral agreement: only the Members that have referred to those rules in their schedules are bound by them and the benefits arising from them must in principle be extended to all Members. In contrast to plurilateral agreements, however, reference rules made effective through entries in schedules can be made part of WTO law without a consensus decision of the Ministerial Conference.¹⁴¹ Furthermore, a Member can effectively withdraw from the reference rules by following the procedures for the modification of schedules set out in the GATT and the GATS. This has the advantage of permitting the prompt renegotiation of the reference rules if circumstances or policy preferences change. It also ensures that the Member withdrawing from the rules must enter into negotiations and offer compensation. As a result, a new balance of interests can be found.

114. If the reference rules are designed to supplement tariff concessions for particular products (for instance, export tariff concessions for metal scrap or hides and skins) or particular services (such as financial or telecommunications services) a withdrawal from the

¹⁴⁰For a survey of the GATT rules on measures affecting exports and a proposal to include rules on export controls in GATT schedules, see Frieder Roessler, 'GATT and Access to Supplies', 9 (1) *Journal of World Trade Law* 25 (1975).

¹⁴¹One of the conclusions of the Sutherland Report provides that "[i]n certain circumstances, a GATS approach would be an appropriate alternative – in developing new disciplines – to a plurilateral negotiation. We therefore advise that these two concepts be further explored together". Sutherland Report, above note 69, at 66-67.

reference rules through a removal of the relevant entry in the schedule can be treated as a modification of the tariff concessions or services commitments for which the rules were accepted. In that case, the application of the standard procedures for the modification of schedules set out Article XXVIII of the GATT and Article XXI of the GATS would not present any difficulties. However, if the reference rules are broadly applicable to all trade (*i.e.*, rules on trade facilitation or anti-dumping measures) the procedures for the modification of schedules would be difficult to apply; it would, in particular, be difficult to identify the Members that would be entitled to compensation if the schedule entry referring to those rules is removed. In that case, it would be necessary to clarify in the reference rules themselves the consequences of the removal.

VI. SUMMARY AND CONCLUSIONS

115. The chart on the following page summarises the procedural requirements, advantages and limitations of the main legal methods by which the results of trade negotiations can be cast into WTO law:

	Procedure	Main Advantages	Main Limitations
Amendment	Requires acceptance by at least 2/3 of the Members. Amendments reducing obligations can in practice be implemented only if accepted by all Members.	Can create and reduce all rights and obligations under WTO law. Can bring about institutional changes. Permanent.	Risks of: (i) delays; (ii) unintended two-tier system of obligations; and (iii) free-riding.
Modification of schedules	Can be done through: (i) a protocol; (ii) certification; (iii) Article XXVIII of GATT or Article XXI of GATS procedures; or (iv) an amendment.	Allows Members to liberalise trade in accordance with their individual policy objectives and constraints.	Cannot be used to reduce obligations under the WTO agreements. Entries only enforceable to the extent that they affect "commerce" or "trade in services".
Waiver	Decision by consensus or by 3/4 of Members.	Can be used to exempt Members from their obligations. Does not require formal acceptance.	Cannot create additional self-standing obligations under WTO law. Temporary.
Authoritative interpretation	Decision of 3/4 of Members.	Can be used to reduce range of possible interpretations of existing provisions. Does not require formal acceptance.	Cannot be used to alter rights and obligations of Members.
"Other Decision" (As defined in Part IV.C of this paper)	Decision by consensus or by simple majority of Members.	Can be used to make institutional and procedural arrangements and structure negotiating process. Unclear whether new obligations for Members can be created through "Other Decisions".	Considerable risk that claims and defences based solely on "Other Decisions" would not be recognised in DSU proceedings. Not practicable for creation of obligations requiring legislative actions.
Multilateral agreement	Same as amendments.	Can create new and reduce existing obligations except those under the WTO Agreement itself. Permanent.	Same as amendments.
Plurilateral agreement	Consensus decisions required to add a plurilateral agreement to Annex 4 of the WTO Agreement and Annex 1 of the DSU.	Permits the introduction of different obligations for different Members.	Consensus requirement constitutes a considerable procedural obstacle. Non-parties retain all their rights under the multilateral trade agreements (including MFN rights).
Reference rules accepted through entries in schedules	Same as modification of schedules.	Permits the incorporation of agreements supplementing the GATT or the GATS into WTO law without a consensus decision of the Ministerial Conference and DSB.	Same as modification of schedules.

116. The procedures for amending the text of the WTO agreements are extremely cumbersome and have significant limitations. Amendments to the WTO agreements normally require the deposit of instruments of acceptance of at least two thirds of Members (at present at least 100 Members). Members that have not accepted the amendment retain their rights under the agreements as originally drafted. As a result, amendments reducing obligations can effectively not be implemented in respect of the goods, services and service suppliers of all Members unless all Members accept the amendment (at present 149 Members). These features of the WTO amendment procedures could cause considerable delays.

117. The most recent amendment of the GATT 1947, the addition of Part IV on Trade and Development, entered into effect in 1966. However, France accepted this amendment only in 1978 and Gabon in 1979.¹⁴² Thus, unanimous acceptance was achieved only after 13 years. A protocol amending Part I of the GATT 1947 (and therefore requiring acceptance by all contracting parties) was abandoned after 10 years because *one* contracting party was unable to obtain parliamentary approval.¹⁴³ The WTO now has more than twice as many Members as the GATT 1947 had in the 1960s. It is therefore likely to face even greater difficulties in obtaining the number of formal acceptances required for amendments than the GATT 1947. This is confirmed by the fact that six months after Members unanimously agreed to the General Council decision to amend the TRIPS Agreement to include Article 31*bis*,¹⁴⁴ only one Member has deposited an instrument of acceptance.¹⁴⁵ The experience with amendments under the GATT 1947 and the WTO Agreement suggests that, unless mechanisms to encourage rapid ratification of amendments are devised, it would be prudent to proceed on the assumption that any amendment requiring a two-thirds majority would enter into effect only after considerable delays and that amendments requiring unanimity (including for practical purposes amendments reducing obligations) may never enter into effect at all.

118. Once an amendment has entered into effect, only those Members that have accepted it are bound by it. The fact that most amendments will enter into effect upon acceptance of two thirds of Members risks creating an unintended two-tier system of obligations in WTO law, with two thirds or more of Members bound by the new obligations while the other Members that have not accepted the amendment remain bound by the original obligations. The most-favoured-nation clauses of the GATT and the GATS may force the Members that have accepted the amendment to accord to the goods, services and service suppliers of *all* Members the treatment required by the amendment. This gives Members the possibility to free-ride on

¹⁴²GATT Status of Legal Instruments, at 2-14.2

¹⁴³BISD 15S/65.

¹⁴⁴ Decision of the General Council, Amendment of the TRIPS Agreement, Decision of 6 December 2005, WT/L/615, 8 December 2006.

¹⁴⁵ That Member is the United States of America.

the obligations assumed by other Members by delaying the acceptance of the amendment or even refusing its acceptance altogether.

119. Some of the results of the Doha Round could be incorporated into WTO law through entries in Members' goods and services schedules. This method of changing WTO law has the advantage that it does not require Members to follow the cumbersome amendment procedures. Improvements in schedules could be effected through protocols, which offer the advantage over amendments that they may take legal effect even if fewer than two thirds of Members have accepted them. Modifications to schedules have also been given legal effect through certifications which have the advantage that acceptance is implied unless formally objected to, and therefore avoids the risks of delays associated with formal acceptance requirements. Delays may nonetheless occur in certification processes due to national requirements that have to be met. Entries in schedules have to remain in the realm of the GATT or the GATS, which means that they can only be used to regulate measures affecting the "commerce" of Members or their "trade in services". Furthermore, entries in schedules cannot reduce obligations under the WTO agreements.

120. Decisions of the Ministerial Conference waiving obligations, or providing authoritative interpretations, of the WTO agreements become legally effective immediately upon their adoption and are therefore a flexible method of changing or clarifying WTO law. However, waivers can release Members only temporarily from existing obligations. While that release can be made subject to terms and conditions, a waiver cannot create enforceable obligations in WTO law. Authoritative interpretations can only be used to reduce the range of meanings that can be attached to the wording of a provision; they cannot be used to alter the rights and obligations of Members.

121. The Appellate Body has not yet ruled on the question of whether decisions of the Ministerial Conference other than waivers can change rights and obligations under WTO law and whether such decisions can be deemed to be part of the WTO Agreement, and hence part of a "covered agreement" that can be invoked in WTO dispute settlement proceedings. The Ministerial Conference has also not adopted an authoritative interpretation clarifying this issue. Until the Appellate Body or Ministerial Conference has removed this uncertainty, it would seem prudent to proceed on the assumption that Members may not invoke a decision of the Ministerial Conference (other than a waiver or authoritative interpretation) as the basis for a legal claim or defence in WTO dispute settlement proceedings.

122. Under the GATT 1947, decisions of the GATT Contracting Parties were used to reduce their level of obligations (*e.g.*, the Enabling Clause), make institutional and procedural arrangements (*e.g.*, notification commitments and the 1979 Dispute Settlement Understanding), or express an agreement on shared values or common goals (*e.g.*, the

adoption of work programmes). Decisions on such matters can normally be implemented without any legislative acts of Members. There appears to be no instance in which a decision of the GATT Contracting Parties increased the level of their legal and policy obligations and, therefore, required implementing legislation. This experience suggests that Members would normally be reluctant to agree to a decision of the Ministerial Conference that would require legislative approval. This is because a decision of the Ministerial Conference is effective immediately upon its adoption, and therefore a Member cannot accept it subject to legislative approval. This sets a natural limit on the use of decisions to create new legal and policy obligations.

123. The addition of a new multilateral trade agreement to the WTO Agreement constitutes an amendment that requires formal acceptance by two thirds of the Members. The addition of a plurilateral agreement requires a consensus decision of the Ministerial Conference. If a limited number of Members wish to make new rules part of WTO law without amending the WTO Agreement or negotiating a consensus decision of the Ministerial Conference, they could incorporate those rules into a non-binding document and then add an entry into their goods or services schedules committing themselves to observe the rules set out in that document (the "reference rules"). So far, this has only been done in the field of services; however, it could also be done in the field of goods. The reference rules, by virtue of their incorporation into GATS or GATT schedules, would automatically be part of the GATS or the GATT and, consequently, enforceable through the WTO dispute settlement procedures.

124. If a Member wishes to withdraw from the reference rules, it would have to follow the procedures for the modification of concessions or specific commitments in Article XXVIII of the GATT and Article XXI of the GATS, or any procedures set out in the reference rules themselves. Members would therefore have to either offer compensation or bear the consequences of compensatory withdrawals of concessions or commitments made by its trading partners. This would ensure the maintenance of a balance of rights and obligations after the withdrawal. As a consequence, Members could exchange a commitment to observe the reference rules against other concessions or commitments set out in their schedules. This contrasts with the withdrawal from a plurilateral trade agreement. In that case, no compensation is due and reciprocity therefore has to be found within the range of issues covered by the agreement.

125. WTO law is based on the principles that: (i) no Member is obliged to accept a new obligation without its consent; and (ii) any economic benefits resulting from obligations assumed by a Member must be extended to all other Members on a most-favoured-nation basis, whether or not they have assumed reciprocal commitments. Both principles ensure stability and predictability in multilateral trade relations. At the same time, they create formidable obstacles to the adaptation of WTO law to new circumstances, goals and interests.

If no Member can be obliged to accept a new obligation without its consent and a Member that has assumed a new obligation must extend the resulting economic benefits to all other Members regardless of whether they offer reciprocal benefits, then Members can pick and choose the obligations they wish to assume and may free-ride on the obligations of other Members.

126. Participants in the Uruguay Round addressed these problems by replacing the GATT 1947 with the WTO Agreement. The replacement of the WTO Agreement by a new agreement incorporating the existing agreements and the changes agreed to in the Doha Round would also avoid these problems, but would create others. The agreement that establishes the WTO as an institution and the multilateral trade agreements administered by the WTO constitute legally a single treaty, the WTO Agreement. The replacement of the WTO Agreement would, therefore, involve not just a change in the trade policy rules contained in the multilateral trade agreements, but also the replacement of the WTO by a new international organisation. The transfer of the personnel, assets and rights of the existing WTO to a new WTO would need to be approved by the existing WTO and accepted by the new WTO. All officers of the WTO – the Director-General, the members of the Appellate Body, etc. – would need to be re-elected and the staff rehired. While such a transfer could theoretically be decided by a simple majority, the stability of the institutional framework for multilateral trade relations would be at risk if this were done without broad support.

127. The difficulties of replacing the trade policy rules in the multilateral trade agreements could be reduced significantly if the WTO Agreement were divided into two separate treaties: one containing the agreement that establishes the WTO as an international organisation; and the other containing the multilateral trade agreements it administers. The replacement of the multilateral trade agreements could then be achieved without replacing the WTO as an institution, and WTO law could be kept up to date much more easily. Such an approach would emulate the legal structure of other international organisations administering treaties.¹⁴⁶

128. In the absence of such fundamental changes, the currently-accessible, albeit less effective, means to ensure a prompt incorporation of the results of the Doha Round into WTO law must be considered. The inevitable gap between the end of the Round and the formal acceptance of its results by all Members could possibly be bridged with a plurilateral agreement obliging the Members that have accepted it to implement the results pending the

¹⁴⁶ The Convention Establishing the World Intellectual Property Organisation is legally separate from the 23 treaties that it administers. Similarly, the Convention of the International Labour Organisation and the conventions negotiated within its framework are legally distinct. These organisations therefore need not be replaced if a treaty administered by them is to be replaced.

formal acceptance by all. If the Members that have accepted the results of the Round were accorded a waiver permitting them to deny the benefits of the Round to the Members that have not accepted its results after a certain date, all Members would have an incentive to speed up their domestic ratification procedures. However, this approach would require consensus decisions of the Ministerial Conference and the DSB, and would, therefore, be available only if no Member objects.