

The Administration of the Vocabulary of International Trade: The Adaptation of WTO Schedules to Changes in the Harmonized System

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A. The Object and Objectives of the Case Study

A common language is indispensable for reaching and maintaining understanding in all inter-subject relations, including international relations. One element of today's common language in the field of international trade in goods is the Harmonized Commodity Description and Coding System (the Harmonized System/HS) which is maintained by the World Customs Organization (WCO). The HS provides for a common vocabulary by classifying all traded goods according to a nomenclature. This common vocabulary facilitates, and avoids misunderstandings in, communications about products. It thus reduces transaction costs and consequently is of eminent economic importance for today's globalized trade relations. Take for example WTO tariff negotiations with respect to chocolate: While one party might assume that the product commonly referred to as white chocolate is included in the negotiations on chocolate, the other trading partner might assume that it is excluded for the reason that it does not contain cocoa and thus does not qualify as chocolate. Reference during the negotiations to specific positions of the HS nomenclature reduces the probability of such misunderstandings. If during the exemplary tariff negotiations parties would refer to the HS heading Chocolate no party could later claim that the negotiated tariff should also apply to white chocolate since the HS classifies the product which is commonly referred to as white chocolate under the heading Sugar Confectionary (and there under a specific sub-position) whereas chocolate containing cocoa is classified under the heading Chocolate.¹ The vocabulary of the Harmonized System

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¹ To be sure, even when the HS is used, classification of products will frequently be contentious. For example, the dispute between the European Communities on one side and Brazil and Thailand on the other concerning the classification of salted frozen boneless chicken cuts. See *EC – Chicken Classification*, WT/DS269, 286/R (panel report), WT/DS269, 286/AB/R (Appellate Body Report).

is a point of reference for many legal norms which relate to international trade in goods – in my example the legal obligation to comply with the negotiated tariff concession (Art. II GATT) and not to discriminate against like products (Art. I, III GATT). While the HS provides the vocabulary, these norms provide the grammar of a common language of international trade.²

The object of this study is the adaptation of World Trade Organization (WTO) schedules of concessions – in which Members' tariff commitments with respect to certain goods are laid down and which are negotiated and structured on the basis of the HS – to changes of the Harmonized System.³ Two characteristics of the adaptation of WTO goods schedules to HS changes motivate this study. First, the administration of the HS in the WCO and its reception in the WTO is an instance of intensive cross-linkage between the WTO and another international institution, the WCO; and second, the adaptation of schedules in the WTO is a rare occasion of effective administration within the WTO.

While the Harmonized System is administered within the WCO, i.e. regularly adapted to changes in trade and needs of its users, interpreted and explained, the adaptation of WTO schedules to HS changes, which can also be characterized as administration, takes place within the WTO. This paper attempts to clarify the subject-matter linkage which exists due to this division of labor, where the WCO administers the vocabulary to which the rules of the WTO relate, as well as the (limited) institutional linkages. Such clarification provides a starting point for a legal conceptualization of inter-institutional linkages. Inter-institutional linkages are often neglected in legal research on international institutions which frequently focuses on one institution, its organs and external “vertical” relations with its Members.⁴ However, functional differentiation and sectoral fragmentation of

² The metaphor of the HS as a vocabulary therefore seems more fitting than that of the HS as the language of international trade which is often used. For example, the WCO referring to the HS as a universal economic language. See http://www.wcoomd.org/home_wco_topics_hsoverviewboxes_overview_hsharmonizedsystem.htm; PETROS C. MAVROIDIS, TRADE IN GOODS. THE GATT AND THE OTHER AGREEMENTS REGULATING TRADE IN GOODS 73 (2007) (depicting the HS as supplying the common language to describe goods).

³ In the following when I speak of schedules of concessions I mean schedules of concessions with respect to goods which are annexed to the General Agreement on Tariffs and Trade (GATT) and according to Art. II:7 GATT form an integral part of the GATT.

⁴ For a study that aims at a conceptualization of horizontal cross-linkages, see Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INTERNATIONAL ORGANIZATION 277-309 (2004). Cross-linkages between international dispute settlement organs are relatively well-studied and there have been several attempts to conceptualize them in legal terms. See e.g. JASPER FINKE, DIE PARALLELITÄT INTERNATIONALER STREITBEILEGUNGSMECHANISMEN. UNTERSUCHUNG DER AUS DER STÄRKUNG DER INTERNATIONALEN GERICHTSBARKEIT RESULTIERENDEN KONFLIKTE (2004); HEIKO SAUER, JURISDIKTIONSKONFLIKTE IN MEHREBENENSYSTEMEN (2008).

international law heighten the importance of inter-institutional relations and consequently the need to conceptualize them.⁵ With respect to the linkages between the WTO and the WCO such conceptualization should address, *i.a.*, the relationship between the settlement of classification disputes within the WCO and the WTO.⁶

The focus of the study is on the schedule adaptation process within the WTO organs. It provides insights into an area in which the WTO engages in effective administration. With effective administration I mean activities (mainly) within the lower specialized bodies of the WTO with a strong involvement of the organization's bureaucracy – the secretariat – which are conducted in pursuit of the organization's tasks and produce external effects.⁷ While administration in the WTO frequently results in non-binding instruments⁸ or consists of assistance and support to Members,⁹ the adaptation of schedules is an exception in that it results in a relatively large amount of binding secondary law, namely decisions on procedures and waiver decisions, and eventually the certification of adapted schedules. The adaptation of schedules is characterized on the one hand by a widely informal managerial approach – albeit based on formal procedures – which aims at the efficient transposition of HS changes into WTO Members' schedules and on the other hand the objective to maintain formal legality in the external relations between WTO Members – an objective which is achieved by the granting of waivers. A further feature is the key part which the secretariat and chairpersons play in the adaptation process. These findings contradict the generalizing depictions of the WTO as a purely member-driven organization with a weak

⁵ Moreover institutional linkage seems to be a more plausible and also a more desirable solution to the perceived dangers of fragmentation than, for example, a hierarchy of norms which does not leave room for politics. For an approach that stresses inter-institutional cooperation, see Gunther Teubner & Andreas Fischer-Lescano, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 999-1046 (2004).

⁶ This could provide a principled answer to the question whether in the *EC – Chicken Classification* the WTO panel or rather the HS Committee of the WCO should have decided the classification question. See (note 1).

⁷ This could also be characterized as the exercise of public authority. See Armin von Bogdandy, Philipp Dann and Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, in this issue (employing a wide definition). Administration as used and defined here, however, is a narrower term since it does not encompass acts taken by the highest political organs that are preceded by processes of inter-state diplomatic bargaining.

⁸ For example the recent draft guidelines to further the practical implementation of Art. 6 of the SPS which explicitly provide that they shall “not add to nor detract from the existing rights and obligations of Members under [...] any [...] WTO Agreement” G/SPS/W/218, para. 2 (25 February 2008); on the activities of the FTSC see Joseph Windsor, in this issue.

⁹ In the form of workshops organized by the secretariat for national administrators.

secretariat and contribute to a more differentiated picture of the activities taking place routinely within the organization and outside the multilateral negotiation rounds.¹⁰

My aim is to present the institutional law and practice relating to the adaptation of schedules so as to contribute to a more differentiated picture of the law-making and administrative processes within the WTO. The criteria according to which I have chosen to structure this study are, firstly, the legal framework constituted by the primary law of the WTO Agreement, including the General Agreement on Tariffs and Trade (GATT) 1994, secondary procedural law laid down in formal legal decisions, as well as other guidelines or generally applied rules even though not formally adopted and, finally, institutional practices of a general nature. I opt for such a broad framework of analysis because a legal analysis restricted to positive legal requirements derived from treaty law and formal sources of secondary law loses sight of important practices and processes which impact on the shape and application of the procedures in question.¹¹ Secondly, the role of bodies and organs of the WTO as well as the WCO in the process of schedule adaptation is observed and in particular the impact of the WTO Secretariat and committee chairpersons on the process. Thirdly, attention is paid to compliance with the procedures and the effectiveness of the process in achieving the objective of schedule adaptation, as well as, where possible, the underlying interest structures – the politics of the process. Attention to actors and interest structures is important in order to understand the process and to identify potential legitimacy deficits and seems more meaningful than the otherwise often-adopted distinction between political and technical matters and related differentiations with respect to legitimacy requirements. This study thus constitutes a doctrinal as well as a hermeneutical exercise. As a caveat it has to be noted that my observations on processes, practices, effects and motivations are predominately based on the publicly available minutes of the formal meetings of the relevant WTO bodies and thus limited by the information contained therein and the conclusions and interpretations this information permits.

¹⁰ For other works which stress the role of secretariat or chairpersons, see Joseph H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats*, 35 JOURNAL OF WORLD TRADE 191 (2001). On the secretariat's role in dispute settlement, see Gregory Shaffer, *The Role of the Director-General and Secretariat: Chapter IX of the Sutherland Report*, 4 WORLD TRADE REVIEW 429 (2005); John S. Odell, *Chairing a WTO Negotiation*, 8 JOURNAL OF INTERNATIONAL ECONOMIC LAW 425 (2005).

¹¹ On the different ways of modification and development of law under the GATT 1947 and the important role of institutional practices in this respect, see WOLFGANG BENEDEK, *DIE RECHTSORDNUNG DES GATT AUS VÖLKERRECHTLICHER SICHT* 115-130 (1990).

B. The Harmonized System

I. The Harmonized System, Its Objectives and Uses

The Harmonized System consists of a Nomenclature, Section, Chapter and Subheading Notes as well as General Rules for the interpretation of the Harmonized System.¹² The nomenclature is divided into 21 sections, 99 chapters, 1241 headings, and more than 5000 sub-positions, resulting in a 6 digit classification system. Each traded product can be subsumed under one six-digit position; it cannot, however, come under more than one position. Take again white chocolate: this product falls under Section IV: Prepared Foodstuffs; Beverage, Spirits and Vinegar; Tobacco and manufactured Tobacco Substitutes, Chapter 17: Sugars and sugar confectionary, Heading 17.04: Sugar confectionary (including white chocolate), not containing cocoa and sub-position 1704.90: Other.¹³

The Harmonized System is annexed to and forms an integral part of the International Convention on the Harmonized Commodity Description and Coding System (HS Convention) which was established under the auspices of the Customs Cooperation Council – which is now the World Customs Organization (WCO) – and replaces the Brussels Convention on Nomenclature for the Classification of Goods in Customs Tariffs of 1950.¹⁴ The HS Convention entered into force on January 1, 1988. As of March 2008, 133 countries and customs/economic unions were parties to the convention. These are obliged to use the HS nomenclature for their customs tariff and statistical nomenclatures. They are allowed to introduce further subdivisions beyond the 6 digit level of the HS (Art. 3:3 HS Convention) and most industrialized countries do so.¹⁵ E.g. the Combined Nomenclature of the European Community extends the 6 digit HS code by two further digits thus creating a further level of sub-positions.¹⁶ All in all more than 200 countries and

¹² Art. 1(a) International Convention on the Harmonized Commodity Description and Coding System (HS Convention). The convention and nomenclature can be found on the WCO's website, at: http://www.wcoomd.org/home_wco_topics_hsoverviewboxes.htm.

¹³ The classification under the residual position "Other" results from the fact that the only other sub-position is titled "Chewing gum, whether or not sugar-coated."

¹⁴ The Brussels Convention had replaced the so-called Geneva Nomenclature of 1937.

¹⁵ If a country wants to impose a specific customs duty on white chocolate, which according to the HS falls under the residual position "Other," it needs to create a further (seventh) level of differentiation in order to separate white chocolate from the other products falling under this residual position.

¹⁶ The Combined nomenclature (a tariff and statistics nomenclature) of the European Community is established by Regulation 2658/87.

economies use the HS nomenclature as the basis for their customs tariffs and trade statistics.¹⁷

The HS is a multipurpose tool which is used not only by the contracting parties to the HS Convention and other states, but also private entities and international institutions. The main objective of the HS Convention is designated in its preamble as the facilitation of international trade;¹⁸ it is also used for purposes unrelated to trade such as the imposition of internal taxes, economic research and analysis,¹⁹ or the monitoring of controlled goods, such as e.g. endangered species, hazardous waste or ozone-depleting substances.²⁰

While the HS is relevant for various international institutions,²¹ not only in the economic sector, its relevance is greatest within the WTO which shares with the WCO the objective of facilitation of international trade.²² Several WTO Agreements, such as the Agricultural Agreement and the Information Technology Agreement refer for their product coverage to the Harmonized System, the draft rules of non-preferential origin have been based on the HS,²³ and most importantly WTO schedules of concessions for goods are based on the HS nomenclature. Today practically all WTO Members base their national tariffs, i.e. their structured lists of product descriptions²⁴ according to which customs duties are imposed and administered, on the HS nomenclature and have schedules which are based on the

¹⁷ See http://www.wcoomd.org/home_wco_topics_hsoverviewboxes_hsharmonizedsystem.htm. WCO Members are not obliged to become parties to the HS Convention and at the same time parties to the Convention do not necessarily have to be Members of the WCO (Art. 11(c) HS Convention).

¹⁸ HS Convention preamble, first recital.

¹⁹ See http://www.wcoomd.org/home_wco_topics_hsoverviewboxes_hsharmonizedsystem.htm.

²⁰ Monitoring is facilitated when the controlled items can be identified by reference to a HS position.

²¹ Examples are the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Basel Convention, The United Nations Food and Agricultural Organization, or the Montreal Protocol. The trade statistical systems of the UN (e.g. the Standard International Trade Classification (SITC) and Central Product Classification (CPC)) are also based on the HS nomenclature.

²² According to the WTO preamble expansion of trade in goods is one of the objectives of the WTO.

²³ With respect to rules of origin it is interesting to note that the Technical Committee on Rules of Origin which carries out the main technical work of harmonizing non-preferential rules of origin was established by the WTO and is a WTO body, but operates under the auspices of the WCO with the WCO Council exercising supervision over it (Art. 4:2 Agreement on Rules of Origin).

²⁴ PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 379 (2005).

HS even though not all WTO Members are parties to the HS Convention.²⁵ The tariff data available on the WTO website now is also presented in a standardized form by using the HS nomenclature.²⁶

As has already been illustrated, the Harmonized System facilitates the negotiation of tariff concessions. It reduces transaction costs by enabling negotiators to refer to a HS position for a specific product line under negotiation with a common meaning ascribed to it by the HS. During the Uruguay Round tariff negotiations were based on the Harmonized System nomenclature,²⁷ and on August 1, 2004 WTO Members agreed to finalize the results of the currently on-going non-agricultural market access negotiations of the Doha Round in the HS 2002 nomenclature.²⁸

After agreement has been reached on concessions, the HS, including the notes and general rules of interpretation, as well as explanatory notes and WCO classification decisions of the HS Committee help WTO Members to interpret and determine the content of concessions and to monitor compliance with the obligation in Art. II GATT to grant the negotiated concessions.²⁹ The HS is also relevant for the interpretation of other WTO obligations relating to goods; most importantly the HS classification of a product can be one factor in the determination of the “likeness” of products, a prerequisite for obligations of non-discrimination in the form of most-favored nation treatment (Art. I GATT) or national treatment (Art. III GATT).³⁰

II. Administration of the Harmonized System of Commodity Coding and Description in the WCO

For it to remain viable as a common vocabulary the HS has to be regularly adapted to changes in reality, such as the development of new products and changing trade

²⁵ As of 31 March 2006, 78 WTO Members (counting the EC-25 as one) were contracting parties to the HS Convention, http://www.wto.org/English/thewto_e/coher_e/wto_wco_e.htm.

²⁶ See http://www.wto.org/english/news_e/news07_e/tariff_sept07_e.htm.

²⁷ VAN DEN BOSSCHE (note 24), at 401, 419.

²⁸ WT/L/579, Annex B, paragraph 5. That tariff negotiations are conducted on the basis of the HS does not mean that WTO Members are limited by the product differentiations which the HS provides. They may further differentiate and negotiate tariff cuts with respect to only a subgroup of a product group subsumed under a subposition of the HS.

²⁹ The relevance of the HS for the interpretation of concessions has been confirmed by the Appellate Body in *EC – Computer Equipment*, WT/DS62, 67, 68/AB/R, para. 89 and *EC – Chicken Classification* (note 1), para. 199.

³⁰ Appellate Body Report in *Japan – Alcoholic Beverages* WT/DS 8, 10, 11/AB/R, at 21, 22.

patterns, as well as to changes in the needs of its users.³¹ To ensure its commonality the HS should be uniformly interpreted. These two demands – for continuous adaptation as well as uniform interpretation – explain certain institutional features of the HS Convention, in particular the entrustment of specialized committees with the development and interpretation of the Harmonized System, as well as the facilitated amendment procedure.

Amendments to the HS Convention are prepared by the HS Committee, which is established under the HS Convention and which is composed of one representative of each contracting party (Art. 6:1 HS Convention), and the Review Sub-Committee and the HS Working Party which have been established by the HS Committee according to Art. 6:8 HS Convention. The HS is revised – and the HS Convention amended accordingly – every 4-6 years.³² Apart from changes in technology or patterns of international trade (Art. 7:1 (a) HS Convention), societal and environmental concerns with respect to certain goods are also reasons for HS changes.³³ Proposals from contracting parties to the convention as well as international institutions³⁴ are first considered by the Review Sub-Committee. Proposals which have been approved by the Review Sub-Committee are submitted to the HS Committee³⁵ which aggregates these proposals and at the end of the review period makes a proposal for an amendment (Art. 7 HS Convention).³⁶

³¹ The HS Convention recognizes in its preamble the “importance of ensuring that the Harmonized System is kept up to date in the light of changes in technology or in patterns of international trade,” recital 11.

³² In 1988 the WCO Council endorsed a conclusion by the HS Committee to review the HS at regular intervals of 3 to 4 years. So far revisions to the HS have entered into force in 1992, 1996, 2002 and 2007, they are referred to as the HS1992, HS1996, HS2002 and HS 2007 changes.

³³ The 2007 HS amendments included changes due to technological progress, changes in trade patterns and amendments for social and environmental reasons. The latter entailed *i.a.* the inclusion of new subheadings to facilitate the monitoring and control of certain species of fish (FAO), pesticides (Rotterdam Convention) or ozone-depleting substances (Montreal Protocol). The HS 2007 changes further take into account the structure of other international agreements, *e.g.* the WTO’s Information Technology Agreement *See* for a summary of the HS2007 amendments the report of the representative of the WCO to the Committee on Market Access at its meeting on 30 March 2005, G/MA/M/39, paras. 4.9-4.19.

³⁴ Proposals by national governments are often prompted by private sector initiatives that are addressed to the customs or trade ministry and are considered by all agencies which have an interest in the matter; as an example of an international institution proposing a HS change, *see* Decision 13.37 of the Conference of the Parties of CITES according to which the secretariat shall “liaise with the World Customs Organization to promote the establishment and use of specific headings within the standard classifications of the Harmonized System for tortoises and freshwater turtles and for products thereof.”

³⁵ Rule 2(b) Rules of Procedure of the Review Sub-Committee.

³⁶ The amendment proposals are drafted by the HS Working Party.

Decisions on amendment proposals by the HS Committee have to be taken by a two-thirds majority.³⁷ An amendment proposal which is made by the HS Committee is examined by the WCO Council³⁸ (Art. 8:1 HS Convention). If no Council member who is a contracting party to the HS Convention requests that a proposal be referred back to the HS Committee for re-consideration, the Council recommends the amendment to the contracting parties. An amendment is deemed to be accepted 6 months after its notification by the Secretary General unless a contracting party has objected to a proposed change (Art. 16:3 HS Convention). In case of an objection the respective HS change does not enter into force for any contracting party. An amendment to the HS Convention enters into force on January 1 of the second or third year after notification depending on whether the amendment has been notified before or after April 1 (Art. 16:4 HS Convention).

The interpretation of the HS is also entrusted to the HS Committee. After acceptance and before entry into force of HS changes the HS Committee establishes and amends explanatory notes to the HS, aided by the HS Working Party, and approves correlation tables (between the former and the amended HS nomenclature) established by the WCO Secretariat.³⁹ These documents are not legally binding but important aids for the exercise of implementing HS changes.⁴⁰ To further ensure the uniform interpretation of the HS nomenclature, the HS Convention provides for the settlement of classification disputes by the HS Committee (Art. 10 HS Convention). To settle disputes, the HS Committee is entitled to make recommendations which the parties to a dispute may in advance agree to accept as binding (Art. 10:4 HS Convention). These recommendations can be adopted by a simple majority.⁴¹

The entrustment of specialized committees with the negotiation of amendments and the interpretation of the HS, the possibility of majority voting in these committees, the facilitated amendment procedure through presumption of

³⁷ Art. 6 HS Convention and Rule 19 Rules of Procedure of the HS Committee.

³⁸ Members of the Council are the contracting parties to the Convention establishing a Customs Cooperation Council. These are not necessarily also all parties to the HS Convention.

³⁹ Up to the HS96 changes correlation tables were prepared by the CCC Secretariat without involvement of the HS Committee.

⁴⁰ Explanatory notes, classification opinions and other advice on interpretation is presumed to be accepted by the WCO Council unless a contracting party to the HS Convention requests referral of the matter to the Council within a specified time period (Art. 8:2 HS Convention). Some contracting parties have put the explanatory notes into law, see statement of the representative of the WCO to the Committee on Market Access at its meeting on 30 March 2005 (note 33), para. 4.36.

⁴¹ Art. 6:4 HS Convention and Rule 19 Rules of Procedure of the HS Committee.

acceptance of HS changes if no objection is voiced and the lack of a ratification requirement are meant to provide for expertise and efficacy and justify the characterization of the maintenance of the HS as an administrative activity within the WCO.

III. The Politics of HS Administration

Even though the maintenance of the HS at first sight appears as a highly technical matter, and even though the HS constitutes a public good⁴² and its administration lies in the common interest of the contracting parties to the HS Convention, it may give rise to conflicts of interests between its users. Such conflicts concern first the question of which terms shall constitute the vocabulary of international trade and second the denomination of goods according to the established terms.

Important economic, but also social or environmental interests may be attached to the creation or deletion of a subheading of the Harmonized System nomenclature which might not be shared by all users or even opposed by some. E.g. certain users might have an interest in the creation of a sub-heading for a certain product because they want to differentiate their domestic tax system⁴³ with respect to this product, e.g. impose an environmental tax on it, or because they wish to restrict trade with respect to it or impose a customs duty. To be sure, if no specific sub-heading is created this does not necessarily frustrate the realization of these interests, since the HS nomenclature allows for further individual differentiation beyond its 6 digit-level; however, such differentiation is costly.

While the aforesaid conflicts of interest relate to the abstract decision as to which product groups receive their own heading, i.e. which terms make up the Harmonized System vocabulary, further conflicts of interests relate to the concrete question of how to classify a certain commodity, i.e. what that product is called according to the agreed-upon vocabulary of the HS. This question arose e.g. in the WTO dispute between the European Communities on the one side and Brazil and Thailand on the other with respect to salted frozen boneless chicken cuts which the EC subsumed under one heading of the HS nomenclature, Brazil and Thailand under another. The involved interests were economic in nature. A higher tariff applied to the heading favored by the EC than to the heading favored by the opponents. This dispute shows that, while uniform interpretation and classification

⁴² The HS nomenclature constitutes a public good in the economic meaning of the term since it is non-excludable and its consumption is non-rivalrous.

⁴³ In some countries tax laws make reference to HS classification of products.

is essential and for this reason should fall within the competence of the WCO, it should not be treated as a merely technical enterprise.⁴⁴

C. The Adaptation of WTO Schedules to the Harmonized System

I. *The Interrelationship of Legal Obligations under the HS Convention, the GATT and Municipal Constitutions*

First it should be noted that the HS Convention and the GATT, are legally unrelated. The HS Convention clarifies that it does not impose any obligations on the contracting parties in relation to the rates of custom duties they impose (Art. 9 HS Convention) and the GATT does not impose on WTO Members an obligation to use a certain tariff nomenclature.⁴⁵

However, the obligations under the HS Convention and the GATT are factually interrelated. The contracting parties to the HS Convention are obliged to implement amendments to the Convention by the time these amendments enter into force.⁴⁶ Most contracting parties, mandated by municipal constitutional law, do so by adopting implementing legislation.⁴⁷ The transposition of HS changes into national tariffs in turn affects WTO Members' obligations under WTO law. The implementation of a HS change may – as will be seen – affect the value of a tariff concession. In any case however the disparity between the national tariff and the schedule, which results from the domestic implementation of HS changes, affects the possibility to monitor whether a WTO Member is in compliance with its

⁴⁴ In *EC – Chicken Classification* (note 1) the AB upheld the panel's finding that the products in question are covered by the EC's tariff commitment of heading 02.10 of its schedule which corresponds to heading 02.10 of the HS nomenclature. The WCO had taken the position that the settlement procedures provided for in the HS Convention should have been followed by the parties to the dispute before the panel took a decision on a violation of WTO law, in this case Art. II GATT (see panel report para. 7.53). Subsequent to the adoption of the AB report, the HS Committee adopted a classification decision with the same result (classification decision No 1, 40th Session, October 2007, available at: http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Harmonized%20System/HS_COMM_Classifications_Decisions/CLHS40Eng.pdf). On this dispute and the question where it should have been adjudicated, see Hendrik Horn & Robert L. Howse, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, 7 *WORLD TRADE REVIEW* 9, 32 *et seq.* (2008).

⁴⁵ GATT panel report in *Spain – Unroasted Coffee*, BISD 28S/102, para 4.4.

⁴⁶ A Developing Country contracting party may, according to Art. 4(1) HS convention delay the application of all or some subheadings. Only 45 and 58 % of contracting parties were able to implement the first and second set of amendments on time, http://www.wcoomd.org/home_wco_topics_hsoverviewboxes_amendinghs.htm.

⁴⁷ According to Art. 12 regulation 2658/87 the EU Commission publishes annually the complete version of the combined tariff together with the duty rates in form of a regulation.

obligation not to impose higher tariff rates on imported products than those laid down in its respective schedule (Art. II GATT).

Thus in order to comply with their international obligations under the HS Convention, the WTO and municipal constitutional law requirements, states and customs unions, including the EC, ideally first adapt their WTO schedules to HS changes and subsequently, until these changes become binding through the entry into force of the respective amendments to the HS Convention, incorporate them into their national tariffs in compliance with municipal constitutional law. As will be seen in the following, this sequence is mostly not achieved in practice and WTO schedules are not adapted before HS changes are implemented domestically thus necessitating the suspension of Art. II GATT through waivers to maintain legality.

II. The Impact of HS Changes on WTO Schedules

The incorporation of HS changes into WTO schedules in all cases results in formal changes to the schedules, but may also result in substantive changes which affect the value of concessions.⁴⁸ The value of tariff concessions may be substantially affected by HS changes when two HS positions are merged into one. This is the case when a WTO Member had adopted different bound rates with respect to the two formerly distinct products groups, or a bound rate with respect to one, but not the other.⁴⁹ A change of the scope of the tariff concession in such a case can be avoided when a sub-heading is created beyond the six-digit level of the Harmonized System. However, the creation of further subheadings is sometimes not feasible since it would result in undue complexity. In such a case different methods have been identified how the affected concessions could nonetheless be maintained or at least their value not materially undermined. Thus, Members could apply the lowest rate of any previous tariff line to the merged new tariff line, they could apply the tariff rate which was previously applied to the tariff line with the majority of trade, the trade weighted average rate for the new line or the arithmetic average of the previous rates in case the trade weighted average cannot be calculated due to insufficient trade data.⁵⁰

⁴⁸ Concessions which are included in the schedules and which may be affected by adaptation to HS changes are not only tariff concessions. However the impact of HS changes is greatest with respect to tariff concessions which shall be the focus of the following observations.

⁴⁹ For a more detailed analysis of how the adoption or changes of the HS nomenclature can affect tariff concessions, see Dayong Yu, *the Harmonized System – Amendments and their Impact on WTO Members' Schedules*, WTO Staff Working Paper ERSD-2008-02, at 12, 13, available at: http://www.wto.org/english/res_e/reser_e/ersd200802_e.htm; see also WTO Procedures for Introduction of HS2002 Changes to Schedules of Concessions, WT/L/405, Attachment A, at 3, 4.

⁵⁰ L/5470/Rev. 1, Annex 1, para 4.2.

III. The Adaptation of WTO Schedules to HS Changes

1. The Need for Procedures for the Adaptation of WTO Schedules to HS Changes

With respect to the adaptation of schedules to Harmonized System changes, legal procedures serve three purposes. First, they formally legalize the resulting modifications of the treaty, second, they are intended to increase the efficiency of the adaptation exercise, and third, procedures serve Members to safeguard their benefits from other Members' concessions.

Schedules – according to Art. II:7 GATT – constitute an integral part of the GATT and as such, via Art. II:2 WTO Agreement, an integral part of the WTO Agreement. Consequently, each change to a Member's schedule – be it formal or substantive – is a change to the WTO Agreement and may not be made unilaterally by a WTO Member. Since the treaty amendment procedure foreseen in the GATT 1947 was deemed to be too complicated and time-consuming for mere formal changes to schedules which did not affect the value of concessions, the CONTRACTING PARTIES adopted a decision which foresees that such changes are formally adopted and enter into force through certification by the Director General.⁵¹ This is the so-called rectification procedure. Another procedure – set out in Art. XXVIII and a decision of the GATT Council⁵² – allows Members to withdraw and modify the value of concessions. In order to safeguard other Members' rights in these concessions it requires renegotiation between the Member that wishes to modify concessions and Members which have a right or special interest with respect to the concessions in question.⁵³ It further foresees that formal effect will be given to the negotiated changes of concessions in accordance with the rectification procedure through certification mentioned above.⁵⁴

These procedures enable Members to modify schedules outside the treaty amendment procedure and at the same time provide for safeguards against the impairment of benefits deriving from concessions. However, they are insufficient

⁵¹ Procedures for Modification and Rectification of Schedules of Tariff Concessions, Decision of 26 March 1980, L/4962, BISD 27S/25.

⁵² Decision of 10 November 1980, C/113 and Corr. 1, BISD 27S/26.

⁵³ Members which may participate in Art. XXVIII GATT renegotiations are Members which have an initial negotiation right or a principal supplying interest. On principal supplying interest see also the Understanding on the Interpretation of Art. XXVIII of the General Agreement on Tariffs and Trade 1994.

⁵⁴ BISD S 27, 26.

for the timely adaptation of a great number of schedules to the HS which partly results in mere formal changes to schedules, but also necessitates large-scale and complex renegotiations of concessions. Further procedures are required which enable a timely and effective adaptation of schedules and ensure that Members have the opportunity to maintain their benefits from concessions.

2. The Procedures Concerning the Introduction of the HS and the Incorporation of HS Changes into WTO Schedules

a) Aims and Content of the HS Procedures

The first procedures for the adaptation of schedules of concessions to the Harmonized System (HS procedures) were adopted under the GATT⁵⁵ and subsequently replaced by procedures for the adaptation of schedules to the HS changes of 1992, 1996, 2002 and 2007.⁵⁶ The HS procedures supplement the existing procedures on the rectification of schedules and modification of concessions. In the following I will mainly refer to the HS2007 procedures.

The HS procedures lay out the documentation which a WTO Member has to provide when it is introducing HS changes to its schedule and sets out procedures for review of this documentation. On the basis of this documentation and its review the other WTO Members can determine whether the HS changes affect the value of concessions in which they have a special interest and thus whether to enter into bilateral renegotiations of concessions on the basis of Art. XXVIII GATT. If renegotiation is not deemed necessary the rectification procedures will be followed.⁵⁷ The required documentation consists mainly of that part of the schedule which is affected by HS changes and which is transposed into the newest version of the HS nomenclature and the indication of any changes in the scope of concessions.⁵⁸ Three main principles can be identified which underlie the HS procedures. These are the guiding substantive principle of the maintenance of concessions, the principle of efficiency and the principle of transparency. In addition, the procedures are characterized by substantial technical assistance provided by the secretariat.

⁵⁵ L/5470/ Rev. 1.

⁵⁶ L/6905 (aimed at the incorporation of HS1992 changes into GATT schedules as well as any future changes and used for the incorporation of HS1992 and HS1996 changes); WT/L/407 and WT/L/605 (for HS2002 changes); WT/L/673 (for HS2007 changes).

⁵⁷ WT/L/673, para. 17.

⁵⁸ WT/L/673, para. 4 and Annex 1.

i) Maintenance of Concessions

If possible existing tariff bindings are to remain unchanged by the adaptation of schedules to the HS.⁵⁹ In order to achieve this aim, Members should – where necessary – create new sub-headings.⁶⁰ Only where this would result in undue complexity of national tariffs, concessions may be changed.⁶¹ If the value of concessions is negatively affected by the adaptation exercise and consequently bilateral renegotiations take place, then these shall aim at maintaining a general level of reciprocal and mutually advantageous concessions.⁶²

ii) Efficiency

The stated aim of the first HS procedures was the simplification and acceleration of the existing GATT procedures for modification of concessions.⁶³ Simplification and facilitation were also the main impetus of the revisions and amendments of the initial HS procedures over the course of the different amendments to the HS Convention and in the light of the experiences made with the transposition of HS changes.⁶⁴

Elements which shall improve efficiency are – apart from the clear documentation of changes made to the schedules – timelines for the submission of the required documentation and the review of draft files,⁶⁵ cooperation with the WCO,⁶⁶

⁵⁹ WT/L/673, para. 4.

⁶⁰ WT/L/673, Annex 2, para. 4.

⁶¹ Preferably according to the methods set out above to avoid a negative impact on the value of concessions, *see* WT/L/673, Annex 2, para. 5.

⁶² L/5470 Rev. 1 Annex 1, para 1.

⁶³ L/5470 Rev. 1 Annex 1, para 1.4.

⁶⁴ *See* WT/L/673, preamble, recital 6.

⁶⁵ Draft files are the electronic files with the transposed parts of the schedule (WT/L/673, Annex 1). For the timelines in the HS2007 procedure, *see* WT/L/673, paras. 2, 11, 12.

⁶⁶ This cooperation is implicit in the procedures which foresee that schedule transposition and preparation of concordance tables by the WTO Secretariat shall be based on information provided by the WCO, WT/L/673, para. 7.

assistance by the secretariat, and multilateral review.⁶⁷ The multilateral review of draft files with the adapted parts of schedules by the Committee on Market Access gives the committee members the opportunity to verify the changes made to schedules and to determine whether the value of concessions is affected and bilateral renegotiations under Art. XXVIII have to take place.⁶⁸

When there are no objections remaining at a multilateral review session regarding a schedule, the schedule can be considered approved by the committee and can subsequently be certified according to the rectification procedures.⁶⁹

iii) Transparency

Various requirements of the procedures are intended to ensure the transparency of the process of schedule transposition. These are first of all the distribution of the submitted documentation by the secretariat to all Members. Secondly, if Members opt for changing concessions instead of introducing new subheadings, they have to explain their reasons for doing so.⁷⁰ Thirdly, transparency has been enhanced by moving to multilateral review of the submitted documentation and draft files prepared by the secretariat. These reviews take place during informal sessions. However, the secretariat notifies Members of any modifications to the draft files.⁷¹ Members that are engaged in bilateral discussions and consultations, including renegotiations of concessions under Art. XXVIII GATT, should report on the status of these consultations at the multilateral sessions.⁷² The secretariat shall submit periodic reports on the status of its work on the transposition of developing country schedules (see below), the status of multilateral review, approval and certification.⁷³ The transparency requirements laid out in the HS procedures serve two purposes – on the one hand to increase the efficiency of the transposition exercise and on the other hand to enable Members to secure their rights in concessions granted by other Members.

⁶⁷ An attempt to increase efficiency through electronic verification of schedule changes by the secretariat foreseen in the HS 2002 procedures (WT/L/407) failed due to unforeseen difficulties the secretariat encountered with this exercise.

⁶⁸ WT/L/673, paras. 13-15.

⁶⁹ *Id.* at para. 16.

⁷⁰ L/6905, para. 1; WT/L/673, Annex 2, para. 5.

⁷¹ WT/L/673, paras. 13, 14.

⁷² WT/L/673, para. 15.

⁷³ WT/L/673, para. 17.

iv) Technical Assistance

While the first HS procedures merely stated that the secretariat would be available to assist governments in negotiations and consultations and that special account would be taken of the needs of developing countries consistent with Part IV of the GATT,⁷⁴ this assistance has increasingly been specified and substantiated. The first HS2002 procedures foresaw that developing countries could request technical assistance from the secretariat for the preparation of the relevant documentation⁷⁵ and the amended HS2002 procedures as well as the HS2007 procedures, which are based on the former, now entrust the secretariat with the preparation of the entire documentation for developing country Members.⁷⁶ Developing Country Members are expected to examine the draft files prepared by the secretariat and to either approve them or submit specific comments. When a developing country Member remains passive the draft file can nonetheless be submitted for multilateral review. It can, however, only be certified once the developing country in question has approved it.⁷⁷

This move to substantial technical assistance has been motivated – not by considerations of justice – but the objective of efficiency. The secretariat provides expertise as well as the necessary resources to prepare developing countries' documentation. Previously, developing countries had often either not submitted any documentation at all or incomplete documentation so that the transposition exercise could not be completed.

b) The Legal Instrument

With the establishment of the WTO the HS procedures are adopted by the General Council as legally binding decisions; under the GATT 1947 they were adopted by the GATT Council. These decisions can thus be classified as acts of secondary law.

⁷⁴ L/5470, Rev. 1, Annex 1, para. 4.5.

⁷⁵ WT/L/407, Attachment B, para. 8.

⁷⁶ WT/L/605, para. 1; WT/L/673, para. 2 (these HS 2007 procedures foresee that developing country Members may opt for preparing their draft files themselves). The secretariat prepares this documentation by incorporating HS changes into the schedules in the Consolidated Tariff Schedules Database, an electronic database which is not legally binding (WT/L/673, preamble, recital 5). Regarding the transposition the secretariat has to follow a methodology laid out in an annex to the procedures, WT/L/673, para. 5 and Annex 2.

⁷⁷ WT/L/673, paras. 8-12, 16.

Many of the requirements they lay down are mandatory.⁷⁸ As they concern the modification of treaty obligations namely the schedules, the procedures can further be characterized as external law of the organization which addresses the legal relationship between the individual Members.⁷⁹ With the entry into force of the WTO Agreement the legal decisions which adopted procedures under the GATT 1947 have become an integral part of the GATT 1994 and thus have been elevated to the status of primary law.⁸⁰

c) The Legal Framework for the Adoption of HS Procedures

The legal basis for the adoption of binding HS procedures within the WTO is unclear. While it is a noteworthy aspect of the increased legalization and formalization in the WTO as opposed to the GATT 1947 that the documents containing the WTO HS procedures are titled “decision” and explicitly refer to Articles IV:2 and IX:1 WTO Agreement,⁸¹ neither Art. IV:2 which establishes the General Council as a plenary organ of the WTO nor Art. IX:1 WTO Agreement which concerns decision-making by the WTO and codifies the consensus practice of the GATT provide for such a legal basis. It is doubtful whether a decision-making competence exists in the WTO which is similarly broad as the decision-making competence of the GATT CONTRACTING PARTIES under Art. XXV:1 GATT.⁸² Commonly it is assumed that the only general powers of the Ministerial Conference to take decisions which are legally binding for the Members in their external relations – apart from decisions on accession and amendment proposals – are those concerning the adoption of authoritative interpretations in Art. IX:2 (which is also a genuine competence of the General Council) and the granting of waivers in Art. IX:3 WTO Agreement.

⁷⁸ For the distinction between the form of a legally binding decision and the mandatory nature of its content, see BENEDEK (note 11), at 118.

⁷⁹ Benedek therefore seems to be mistaken when he groups the Procedures for negotiations under Art. XXVIII (note 52) with rules of procedures of the GATT organs and collectively qualifies them as internal rules. BENEDEK (note 11), at 122.

⁸⁰ See introductory note to the GATT 1994, para. 1 (the so-called incorporation clause).

⁸¹ WT/L/407; WT/L/605; WT/L/673. The legal documents of the GATT 1947 to which the HS procedures are annexed neither refer to a legal basis in the GATT nor are they entitled “decision,” L/5470/Rev.1, L/6905.

⁸² It is sometimes discussed whether Art. IV:1, cl. 2 WTO Agreement entails a general competence to take legally binding decisions. Pieter J. Kuijper, *Some Institutional Issues Presently Before the WTO*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 81, 82 (D. L. M. Kennedy & J. D. Southwick eds., 2002). On the broad decision-making power under Art. XXV:1 GATT, see Frieder Roessler, *The Competence of GATT*, 21 JOURNAL OF WORLD TRADE LAW 73 (1987).

The WTO HS procedures have – as the HS procedures under the GATT 1947 – been negotiated and drafted by a committee, namely the Committee on Market Access.⁸³ The Committee on Market Access was established by the General Council – acting on behalf of the Ministerial Conference – on the basis of Art. IV:7 WTO Agreement.⁸⁴ It is a subsidiary organ of the Council for Trade in Goods which is established by the WTO Agreement and operates under the general guidance of the General Council (Art. IV para. 5 WTO Agreement). Membership in the Council for Trade in Goods as well as the Committee on Market Access is open to representatives of all Members. According to its terms of reference laid down by the Council for Trade in Goods it is within the mandate of the Committee on Market Access “to ensure that GATT Schedules are kept up-to-date, and that modifications, including those resulting from changes in tariff nomenclature, are reflected.”⁸⁵ The rules of procedure of the Committee on Market Access and the Council for Trade in Goods foresee that matters on which no consensus can be reached are to be referred to the higher body – from the Committee on Market Access to the Council for Trade in Goods,⁸⁶ and from the Council for Trade in Goods to the General Council.⁸⁷

Further opportunities for oversight of the higher bodies with respect to the working of the lower bodies are created by the rules on reporting. According to these, the Committee on Market Access annually reports to the Council on Trade in Goods and the Council on Trade in Goods reports once a year to the General Council.⁸⁸ The reports shall be factual in nature.⁸⁹ It can however be observed that in general

⁸³ Under the GATT 1947 the HS procedures were established by the Committee on Tariff Concessions which had been created in 1980 by the GATT Council; Minutes of the Council meeting on 29 January 1980, C/M/138, at 10.

⁸⁴ WT/GC/M/1, 11, 12. The terms of reference of the committee are contained in document WT/L/47; the rules of procedure which the committee according to Art. IV:6 WTO Agreement may establish for itself, subject of approval of the Council for Trade in Goods, are based on the rules of procedure for meetings of the General Council and contained in G/L/148. It is interesting to note that it was stated by the chairman at the first committee meeting that until the committee had adopted its rules of procedure, it “would conduct its business on the basis of common sense and GATT practice” (G/MA/M/1, para. 1.1).

⁸⁵ WT/L/47, para. C.

⁸⁶ Rule 33 Rules of Procedure of the Committee on Market Access, G/L/148.

⁸⁷ Rule 33 Rules of Procedure of the Council for Trade in Goods, WT/L/79.

⁸⁸ Procedures for an Annual Overview of WTO Activities and for Reporting Under the WTO, adopted by the General Council on 15 November 1995, WT/L/105, para. 1.

⁸⁹ *Id.* at para. 1.

these reports are not discussed by the body to which the reporting obligation is owed.⁹⁰

d) The Process of Establishing the Procedures

While the process leading to the adoption of HS procedures is only to a limited extent framed by positive law, there are regularities and practices that are followed which can also be detected in other areas of work of the WTO – some of which merit a characterization as institutional practice or even customary law of the organization.⁹¹

In the WTO it is – as it was under the GATT 1947 -- common practice that consultations are taken outside formal meetings and are conducted in informal meetings of interested delegations. The HS procedures were established during informal consultations of delegations to the Committee on Market Access and the committee only returned to formal mode when the procedures were ready for approval.⁹² Before the procedures are approved by the committee, delegations submit the procedures for approval to the competent government agency in their capitals.⁹³ While there are public minutes of the formal committee meetings, there is no publicly accessible record of informal meetings. To ensure greater transparency a practice has developed in recent years that the chairperson of the committee gives a short summary of the outcomes of informal discussions at the next formal committee meeting.⁹⁴

The committee approves the draft procedures by consensus.⁹⁵ Subsequently they are referred to the Council for Trade in Goods⁹⁶ and from there to the General

⁹⁰ According to the Procedures the Council for Trade in Goods and the General Council “take note of reports.” *Id.* at para. 4.

⁹¹ On customary law under the GATT 1947 and its importance for the evolution of the GATT, *see* BENEDEK (note 11), at 126-130.

⁹² The proposal by the Chairman of the Committee on Market Access with respect to the HS2007 procedures, G/MA/M42, para. 4.4.

⁹³ G/MA/M/26, para. 3.1.

⁹⁴ G/MA/M/38, Add. 1, para. 1.2.

⁹⁵ While the first 2002 HS procedures and the 2007HS procedures were approved in formal meetings, the second procedures on the transposition of HS 2002 changes were only agreed upon by the committee during an informal meeting, *see* statement of the chairperson in the minutes of the meeting of 30 March 2005, G/MA/M/38, Add.1, para. 1.2. The first procedures for the introduction of HS2002 changes were approved by the committee *ad referendum*, G/MA/M/29, para. 2.18.

Council for adoption.⁹⁷ So far there has been no further discussion of the procedures within the Council for Trade in Goods or in the General Council which usually refer to the consensus in the lower body as the basis for their own consensus.

The secretariat – more precisely the Market Access Division of the secretariat – is strongly involved during this process. At a preliminary stage it provides the committee Members with information on the HS revisions drafted in the HS Committee as well as their implications for schedules.⁹⁸ The secretariat is further substantially involved before and during the consultation stage, makes suggestions for procedures, drafts the final decisions and gives legal opinions.⁹⁹

Leadership by the chairperson of the committee¹⁰⁰ often plays a crucial role in achieving compromise. In one instance the chairman has taken the initiative and proposed changes to the HS 2002 procedures when it turned out that the difficulties encountered with these procedures would not allow for a timely conclusion of the transposition of schedules.¹⁰¹

Cooperation between the WTO and the World Customs Organization regarding schedules, which is regulated only to a very limited extent by positive law – the WCO has been granted observer status in the Council for Trade in Goods and the Committee on Market Access¹⁰² – is a further important element in the process of establishing HS procedures. The secretariat maintains close contacts with the WCO by attending the meetings of the HS Committee. Representatives of the WCO

⁹⁶ The second HS2002 procedures were directly submitted by the committee to the General Council, G/MA/M/38, Add.1, para. 1.2.

⁹⁷ With respect to the first GATT HS procedures concerning the adoption by contracting parties of the HS nomenclature, there was some discussion in the Committee on Tariff Concessions on the procedure for adopting the procedures. It was finally proposed by the chairman that the committee adopt the procedures and that they would be transmitted to the Council for approval (TAR/M/10 paras. 3.1 *et seq.*).

⁹⁸ The information notes of the GATT Secretariat, TAR/W/22, TAR/W/81, TAR/W/89.

⁹⁹ G/MA/M/37, paras. 3.2-3.6 and G/MA/M/45, para. 6.4.

¹⁰⁰ The chairperson of the committee is appointed for one year after informal consultations among Members on the distribution of chairperson posts for the different WTO organs; on the practice of chairperson appointments *see*: http://www.wto.org/english/thewto_e/secret_e/current_chairs_e.htm.

¹⁰¹ G/MA/M/37, para. 3.2.

¹⁰² *See* http://www.wto.org/english/thewto_e/igo_obs_e.htm.

regularly attend formal committee meetings and report on and explain impending HS changes to facilitate the development of new HS procedures.¹⁰³

The informality of the process, its locus within a specialized committee and the engagement of the expertise of WTO Secretariat and WCO officials can be explained by the aims to achieve efficacy in the decision-making process and adequacy of the resulting procedures. Several safeguards have been established with a view to address the intransparency resulting from informality and to avoid that the procedures are only attributable to a small number of trade representatives actually participating in the informal negotiations and experts from the secretariat. All Members are notified when the issue of HS procedures is put on the agenda for a formal meeting and thus can -- if interested -- consult with their capitals and attend the formal meeting to raise any objections they may have. Due to the consensus requirement each Member has a veto power. The institutional links to the higher organs by the need for approval or through reporting often seem like mere formalities since the higher organ mostly relies on the consensus formed within the lower organ. However, they are more than that. Most importantly the referral chain from Committee on Market Access to Council for Trade in Goods and then General Council ensures that a Member has the opportunity to contest an alleged consensus within a lower body.

Lastly, it should be noted that the objective of efficacy and timely establishment of procedures has not always been achieved. The process has often been lengthy and the procedures have consequently been adopted so late that there was not sufficient time for schedule adaptation between their adoption and the entry into force of HS changes.¹⁰⁴ It seems, however, that with the 2007 HS procedures a procedure has been set up which works well in practice and therefore might become the template for a procedure which will be generally applicable to future HS changes.

3. The Implementation of the Procedures and their Informal Modification

The process of schedule adaptation is characterized by a great degree of flexibility in the application and modification of the formal HS procedures. With respect to compliance with the requirements set out in the procedures it is noteworthy that the committee -- instead of sanctioning non-compliance -- has opted for an approach that aims at assisting WTO Members in meeting the requirements.

¹⁰³ G/MA/M/39, paras. 4.9-4.19.

¹⁰⁴ The HS 2007 procedures have only been adopted by the General Council on 15 December 2006.

Just as with the process of establishing the HS procedures, secretariat and chairpersons are strongly involved in the implementation process.¹⁰⁵ Beyond rendering technical assistance to developing countries foreseen in the procedures, the secretariat serves as a distributor of information – e.g. it provides necessary information on the submission of documentation, the status of the transposition exercise and renegotiations¹⁰⁶ -- and a repository of expertise with which it assists Members, e.g. by holding workshops on the technicalities of the transposition exercise.¹⁰⁷

In the following sections the informality of the implementation process, as well as the managerial approach to compliance shall be illustrated by way of examples.

a) Informal Change of Rules – The Issue of General Reservations

The procedures on withdrawal and modification of concessions foresee that a Member which believes it has a principal supplying interest in a concession granted by another Member should submit a claim of interest within 90 days following the submission of documentation by that Member. It has to do so in order to secure its rights to participate in Art. XXVIII GATT renegotiations.¹⁰⁸ This time period was deemed to be too short for the submission of specific claims due to the amount of documentation to be reviewed by the contracting parties in the transposition exercise. Upon a proposal by the United States in 1986¹⁰⁹ the Committee on Tariff Concessions of the GATT 1947 accepted that it should suffice to make general reservations to the change of concessions within the 90 day period. No formal decision was taken on this matter¹¹⁰ – it was later stated that there had been “tacit

¹⁰⁵ One example of the crucial role of the chairpersons in the implementation process has been the engagement of one chairman in getting Members to approve their HS2002 schedules after multilateral review. To induce Members to give their approval – which is a prerequisite for the certification of schedules – this chairman wrote letters to and successfully initiated bilateral meetings with the respective delegations, G/MA/M/44, para. 3.1.; G/MA/M/45, paras. 6.5, 6.6.

¹⁰⁶ G/MA//TAR/2/Rev. 40 on the submission of HS96 documentation and G/MA/W/23/Rev. 4 on the situation of schedules.

¹⁰⁷ G/MA/M/38 Add. 1, para. 1.1.

¹⁰⁸ Procedures for Negotiations under Art. XXVIII, BISD 27S/26, 27, para. 4.

¹⁰⁹ TAR/W/61.

¹¹⁰ TAR/M/21, para. 2.9.

agreement" in the committee¹¹¹ -- and thus the formal procedures for renegotiation were informally amended.¹¹²

In the following years, and especially with respect to the 1996 HS changes, the practice of submitting general reservations created a problem. Because the general reservations often were not specified afterwards, neither bilateral re-negotiations of concessions nor the certification of the adapted schedules could take place. For lack of consensus on a solution in the Market Access Committee, the issue was taken by two delegations, namely Switzerland and Norway, outside the committee and to the Council for Trade in Goods. The solution found after a series of informal consultations once again was not a formal and legally binding decision, but a statement by the Chairman of the Council for Trade in Goods to the effect that all general reservations not specified within a certain time limit would be considered removed and that such reservations in future should as far as possible be specified.¹¹³ Upon request the chairman indicated that his statement, to which no objection was raised, was not a formal decision by the Council for Trade in Goods, but a statement of the chairman which would be entered into the minutes of the meeting.¹¹⁴ Nonetheless it was effective and in the following most of the general reservations were specified and the remaining ones considered as having been withdrawn.¹¹⁵

b) Complementary Practices and Compliance Management – The Issue of Missing or Incomplete Documentation

Another problem encountered in particular during the HS96 transposition exercise was deficient submission of the required documentation. As a consequence the committee in an informal meeting in the year 2000 – *i.e.* already four years after the HS96 changes entered into force for parties to the HS Convention – agreed that the secretariat should prepare an informal list on the status of the pending submissions

¹¹¹ C/M/205, P. 13 (*see* statements by the US and EC delegates).

¹¹² An initiative by a group of developing countries for a formal amendment extending the 90 days time limit did not achieve consensus. Since there was no consensus in the committee the matter was taken to the Council and the CONTRACTING PARTIES where consensus could also not be reached due to objections by some contracting parties that such an amendment might delay the transposition process too much. The CONTRACTING PARTIES consequently referred the matter back to the Committee on Tariff Concessions for an appropriate solution (SR.42/5, at 5).

¹¹³ G/C/M/23, para. 2.5.

¹¹⁴ G/C/M/23, para. 2.9.

¹¹⁵ G/MA/M/14, para. 3.2.

of HS96 documentation to enhance transparency.¹¹⁶ It was further agreed that the secretariat would continually update this list and that individual Members would have to explain themselves in informal meetings. In the following the secretariat regularly updated the list, informal review sessions were frequently held and this practice was generally welcomed as a successful acceleration of the adaptation of schedules to HS96 changes.¹¹⁷

IV. HS Waivers

1. The Function of Waivers in the Administration of Schedule Adaptation

Deficient compliance with the requirements of the HS procedures and the issue of general reservations discussed above, but also late adoption of procedures and capacity restraints of the secretariat have obstructed the timely adaptation of schedules to HS changes and their subsequent certification. While the committee attempts to address these challenges in a pragmatic and often informal way, there is at the same time a strong desire to maintain formal legality in the external relations between WTO Members. This is evidenced by the extensive practice of the General Council to grant so-called HS waivers to WTO Members who implement HS changes domestically without having adapted and certified schedules.¹¹⁸

The HS waiver suspends the application of the provisions of Art. II “to the extent necessary for the purpose of enabling [...] Members to implement domestically the recommended amendments to the Harmonized System nomenclature pending incorporation of such changes into their schedules of concessions.”¹¹⁹

2. The Legal Framework for the Adoption of Waivers

The legal basis for the adoption of HS waiver decisions is Art. IX:3 WTO Agreement which authorizes the Ministerial Conference to waive an obligation imposed on a Member by the WTO Agreement or any of the Multilateral Trade Agreements. Between the meetings of the Ministerial Conference, the General

¹¹⁶ G/M/MA/23, para. 2.5.

¹¹⁷ G/M//MA/26, para. 23. Due to capacity problems of the secretariat the informal meetings could not take place as often as intended, *see e.g.* G/M//MA/34, para. 3.2; G/M//MA/35, para. 2.2.

¹¹⁸ TAR/M/28, para. 2.1 referring to the function of HS waivers under the GATT; on WTO Members' need for a waiver when they are implementing HS2002 changes domestically, but have not yet completed the procedures to introduce these changes into their schedules, *see* G/MA/M/31, para. 4.1.

¹¹⁹ WT/L/675.

Council exercises the waiver competence (Art. IV:2 WTO Agreement). According to Art. IX:3 WTO Agreement a waiver decision can be adopted by three-fourths of the Members.¹²⁰ While under the GATT 1947 waiver decisions and decisions on accessions were routinely taken by vote, this practice has been abandoned with the establishment of the WTO and waivers are now exclusively taken by consensus.¹²¹ Requests for waivers concerning the GATT – according to Art. IX:3 (b) WTO Agreement – shall be submitted to the Council for Trade in Goods which shall consider such a request within a time period that shall not exceed 90 days.

The only substantive requirement for waivers set out in Art. IX:3 WTO Agreement and the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994 (“the Understanding”) is the existence of exceptional circumstances. This requirement has however never been specified and in the past has not provided for a substantive limitation of the waiver power. According to Art. IX:4 WTO Agreement waiver decisions have to have a termination date, shall be reviewed annually by the Ministerial Conference and can be subject to conditions.¹²²

3. *Qualification of the Waiver Decision*

Since a waiver decision changes the pre-existing legal situation by freeing the addressee from having to comply with the waived obligation it has to be characterized as a legally binding decision.¹²³ Waiver decisions also bind all other Members of the organization in that no Member can successfully claim that the obligation which has been waived has been violated by the addressee of the waiver.¹²⁴ For the duration of the waiver, the decision thus modifies the primary

¹²⁰ According to footnote 4 to Art. IX:3 WTO Agreement, consensus is required for a decision to waive obligations subject to a transition period or a period for staged implementation.

¹²¹ On 15 November 1995 the General Council agreed that decisions concerning waivers and accessions would also be taken in accordance with Art. IX:1 WTO by consensus and that only when consensus could not be arrived at, should voting take place in accordance with the relevant provisions. Decision-Making Procedures under Arts. IX and XII of the WTO Agreement, Statement by the Chairman, as agreed by the General Council on 15 November 1995, WT/L/93. The statement also specifies that a Member may request a vote at the time the decision is taken.

¹²² The legal requirements that waivers may only be of a limited duration and have to be reviewed annually did not exist under the GATT 1947 and were negotiated during the Uruguay Round.

¹²³ H. G. SCHERMERS & N. M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW § 811 (3rd revised ed., 1995).

¹²⁴ A Member may however bring a non-violation complaint against a Member which received a waiver, this possibility is acknowledged in the Understanding.

treaty law. The obligation which is being waived cannot serve as a standard against which the legality of the waiver decision can be measured.¹²⁵

4. *The Practice of Granting HS Waivers*

The amount of HS waiver decisions is extensive and far outnumbers the waivers granted of other WTO obligations in different contexts.¹²⁶

HS waivers requests are submitted to the Committee on Market Access. There the requests are discussed in formal and informal meetings and after approval referred to the Council for Trade in Goods together with a draft decision. The Council for Trade in Goods approves it usually on the basis of approval in the committee and without discussion and transmits it to the General Council for adoption. Under the GATT 1947 and later under the WTO HS waivers were granted for 6 months only. Later this practice was changed and starting in 2000 HS waivers were granted for 12 months.

Two main themes can be identified with respect to the practice of granting HS waivers. On the one hand waivers are perceived as a necessary element to ensure the formal legality of trade relations during the process of schedule adaptation to the HS and on the other hand the perceived need to counter the danger that waivers perpetuate a state of exceptions and thus obstruct the effectiveness of the process of schedule adaptation.

a) *Waiver Decisions as a Necessary Element of the Process of Schedule Adaptation*

As has been noted above certain general deficits of the adaptation process led to a general need for waivers to maintain legality in the external relations between WTO members. This general and systemic need for waivers resulted in certain specific characteristics of the HS waiver process. Starting with the HS1996 transposition, waivers were granted on a collective basis.¹²⁷ This means that one waiver decision was drafted and Members could submit requests to be included in

¹²⁵ This ability to change legal obligations established by primary law distinguishes waiver decisions from other acts of secondary law which usually establish a level of law beneath primary law and thus a hierarchy of norms. Due to these characteristics Benedek characterized the granting of waivers under GATT 1947 as a special form of lawmaking by secondary law ("sekundärrechtliche Rechtsfortbildung") note 11, 141.

¹²⁶ Of the 35 waiver decisions (including extension decisions) taken in 2001, 23 were HS waiver decisions; for the waivers granted in 2001 see Note by the WTO Secretariat, Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Information on Waivers, IP/C/W/387, at 13.

¹²⁷ For the collective waivers granted by the General Council for the HS1996, HS2002 and HS2007 transposition exercises see G/MA/W/23/Rev. 4.

the decisions. Even though it was from time to time stressed by Members that a so-called collective waiver decisions in fact constituted individual decisions grouped together in one,¹²⁸ the granting of collective waivers nonetheless signified that these waivers were deemed a necessary element of the adaptation process in the common interest of the organization.

Further aspects of this “institutionalization” of the HS waiver are that the secretariat often drafts the waiver decision¹²⁹ and that the committee chairpersons regularly remind committee Members to request necessary extensions of their waivers in time so that they can be considered at the meetings of Council of Trade in Goods and General Council before expiry of the waiver.¹³⁰ Even though the positive law does not foresee this, in practice waivers have been granted from time to time with retroactive effect.¹³¹

However not all waivers are granted for general systemic reasons common to many Members. Frequently waivers are granted because Members need more time for the submission of documentation or conclusion of renegotiations of concessions. The impression that waivers were often granted and extended quasi-automatically and could lead to permanent situations endangering legal security and predictability of tariff concessions has led to the imposition of procedural safeguards beyond those set out in the primary law.

b) Limitations on Waivers

There are several mechanisms which aim at restricting and controlling waivers. One important bilateral control mechanism, intended to safeguard the reciprocity of benefits from concessions, is foreseen in the waiver decisions themselves. They provide that Members -- pending the entry into force of the results of negotiations and/or consultations under Art. XXVIII GATT -- will be free to suspend concessions initially negotiated with the Member under the waiver to the extent that they consider that adequate compensation is not offered by the Member concerned.¹³²

¹²⁸ G/MA/M/6, para 2.1.9 (statement by the Swiss representative).

¹²⁹ The first collective HS waiver concerning the transposition of HS2007 changes was drafted together with the HS2007 procedures by the Market Access Division with the help of the Legal Affairs Division, the draft waiver is contained in G/MA/W/82.

¹³⁰ G/MA/M/42, para. 3.11.

¹³¹ The decision of 15 June 1999 extended the HS96 collective waiver and was granted with retroactive effect to 30 April 1999, WT/L/303, footnote 1.

¹³² WT/L/675, para. b(iii).

Further, multilateral, control is enabled by regular (twice-yearly) reports by the committee to the Council for Trade in Goods which are prepared by the secretariat. With respect to HS96 waivers, they contain factual information in an annex on the number of waivers granted, which Members they are granted to and for which HS changes.¹³³ This reporting practice goes back to the GATT 1947. It was a compromise between the delegations from developed and developing Members. While some delegations, led by a proposal from the Swedish delegation, had wanted to restrict the waiver practice by requiring that Members requesting a waiver should submit a full and detailed report to the committee on how they intended to finalize the HS implementation during the period covered by the waiver,¹³⁴ this proposal was met by opposition of developing countries, the main beneficiaries of waivers. Compromise was reached after informal consultations and on the basis of a proposal by the chairman,¹³⁵ which foresees the just mentioned reporting.

A further compromise was reached with respect to the practice to grant collective waivers. In 2000 after the issue of general reservations with respect to HS96 documentation was solved, discussion ensued in the committee about ending the practice of extending the collective waiver with respect to the transposition of HS 96 changes. There was strong opposition to this proposal in the committee by developing country delegations. The compromise finally agreed upon foresaw that the collective waiver would be extended one last time for the duration of one year under the condition that all of the required documentation be provided. This solution was accompanied by the agreement to hold informal meetings on the status of HS96 documentation (see section 3.2 above). The HS2002 and 2007 collective waivers were also granted on the condition of the submission of documentation.

V. The Politics of Schedule Adaptation in the WTO

All WTO Members have an interest that schedules conform to the Harmonized System for the reasons stated earlier in this paper. As long as the adaptation does not affect the value of concessions Members' interests do not conflict. Where however concessions are substantially affected, economic interests of the granting

¹³³ The latest report of 6 May 2008 is contained in G/MA/198.

¹³⁴ Proposal by Sweden, TAR/W/88 (23 September 1993).

¹³⁵ This proposal was based on proposals submitted by delegations; for the chairman's proposal see TAR/M/36, Annex, at 3.

and the benefitting Member may collide. WTO law foresees that the resolution of these conflicts does not take place within WTO bodies, but that they are resolved outside the institutional structure in bilateral negotiations.

What is addressed within the WTO, is the uncertainty that arises as to how economic interests might be affected by schedule adaptation. Since all Members are in the same position of uncertainty there is again a common and shared interest to devise and implement procedures in a manner that all Members are able to detect when their economic interests are affected. Once safeguards are instituted that enable Members to distinguish between schedule adaptation which affects their economic interests and schedule adaptation which does not, and thus between mere technical changes and others, there is little reluctance to entrust the organization, i.e. the secretariat, with wide-ranging tasks with respect to the technicalities of schedule adaptation.

It should be noted however that the capacity of developing Members to benefit from these safeguards is much more limited than that of developed countries since they often will not have the resources available to review all documentation and attend all informal meetings. While technical assistance is rendered by the secretariat to developing Members, this assistance in effect mainly benefits the other Members since it ensures that the developing Members' schedules are properly transposed and thus its concessions to other Members are safeguarded.¹³⁶

As a device to maintain formal legality during the adaptation process, the adoption of HS waiver decision frequently lies within the common interest of the organization. This explains why mostly HS waivers are granted easily and mostly without much discussion as compared to other waivers which frequently result from the need to reconcile conflicting interests.¹³⁷

D. Conclusions

Overall, the process of schedule adaptation to the Harmonized System is characterized by a problem-oriented and managerial approach aiming at efficiency which is accompanied by a relatively large number of formal and binding legal

¹³⁶ Developing country Members are further disadvantaged with respect to the renegotiation of concessions due to the transaction costs incurred in such renegotiations and their limited bargaining power.

¹³⁷ The so-called TRIPS waiver (WT/L/540) was granted to facilitate the importation by Members of generic drugs in case of public health crises, or the Kimberley waiver (WT/L/518) which was granted to legalize trade restrictions implementing the Kimberley Process Certification Scheme to combat trade in so-called blood diamonds.

decisions. Both characteristics – effective pragmatism with strong involvement of the secretariat on the one hand and formal legal decisions by the WTO organs on the other – are relatively unusual at least according to common depictions of the work of the political organs and secretariat within the WTO.

The first characteristic can be explained by the common interest of the organization as well as its Members in the HS and its effective transposition into schedules and the eminent importance this has for international trade in goods. The formal legal procedures enable this process and support its efficiency by codifying successful practices and ensure transparency enabling Members to safeguard their benefits from concessions. The waiver decisions ensure formal legality where the process of schedule adaptation would otherwise lead to a violation of Art. II GATT. The maintenance of formal legality in the external relations of WTO Members through waivers is important in regard of the high degree of legalization and judicialization in the WTO.

Finally it is interesting to note that with respect to the administration of the HS one can detect a reversal of roles between the WTO and the WCO. While the WTO is often depicted as the locus for political negotiations on trade matters and the WCO as the organization taking care of the technicalities of trade, another picture is presented here. As has been indicated above, agreement on HS changes which is to be achieved within the WCO, will frequently require the balancing of different interests and thus might for its legitimacy necessitate an open political process characterized by reason-giving. At the WTO the incorporation of the adopted HS changes into the schedules is then a mainly technical matter requiring technical expertise and assistance, as provided by the WTO Secretariat.

