

WTO – Institutions and Dispute Settlement	
<i>ISBN</i>	978-90-04-14563-4
<i>Pages</i>	123-136
<i>Author(s)</i>	Boklan
<i>Title</i>	Agreement Establishing the World Trade Organization (WTO Agreement)
<i>Subtitle</i>	Article X WTO Agreement
<i>File</i>	Vol2_123-136.docx
<i>Date Word file</i>	07-10-2019
<i>Edited by</i>	Wanner

Article X WTO Agreement

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 proposals 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. Unless the provisions of paragraphs 2, 5 or 6 apply, that decision shall specify whether the provisions of paragraph 3 or 4 apply. 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. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three-fourths majority of the Members that the provisions of paragraph 4 shall apply.
2. Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members:
 - Article IX of this Agreement;
 - Articles I and II of GATT 1994;
 - Article II:1 of GATS;
 - Article 4 of the Agreement on TRIPS.
3. Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, 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 amendments 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.
4. Amendments to provisions of this Agreement or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraph 2 and 6, of a nature 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.
5. Except as provided in paragraph 2 above, amendments to Parts I, II and III of GATS and the respective annexes shall take effect for the Members that have accepted them upon acceptance by two-thirds of the Members and thereafter for each Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under the preceding provision 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. Amendments to Parts IV, V and VI of GATS and the respective Annexes shall take effect for all Members upon acceptance by two-thirds of the Members.

6. Notwithstanding the other provisions of this Article, amendments to the Agreement on TRIPS meeting the requirement of paragraph 2 of Article 71 thereof may be adopted by the Ministerial Conference without further formal acceptance process.
7. Any Member accepting an amendment to this Agreement or a Multilateral Trade Agreement in Annex I shall deposit an instrument of acceptance with the Director-General of the WTO within the period of acceptance specified by the Ministerial Conference.
8. Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference. Decisions to approve amendments to the Multilateral Trade Agreement in Annex 3 shall take effect for all Members upon approval by the Ministerial Conference.
9. The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that Agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4.
10. Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

BIBLIOGRAPHY

- *J.H. Jackson*, World Trade and the Law of GATT, A Legal Analysis of the General Agreement on Tariffs and Trade, 1969;
- *J.H. Jackson*, The World Trading System, Law and Policy of International Economic Relations, 2nd ed. 1997;
- *R. Senti*, WTO, System und Funktionsweise der Welthandelsordnung, 2000;
- *W. Weiß & C. Herrmann*, Welthandelsrecht, 2003;
- *A. Ansong*, Unclogging WTO Decision-making with the Provisions on Amendments in Article X of the WTO Agreement, *Afr. J. Int'l Comp. L.* 26.2 (2018), 227-241.

CASE LAW

- Appellate Body Report, *EC-Bananas III (Art. 21.5 – Ecuador II)*, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW2/ECU/Corr.1;
- Appellate Body Report, *Peru – Agricultural Products*, WT/DS457/AB/R.

DOCUMENTS

- Ministerial Conference, Proposed Amendment of the Dispute Settlement Understanding, WT/MIN(99)/8, 22 November 1999 and WT/MIN(99)/8/Corr.1, 23 November 1999;
- General Council, Amendment of the TRIPS Agreement, WT/L/641, 8 December 2005;
- General Council, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, WT/L/940, 28 November 2014;
- General Council, Decision amending the Trade Policy Review Mechanism, WT/L/540, 26 July 2017.

A. General

- 1 Art. X provides for a complex amendment procedure for the WTO Agreement and the annexed multi- and plurilateral trade agreements-treaties. It was specifically pointed out by the Appellate Body, that the “WTO Agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention, such as Article 41”.¹ The **elaborate structure** of the article is the result of the attempt to reconcile the respect for the sovereignty of the Members, which requires that new contractual obligations be based on their consent, with the practical need to adapt the vast body of international trade law codified in the WTO Agreement and the annexed agreements to the constantly changing economic and political environment of multilateral trade relations. In order to achieve this goal, Art. X establishes a fundamental distinction between the core institutional and substantive principles of international trade law, which can only be changed if all parties agree, and the other rules and provisions of a “non-constitutional” character, which can be amended with varying degrees of flexibility.

B. Historical Development

- 2 The GATT 1947 already drew a distinction between amendments to the **basic provisions** of the agreement, *i.e.* Art. I GATT 1947 and Art. II GATT 1947 (relating to the most-favoured-nation principle and the tariff concessions agreed upon by the parties), Art. XXIX GATT 1947 (referring to the relation between the GATT 1947 and the Havana Charter)² and Art. XXX GATT 1947 ~~itself~~, which could enter into force only upon acceptance by all parties, and other amendments which were to become effective in respect of those contracting parties which accepted them upon acceptance by two thirds of the Members. In practice, Art. XXX GATT 1947 proved to be one of the most difficult and controversial GATT 1947 provisions. Since the schedules with the relevant tariff concessions entered into by the parties were made an “integral part” of the GATT 1947 by virtue of Art. II GATT 1947, it was argued that the unanimity requirement also applied to changes made to the tariff concessions contained in them.³ As items in the schedules were constantly being renegotiated and errors had to be removed, this created numerous problems which had to be dealt with if the negotiating process were not to be paralysed. With regard to “rectifications”, there was a practice developed early on to accept “nonsubstantive” rectifications if no objections were raised upon notice to all parties.⁴
- 3 At the **Review Session in 1955**, an attempt was made to amend Art. XXX GATT 1947 in order to address these problems. The draft amendment provided that amendments to the provisions of Part I ~~of~~ GATT 1947 would become effective on the ~~thirtieth-30th~~ day following the day on which they were accepted by all contracting parties. Other amendments to the GATT 1947 should become effective in respect of the contracting parties accepting them on the ~~thirtieth-30th~~ day following the day on which they were accepted by two-thirds of the contracting parties. Since the adoption of amendments by a two-thirds majority created the prospect of different legal rules being applicable between different contracting parties, the amendment also provided for the right of the contracting parties to

Примечание [LW1]: I am not sure what the itself references...

Примечание [LW2]: The main sentence misses a verb.

¹ Appellate Body Report, *Peru – Agricultural Products*, WT/DS457/AB/R, para. 5.112.

² Havana Charter for an International Trade Organization of 24 March 1948, CTS No. 32, 3; UN Doc. E/CONF. 2/78 (1948).

³ See *Jackson*, Law of GATT, 75. **GATT Cross reference**

⁴ *Jackson*, Law of GATT, 77.

decide that any amendment adopted by a two-thirds majority was of such a nature that any contracting party which did not accept it within a specified period should be free to withdraw from the agreement or to remain a contracting party (only) with the consent of the other contracting parties.⁵ This draft amendment to Art. XXX GATT 1947 already contained some of the principles which would later be incorporated into Art. X.

- 4 However, the protocol amending Art. XXX GATT 1947 never came into force and lapsed at the end of 1967. It was only the experience with the subsequent development of **side codes**, or **stand-alone ancillary treaties**, to enlarge and elaborate the GATT rules, and the increasing legal, technical and administrative complexity which resulted from this practice which paved the way for the approval of a new amendment mechanism in the Uruguay Round negotiations. The Art. X mechanism, while still being highly complex, at least avoids some of the pitfalls which stood in the way of a dynamic evolution of the GATT legal system after 1947.

C. Structure of Art. X

- 5 Art. X provides for **different amending procedures** with regard to the WTO Agreement and the agreements which are annexed to it. Art. X:1 to 7 deal with amendments to the WTO Agreement and the Multilateral Trade Agreements (MTAs) contained in [Annex 1](#). The Appellate Body noted that

Article X of the WTO Agreement sets out rules and procedures to amend the provisions in the Multilateral Trade Agreements. Article X specifies the process and quorum required to amend particular provisions or covered agreements. Amendments, unlike waivers, are not limited in time and create new or modify existing rights and obligations for WTO Members. Special rules on acceptance and entry into force apply, depending on the provisions that are being amended and on whether the amendment 'would alter the rights and obligations of the Members'.⁶

In this respect, Art. X:1 to 4 and 7 formulates rules which apply to all or most of those agreements, while Art. X:5 deals specifically with changes to GATS. Art. X:6 formulates an **alternative amending procedure** for amendments to the TRIPS Agreement in certain circumstances which leaves unaffected the right of the Members to amend the agreement in accordance with Art. X:1, 3 and 4. The rules concerning changes to the Dispute Settlement Understanding (DSU) and the [Trade Policy Review Mechanism](#) (TPRM) are contained in Art. X:8. Finally, Art. X:9 and 10 deal with the addition to, and the deletion of Plurilateral Trade Agreements from [Annex 4](#) as well as with the amendments to those agreements.

D. Amendments to the WTO Agreement and to the Multilateral Trade Agreements in Annex 1

I. General Provisions (Art. X:1 to 4 and 7 WTO Agreement)

- 6 Any amendment procedure under the WTO Agreement can be divided into two distinct

⁵ Protocol Amending Part I and Articles XXIX and XXX of the GATT, 1955 (Agreement No. 32 in App. C), section D. Text reproduced in *Jackson*, Law of GATT, 77, footnote 17.

⁶ Appellate Body Report, *EC-Bananas III (Art. 21.5-Ecuador II)*, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW2/ECU/Corr.1, para. 384.

Примечание [ННЗ]: Even though it didn't come into force: if possible cross-reference in the footnots. Doc should be available from Stanford collection

stages. The **first phase** comprises the period from the time when an initiative for an amendment is taken by a Member or one of the councils and concludes with the decision of the Ministerial Conference to submit the amendment proposal to the Members for acceptance. The **second phase** covers the acceptance procedure and ends with the entry into force of the amendment either for all Members or at least for those which have explicitly accepted the amendment. As defined in Art. X:7, acceptance means the deposition of an instrument of acceptance with the Director-General of the WTO, *i.e.* ratification, within the period specified by the Ministerial Conference. While the rules governing the first phase are of a general character and apply to all amendments to the WTO Agreement or one of the MTAs listed in [Annex 1](#), the provisions on the second stage of the amendment procedure differ, depending on the object and the legal effects of the proposed amendment and/or the decision taken by the Ministerial Conference as to the requirements for entry into force applicable in the individual case.

7 **Art. X:1** enshrines that the **right to initiate a proposal** to amend the provisions of the WTO Agreement or of any of the MTAs listed in [Annex 1](#) belongs to every Member. The specific councils set up by [Art. IV:5](#), *i.e.* the Council for Trade in Goods, the Council for Trade in Services and the Council for TRIPS, have a more limited right to initiate the amending procedure; they can initiate amendments only to those agreements which they oversee in accordance with [Art. IV:5](#), *i.e.* to the [GATT 1994](#) and the agreements related thereto in the case of the Council for Trade in Goods, to the [GATS](#) in the case of the Council for Trade in Services and to the [TRIPS](#) in the case of the Council for TRIPS. All proposals for amendment have to be submitted to the Ministerial Conference as the highest organ of the WTO in which all Members are represented. The Ministerial Conference has to decide whether to submit the proposal to the Members for acceptance within a period of 90 days after the proposal has been formally tabled. This period can be prolonged by decision of the Ministerial Conference which, like any other decision for which no special provision has been made, is taken preferably by **consensus**, but can be adopted, if attempts to reach a consensus fail, by simple majority, *i.e.* by a majority of the Members present and voting.⁷ This is important because the requirement of a consensus on the proposed amendment itself is removed only once the original period of 90 days has lapsed without prolongation or, if the period has indeed been prolonged in accordance with the rules stated above, once the prolongation has expired. Art. X does not impose any fixed limit on the period for which the prolongation can be granted; this is left entirely to the discretion of the Ministerial Conference.

8 The decision on the submission of the proposal to the Members for acceptance is again subject to the rule of consensus. Practically, this means that the amendment may go forward even if it is not wholeheartedly approved by all the Members as long as the sceptical Members come to the conclusion that the proposal is not sufficiently important for them to go on the record with their opposition. If, however, no consensus is reached either during the original period of 90 days or within the prolonged period determined by the Ministerial Conference, the decision can be adopted by a two-thirds majority of the overall WTO membership. Two-thirds of all Members - not only of the Members present and voting - still constitutes a **significant threshold**, but less so than the quora required for other fundamental decisions taken in the application of the WTO Agreement or the MTAs, *e.g.* the adoption of interpretations of the agreements or the decision to waive certain treaty obligations, which both require a three-quarters majority.⁸ For instance, on 27 November 2014, the General

⁷ See *Marhold*, [Art. IX WTO Agreement](#), para. 11.

⁸ See *Marhold*, [Art. IX WTO Agreement](#), paras 15 *et seq.* and 20 *et seq.*

Council conducting the functions of the Ministerial Conference in the interval between meetings pursuant to [Art. IV:2](#) adopted and submitted to the Members for acceptance the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, which contained in its Annex the Agreement on Trade Facilitation.⁹

- 9 After the adoption by consensus of a proposal for amendment different procedures apply, depending on the object of the amendment and its legal effects and also on the decisions taken by the Ministerial Conference with regard to the acceptance procedure. Amendments concerning the provisions referred to in **Art. X:2** become effective only once they have been accepted by all Members. No derogation from the requirement of unanimity is permitted in respect to these amendments. The relevant provisions include, on the one hand, the rules governing the decision-making process and the amending procedures under the WTO Agreement, *i.e.* [Art. IX](#) and Art. X; and, on the other hand, the most fundamental substantive provisions of the MTAs ~~on the other~~. The latter concern the application of the most-favoured-nation principle (MFN-principle) in trade in goods ([Art. I GATT 1994](#) and [Art. II GATT 1994](#)) and services ([Art. II GATS](#)) and with regard to the protection of trade-related intellectual property rights ([Art. 4 TRIPS](#)). These provisions embody the **core principles of the multilateral trade system** as it now stands. Since the GATT 1994 takes great care in distinguishing between the provisions of the GATT itself and the protocols and schedules which have later been adopted in order to implement those provisions, the schedules of tariff concessions are not to be considered as a part of [Art. II GATT 1994](#) for the purpose of identifying the applicable amendment procedure. Moreover, the special status, which Art. X:2 accords to the MFN-principle, is not extended to the national treatment requirement with regard to non-tariff barriers to trade, a requirement which is formally recognized in the field of trade in goods ([Art. III GATT 1994](#)) but not in respect of trade in services.
- 10 In respect of the amendments which do not propose to modify a fundamental provision in the sense of Art. X:2, the fundamental distinction introduced by Art. X is that between amendments which alter the rights and obligations of the Members and those which do not. The latter group of amendments is dealt with in Art. X:4. Since these amendments do not raise any major issue in terms of sovereignty of the Members, their acceptance is subject to a **simplified procedure**. On the acceptance by two-thirds of the Members they come into force for **all Members**, including those which have previously objected to the amendment and continue to oppose it.¹⁰
- 11 If, on the other hand, the proposed amendment alters the legal position of the Members, it can enter into force only upon their acceptance, since, in accordance with general principles of international law, contractual obligations cannot be imposed on States against their will. **Art. X:3** therefore provides that amendments of a nature which would alter the rights and obligations of the Members become effective only upon acceptance by two-thirds of the Members, and **only for those Members which ratified the relevant amendment**. Members which remain opposed to the amendment continue to be bound by the unamended treaty provisions.
- 12 This creates the prospect of different substantive and procedural provisions being applicable between different Members of the WTO, thus threatening the unity of the WTO legal structure. In order to confront this risk, Art. X:3 expressly grants the Ministerial Conference the right to decide by a three-quarters majority that any Member which has

⁹ Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, Decision of 27 November 2014, [WT/L/940](#), 28 November 2014.

¹⁰ [Jackson](#), Law and Policy, 72; [Weiß](#), in: [Weiß & Herrmann](#), para. 213.

not accepted the amendment within a period specified by it in each individual case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference. The **legal effects** such a decision would have are not entirely clear. Art. X:3 stops short of saying that any Member opposing the amendment which has not obtained the consent of the Ministerial Conference for its continued membership of the WTO will automatically lose its membership status once the period for acceptance specified by the Ministerial Conference has lapsed. A right to expel Members opposing an amendment from the organization could be assumed to exist only if it had been incorporated into the Agreement in unambiguous language.¹¹ But this has not happened. Unlike [for example the IMF Articles of Agreement](#),¹² *e.g.*, the WTO Agreement has conspicuously failed to include any provision on the compulsory withdrawal of a Member. Under general treaty law there is no basis for the termination of the treaty membership against its will of a party which has not violated existing treaty obligations.

- 13 The “decision” referred to in the second sentence of Art. X:3 thus does not have a legal character in the strict sense, but should be viewed rather as an **exhortation** to the dissenting Member: it “invites” this Member carefully to consider whether its membership of the WTO still makes sense although it has neither ratified an amendment deemed essential by the vast majority of the other Members nor obtained the approval of the Ministerial Conference for its conduct. Art. X:3 does not specify how this “consent” may be given. It therefore seems that the ordinary rules apply, *i.e.* that the consent can be granted by simple majority decision.¹³ In making up its mind on the question whether to accept the dissident Member’s conduct the Ministerial Conference will look at the reasons for its refusal to accept the amendment and weigh the negative effects of its decision for the coherence of the treaty arrangements with the benefits of its continued membership. Despite its doubtful legal character, Art. X:3, second sentence has a useful function insofar as it reminds the Ministerial Conference of its responsibility for the maintenance of a coherent legal framework for multilateral trade in the face of continued opposition to changes which have been endorsed by a large majority of Members. Art. X:3 “envisages a progressive multilateralisation process after an initial two-thirds of WTO members accept an amendment and the remaining one-third accept after the official coming into effect of the amendment”.¹⁴ Thus, [on 23rd January 2017, the Protocol Amending the TRIPS Agreement entered into force in accordance with Art. X:3. The period for acceptance of the mentioned Protocol was extended several times, most recently until 31 December 2021 or such later date as may be decided by the Ministerial Conference.](#)¹⁵ Another example of an application of Art X:3 is the entering into force of the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, which contained in its Annex the [Agreement on Trade Facilitation](#) on 22 February 2017.
- 14 The distinction between amendments which alter the existing balance of rights and obligations of the Members’ and those which leave that balance unaffected is ~~thus~~ of central relevance to the identification of the applicable amendment procedure. The determination whether an amendment belongs to one category or the other has to be made by

¹¹ See *Senti*, para. 332, footnote 48.

¹² Art. XXVI:2 lit. c IMF Articles of Agreement.

¹³ *Senti*, para. 332, footnote 48, envisages the application of the requirement of a three-quarters majority to this decision; this view conflicts with the general rule, however, that qualified majorities have to be specifically prescribed in the agreement in order to apply.

¹⁴ *Ansong*, Afr. J. Int’l Comp. L. 26.2 (2018), 227, 232, 241.

¹⁵ https://www.wto.org/english/tratop_e/trips_e/accept_e.htm.

the Ministerial Conference once it decides to submit a proposal to the Members for their acceptance. Art. X:1 provides for two different ways in which the character of the amendment with regard to the rights and obligations of the Members is determined, depending on the procedure by which the logical prior decision on the issue of submission is reached. If the decision to submit the proposed amendment to the Members for acceptance is taken by consensus within the period of 90 days prescribed in the agreement or any longer period fixed by the Ministerial Conference, the decision of the Conference must also specify which acceptance procedure shall apply: the procedure envisaged in Art. X:3 for amendments altering the rights and obligations of the Members or the one regulated in Art. X:4 relating to amendments not affecting Members' rights and duties. If, by contrast, the decision to submit the proposal for acceptance is taken by a two-thirds majority of Members after the period for a decision by consensus has lapsed, the agreement prescribes as a rule the application of the acceptance procedure provided for in Art. X:3 unless a decision to apply the procedure referred to in Art. X:4 is taken by a majority of three-quarters of the overall WTO membership. In practical terms, this means that only in those **exceptional cases** in which a huge majority of WTO Members supports the view that the proposed amendment is of a purely technical character and therefore leaves the balance of rights and obligations under the WTO Agreement and the MTAs unaffected the simplified acceptance procedure under Art. X:4 will apply. Art. X:4 "could offer opportunities for WTO members to use soft law approaches in the regulation of international trade. It may well be that after operating a soft law agreement for some time, WTO members can come to a consensus to make it more obligatory by adopting an amendment under Article X:3 WTO Agreement".¹⁶

II. Amendments to GATS (Art. X:5 WTO Agreement)

- 15 The acceptance procedure to be followed in the case of an amendment to GATS is closely modelled on the rules that apply to changes to the WTO Agreement and the MTAs. The main difference is that the distinction between amendments that alter the rights and obligations of the Members and those that do not, which is essential for the selection of the applicable acceptance procedure in the case of an amendment to the WTO Agreement or the multilateral agreements on trade in goods, does not apply and is replaced by a **formal distinction** between the different parts of the GATS. If the amendment concerns Part I, II or III of the GATS and the respective annexes, it enters into force upon acceptance by two-thirds of the Members for those Members which have accepted it. Since this creates the prospect of different GATS rules applicable between different Members depending on whether the parties in question have all accepted the amendment or not, Art. X:5 provides for the same procedure already provided for in Art. X:3 in order to tackle this problem: the Ministerial Conference may decide by a three-quarters majority that the amendment is of such importance that any Member which has not accepted it within a period specified by the Ministerial Conference in each case is free to withdraw from the WTO or can remain a Member of the WTO with the consent of the Ministerial Conference. If, by contrast, the amendment concerns Part IV, V or VI of GATS and/or the respective annexes, the amendment shall become effective for all Members upon acceptance by two thirds of the parties.
- 16 The assumption behind this distinction is that amendments to Parts I to III of the GATS will normally also affect the rights and obligations of Members, whereas changes to the other parts of the agreement typically will not. While it is doubtful whether this assumption

¹⁶ *Ansong*, Afr. J. Int'l Comp. L. 26.2 (2018), 227, 234, 241.

holds true in all cases,¹⁷ it nevertheless **simplifies the acceptance procedure** in cases of an amendment to GATS. While the provisions on acceptance of amendments to the WTO Agreement and the MTAs leave a substantial margin of discretion to the Ministerial Conference in selecting the applicable amendment procedure because it is ultimately this body which has to determine whether the proposed amendment alters the rights and obligations of the Members or not, the agreement takes this decision in respect of GATS amendments out of the hands of the Ministerial Conference by using purely formal criteria for the purpose of identifying the applicable procedural requirements.

III. Amendments to the TRIPS Agreement (Art. X:6 WTO Agreement)

- 17 Art. X:6 facilitates the adoption of amendments to the TRIPS Agreement¹⁸ in certain circumstances. The wording¹⁹ clearly indicates that the procedure referred to in Art. X:6 can be used as an **alternative to the ordinary treaty amendment procedures** provided that some specific requirements are met. But the Members may as well decide to stick to the ordinary amendment procedure for MTAs regulated in Art. X:1, 3 and 4. The main effect of Art. X:6 is the removal of the requirement of a separate acceptance by the individual Member in order for the amendment to become effective.
- 18 The amendment procedure under Art. X:6 concludes with the decision by the Ministerial Conference to adopt the amendment, a decision which, in accordance with the general rule of [Art. IX:1](#), can be taken by simple majority if no consensus is reached.²⁰ This may seem unduly liberal, especially in view of the provisions applying to the ordinary amendment procedure which require a two-thirds majority of the overall WTO membership just in order to conclude the first stage of the process. However, the obstacles which have to be overcome in order for the procedure under Art. X:6 to be available are formidable. They are defined in [Art. 71.2 TRIPS](#) to which Art. X:6 refers. According to this provision, the amendment in question must merely serve the purpose of adjusting the level of protection of intellectual property rights under the TRIPS Agreement **to a higher standard** which has been achieved in other multilateral agreements that are already in force and have been accepted by all Members of the WTO. In these circumstances, a separate acceptance procedure for a corresponding amendment to the TRIPS Agreement would indeed appear to be superfluous because the substance of the proposed changes has already been accepted by all WTO Members under the relevant multilateral agreements. This being the case, it makes sense that the Ministerial Conference can adopt the amendment by a simple majority, once a proposal to this effect has been submitted to it by the Council for TRIPS, which must itself act by consensus. The requirement that all WTO Members must have accepted the substance of the proposal beforehand amounts in effect to a requirement of unanimity and thus makes the adoption of amendments rather more difficult than under the ordinary

Примечание [TS4]: The author may wish to consider to mention, that the TRIPS Agreement was amended through the Protocol of 6 December 2005 that entered into force on 23 January 2017. The amendment inserted a new Article 31bis into the Agreement.

¹⁷ As *Weiß*, in: *Weiß & Herrmann*, para. 218 points out, changes to the Members' right to withdraw concessions under the GATS, for example, may very well affect existing rights and obligations but can still be approved in the simplified acceptance procedure since the right of withdrawal is regulated in Part VI of the agreement.

¹⁸ **Cross reference Art. 31bis and other TRIPs provisions.**

¹⁹ "Notwithstanding the other provisions of this Article, amendments [. . .] may be adopted".

²⁰ *Weiß*, in: *Weiß & Herrmann*, para. 210.

procedures envisaged in Art. X:1, 3 and 4.²¹

E. Amendments to the Dispute Settlement Understanding and the Trade Policy Review Mechanism (Art. X:8 WTO Agreement)

19 The common feature of amendments to the DSU and the TPRM is that they are **not subject to acceptance by the individual Members** of the WTO once they have been approved by the Ministerial Conference. The decision on the adoption of these amendments thus lies entirely in the hands of the highest body of the WTO. Any WTO Member may initiate the amendment procedure by submitting a proposal to amend the provisions of the DSU or the TPRM to the Ministerial Conference. In view of the potentially far-reaching consequences of changes to the DSU for the legal position of the Members, it is not surprising that Art. X:8 provides that any decision on the adoption of an amendment to the DSU has to be taken by consensus. There is no time limit for the search for consensus, and there does not need to be one, since there is no alternative mechanism for the adoption of an amendment to the DSU, as there is for the approval of changes to the WTO Agreement and the MTAs (see Art. X:8). Upon approval by the Ministerial Conference, the amendment to the DSU becomes effective for all WTO Members, without any separate acceptance procedure. By contrast, amendments to the TPRM do not require adoption by consensus. They can be approved by a simple majority once it becomes clear that efforts to arrive at a decision by consensus have failed (Art. IX:1). Thus, on 27 July 2017, a decision to amend the TPRM was adopted and entered into force on 1 January 2019.²²

F. Amendments to the Plurilateral Trade Agreements (Art. X:9 and 10 WTO Agreement)

20 The rules applicable to amendments to the Plurilateral Trade Agreements included in [Annex 4 WTO Agreement](#) are necessarily different from those applying to the amendment procedures prescribed for the MTAs since they concern only **a part of WTO membership**. This implies that the Ministerial Conference which represents all WTO Members, including those that are not a party to the relevant Plurilateral Trade Agreement, does not have a formal role in the amending procedure applying to one of these agreements. The WTO Agreement therefore abstains from incorporating any substantive rules on the amendment of the Plurilateral Trade Agreements and limits itself in this respect to a reference to the amendment provisions contained in the relevant agreement itself (Art. X:10).²³ Thus, in December 2006, negotiators reached an understanding on the revision of one of the MTAs, namely the Agreement on Government Procurement (GPA). On 30 March 2012, the Committee on Government Procurement adopted the Protocol Amending the GPA. The Protocol entered into force on 6 April 2014, in accordance with Article XXIV:9 of the Agreement on Government Procurement. Also another Plurilateral Trade Agreement, namely the Agreement on Trade in

²¹ [TRIPS Agreement was amended through the Protocol of 6 December 2005 that entered into force on 23 January 2017. The amendment inserted a new Article 31bis into the Agreement.](https://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm)
https://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm

²² Decision amending the Trade Policy Review Mechanism of 26 July 2017, WT/L/540.

²³ See e.g. Art. XXIV:9 Agreement on Government Procurement.

Отформатировано: Шрифт: 10 пт

Отформатировано: Шрифт: 10 пт

Отформатировано: Английский (США)

Civil Aircraft has been amended on three occasions, in 1986, 2001 and 2015.²⁴

- 21 Where the Ministerial Conference does have a role, ~~however~~, is with regard to the list of Plurilateral Trade Agreements included in Annex 4, since these agreements are formally part of the WTO Agreement.²⁵ Changes to this list ~~therefore~~ require the approval of the Ministerial Conference. Art. X:9 provides accordingly that the Ministerial Conference decides on the addition of further trade agreements to Annex 4 upon request by the WTO Members party to the agreement. The wording of the paragraph suggests that the request has to be supported by **all Members of the relevant agreement**. The Ministerial Conference can grant the request only by consensus. By contrast, the decision to delete from Annex 4 one of the Plurilateral Trade Agreements now included in the list can be taken by simple majority. ~~But~~ However, the decision requires a unanimous request by all WTO Members which are parties to the Agreement in question.²⁶

G. Evaluation and Outlook

- 22 The amendment provisions of the WTO Agreement are highly complex. In this regard, Art. X compares rather unfavourably with the amendment rules in other international organizations, like the IMF, the World Bank or the UN. To a certain extent, this is perhaps inevitable for an agreement which aspires to provide a comprehensive framework for the multiplicity of agreements and rules which today form the legal basis of the multilateral trade system. Apart from these complexities resulting from the peculiarly technical nature of the agreement, however, the amendment provisions codified in Art. X continue to suffer from the fact that the **central dilemma** which underlies the whole debate on appropriate amendment procedures has not yet been satisfactorily resolved: this is the difficulty of reconciling the respect for the Members' sovereignty, which is one of the dominant features of the WTO system, with the need to provide a sufficiently flexible institutional structure that is capable of adapting to the rapidly changing economic and political conditions in this particularly dynamic area of law. This dilemma is evident in the provision of Art. X:3. ~~While~~ While the provision is based on the recognition that the consistency of the WTO legal framework will be preserved in the long run only if necessary changes cannot be boycotted indefinitely by dissenting Members, even if their rights and obligations are at stake, it has failed to transform this analysis into a viable legal concept. The mechanism now envisaged is of dubious legal character and provokes more questions than it answers.²⁷
- 23 Hitherto, the amendment procedures provided for in Art. X have rarely been used. A

²⁴ <https://www.wto.org/english/res_e/publications_e/ai17_e/ai17_e.htm>.

²⁵ See Stelzer, [Art. II WTO Agreement](#), para. 11 *et seq.*

²⁶ It is worth noting, that in some instances agreements signed by not all the WTO members still do not fall under Annex 4 of the Marrakesh Agreement and hence are not subject to Article X:9. The example could be Information Technology Agreement (ITA). The ITA concessions are included in the participants' WTO schedules of concessions, the tariff elimination is implemented on a most-favoured nation (MFN) basis. This means that even countries that have not joined the ITA can benefit from the trade opportunities generated by ITA tariff elimination.

²⁷ See above paras 12 and 13.

Примечание [НН5]: I would propose that the author reference the „new plurilateralism“ of the last Ministerial Conference – and the difficulties involved by the proposals not being true plurilaterals. It might also be worthwhile to mention similar previous efforts (zero for zero and the ITA) that were not true plurilaterals and hence fell under MFN. This could also be put into the outlook instead.

Отформатировано: без нумерации

Отформатировано: Шрифт: не полужирный

Отформатировано: Английский (США)

comprehensive proposal for **amendment to the DSU** was submitted to the Ministerial Conference under Art. X:8²⁸ but did not meet with the required unanimous support among the other Members. A proposal for **amendment to the TRIPS Agreement**²⁹ was more successful. On 6 December 2005, the General Council approved changes to the TRIPS Agreement making permanent a decision on patents and health³⁰ adopted in 2003.³¹

- 24 The **Sutherland Report on the Future of the WTO** did not specifically address the issue of treaty amendments, but it made some observations on the benefits and drawbacks of the consensus principle in WTO decision-making which would also apply to the amendment procedure. While the report recognizes that the consensus principle adds a measure of “constitutional stability”, it also notes its inadequacy in the many instances where proposed changes concern non-fundamental measures, some of which are designed merely to fine-tune the rules in order to keep them abreast of changing economic and other circumstances. The report sees a possible solution to this dilemma in a more **refined distinction between substantive matters and issues of a merely procedural character**.³² While such a distinction could go some way in simplifying the amendment procedure, it remains to be seen whether the distinction between procedural and substantial matters is as clear in practice as it is in theory and will be embraced by the Members.

Примечание [LW6]: Maybe, the amendments prescribed in the text could be included here as well?

²⁸ WTO, Ministerial Conference, Proposed Amendment of the Dispute settlement Understanding – Communication from Canada, Costa Rica, Czech Republic, Ecuador, the European Communities and its member states, Hungary, Japan, Korea, New Zealand, Norway, Peru, Slovenia, Switzerland, Thailand and Venezuela, WT/MIN(99)/8 and WT/MIN(99)/8/Corr.1, 22 November 1999.

²⁹ Council for TRIPS, Implementation of Paragraph 11 of the General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Proposal for a Decision on an Amendment to the TRIPS Agreement, IP/C/41, 6 December 2005.

³⁰ Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Decision of 30 August 2003, WT/L/540, 2 September 2003.

³¹ WTO, Amendment of the TRIPS Agreement, Decision of 6 December 2005, WT/L/641, 8 December 2005.

³² Consultative Board to the Director-General Supachai Panitchpakdi, para. 288.