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**The Waiver Power of the WTO:  
Opening the WTO for Political Deliberation on the Reconciliation of Public Interests**

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**The Waiver Power of the WTO:  
Opening the WTO for Political Deliberation on the Reconciliation of Public Interests**

By Isabel Feichtner\*

**Abstract:**

*This paper analyses the potential of the WTO waiver as a legal instrument to reconcile conflicting norms and interests. It is argued that conflicts between WTO law and other international legal regimes are often an expression of underlying interest conflicts and that these should be addressed in political processes. The paper proposes that the waiver process could be a forum for political debate on the reconciliation of competing interests which is not only open to economic interests, but also other public interests and perspectives. This thesis is explored with reference to the Kimberley and TRIPS waiver decisions.*

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## **I. The reconciliation of public interests in the international legal order**

Increasingly international law aims at the protection or promotion of public or common interests. These are interests which can be attributed across borders to individuals or groups of individuals relating to their well-being and which are to be distinguished from interests in the delimitation of sovereign spheres of influence, the reconciliation of opposed national interests or the reciprocal exchange of benefits between subjects of international law. International legal norms that protect and pursue such shared interests and values can be termed public interest norms.<sup>1</sup>

Often different public interests are pursued in separate international legal regimes.<sup>2</sup> This leads to a functional differentiation of the international legal order.<sup>3</sup> However, while the legal regimes for the protection of public goods and interests such as the environment, human rights, trade are institutionally separate, often mirroring a similar separation of government agencies domestically, their subject matters are interconnected. Economic matters are frequently also environmental matters and human rights matters. In a polity, be it the state or a supranational polity such as the European Union, legally framed processes of political deliberation provide for a legitimate balancing and reconciliation of different public interests – the outcome being *the* public interest. Political processes in this sense are rare on the international level. Fora in which deliberations take place, such as the political organs of international organizations or conferences and meetings of the parties to an international treaty, often have a limited mandate that restricts discussions to issues within the ambit of the specific regime. More importantly, national or regional interests still often dominate and impede deliberation on the proper balance of competing public interests.

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<sup>1</sup> W. Friedmann, *The Changing Structure of International Law*, 1964, 62 *et seq.*

<sup>2</sup> The term ‘international legal regime’ as used throughout this paper encompasses international treaties, international organizations and other international institutions, but also bodies of non-binding norms with or without an institutional structure.

<sup>3</sup> This differentiation can be seen critically as posing a danger of fragmentation, in particular when it leads to norm conflicts and diverging interpretations of the same legal concepts by organs of different legal regimes, see e.g. the differing standards to determine state responsibility for acts of military groups applied by the ICJ in Nicaragua (“effective control”) (Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, 1986 ICJ Rep. 14, 62–63, at paras. 110–112) and the ICTY in Tadic (“overall control”) (*The Prosecutor v. Duko Tadić*, Judgement, Case No. IT-94-1-A, A.Ch., 15 July 1999).

Differentiation of the international legal order into specialized regimes of public law and the lack of a global polity to reconcile competing interests pose dangers to the legitimacy of the international legal order. One consequence of the differentiation of international legal regimes according to the public interests pursued can be the neglect of other public interests within one regime. This neglect can occur already at the drafting stage of international instruments, the reasons for it ranging from ignorance to intent. The insufficient consideration of outside public interests can lead to a situation of potential conflict between norms of different public interest regimes. It can also lead to allegations of illegitimacy when norms of one regime impede the realization of interests or values explicitly acknowledged in another regime.<sup>4</sup>

With respect to the WTO these dangers of sectoral differentiation have materialized in two constellations. On the one hand there is an increasing interface between WTO law and the law of other international legal regimes, e.g. for the protection of the environment, culture or human rights, which results in potential norm conflicts. On the other hand there are strong claims that WTO norms, in particular of the TRIPS Agreement, are illegitimate because they take insufficient account of values which are recognized and protected in other international legal regimes, such as the human right to health care or indigenous traditional knowledge.

In this paper I will inquire into the potential of waivers and the waiver process to coordinate the WTO with other international legal regimes and to reconcile competing public interests within the law of the WTO. The evaluation of the WTO's waiver competence – the competence of the Ministerial Conference to suspend obligations of the WTO Agreements for a limited period of time (Art. IX:3 WTO Agreement) -- will proceed against the background of other approaches to the interface of the WTO and other international legal regimes as well as to the reconciliation of public interests in the WTO. I will make reference to two debates which can be seen as representative of the two constellations identified above and which resulted in the adoption of waiver decisions. One is the debate about measures taken to implement the Kimberley

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<sup>4</sup> The limited recognition of other public interests by an international regime can be exacerbated when international institutions engage in further law-making and administrative activities which are only to a limited extent controlled by its members. This enhances the tension between international law and institutions and the municipal polity where collective interests are determined and the exercise of public authority is legitimated through collective political processes resulting in law.

Certification Scheme for Rough Diamonds and their legality under WTO law, the other the debate on the TRIPS Agreement and its restrictions on access to essential medicines.

With respect to the different approaches to coordinate legal regimes and to reconcile public interests at the international level,<sup>5</sup> I wish to broadly distinguish between what I call legal approaches on the one hand and governance approaches on the other. The former often strive for unity, coherence of norms and a state of legality. Lawyers frequently posit that general international law includes conflict rules and establishes a hierarchy of norms which provide solutions to norm conflicts. Among these legal approaches one can identify different strands, in particular with respect to the question to what extent a hierarchy of norms exists that is based on common values.

While legal approaches often limit their observations to norms, norm texts and interpretations, governance approaches focus on actors and processes.<sup>6</sup> With respect to the aim of a reconciliation of public interests and coordination of regimes the latter look at modes of cooperation and coordination between different actors during the process of norm creation which shall help to prospectively avoid conflict. Reactively, solutions to conflicts are proposed which do not aim to reconcile norms doctrinally, but rather address questions such as which institutional arrangements might avoid or mitigate the effects of conflict.<sup>7</sup>

Legal and governance solutions to problems of conflicting norms and interests are not mutually exclusive, but often complement each other. A good illustration of these two broad perspectives on the coordination of regimes is the work currently undertaken within the WTO's Committee on Trade and Environment, mandated by the Doha Ministerial Declaration, on the relationship

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<sup>5</sup> I will not deal here with the approach that would leave it to the polities which constitute the WTO to determine which weight to give to which international obligation and thus to avoid conflict and mitigate legitimacy deficits.

<sup>6</sup> I am aware that this depiction is overly simplified and does not take account of approaches such as that which sees law as process. However, I think that this dichotomy is a useful generalization to clarify certain shortcomings in legal and international relations scholarship.

<sup>7</sup> An example is the proposal to include non-trade experts in WTO panels, e.g. cultural experts in panels which adjudicate cases in which cultural interests are at stake, see C. B. Graber, *The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO*, 9 *Journal of International Economic Law* (2006), 553, 571 *et seq.*

between WTO rules and Multilateral Environmental Agreements (MEAs).<sup>8</sup> It represents both approaches. On the one hand a debate is conducted on norms, i.e. on trade obligations in MEAs and their relationship to GATT norms, in particular Art. XX GATT and how these norms in case of conflict can be reconciled either through interpretation or norm change. On the other hand the debate frames the relationship between MEAs and the WTO as an “international governance issue”<sup>9</sup> and addresses questions of institutional linkages and municipal coordination of policies with the stated aim of mutual supportiveness.<sup>10</sup>

In this paper on the waiver competence I wish to focus on one aspect which I believe is frequently neglected by the legal approach as well as by the governance approach to the issues of coordination of the WTO and other regimes and the reconciliation of interests within the WTO: the potential of formal international political processes to coordinate international legal regimes and balance interests. In my view legal, as well as governance research all too often present the relationship of different norms and different international institutions as a technical, doctrinal or bureaucratic matter. This conceals the fact that often it is conflicts of interest that underlie conflicts of norms and neglects the role of politics in the solution of such conflicts.<sup>11</sup>

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<sup>8</sup> Paragraph 31(i) of the Doha Declaration, adopted on 14 November 2001 (WT/MIN(01)/DEC/1 (20 November 2001) reads:

31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question.

<sup>9</sup> Submission by the European Communities, The Relationship Between WTO Rules and MEAs in the Context of the Global Governance System, TN/TE/W/39 Committee on Trade and Environment Special Session 24 March 2004), para 2.

<sup>10</sup> See e.g. Doha Declaration, *supra* note 8, paras 6, 31. The term has also entered the TRIPS Agreement which states in its preamble: “Desiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization...as well as other relevant international organizations” (recital 8).

<sup>11</sup> On fragmentation as resulting from differences in normative preferences and policy conflicts and not lack of coordination, cf. M. Koskenniemi, What is International Law for, in: M.D. Evans, *International Law*, 2<sup>nd</sup> ed. 2006, 76; A. Fischer-Lescano, Regime-Collisions: The Vain Search for Unity in the Fragmentation of Global Law, 25 *Michigan Journal of International Law* (2004), 999, 1003. For the view that social conflict needs to be solved by political means cf. I. Scobbie, Wicked Heresies or Legitimate Perspectives? Theory and International Law, in: M.D. Evans, *International Law*, 2<sup>nd</sup> ed. 2006, 83, 86.



I intend to substantiate my view that the waiver competence has the potential to open the WTO for processes of international politics on the reconciliation of diverging interests which can result in a formal legal decision, thus ensuring legal security and coherence. In the following sections, I will first give a short introduction to the waiver competence of the WTO (II). Then I will set out the interface between the international regime for the certification of rough diamonds and the WTO (III.1) and on the other hand intellectual property rights as protected by the TRIPS Agreement and the human right to health care (III.2) which led to the adoption of two waiver decisions – the so-called Kimberley waiver and TRIPS waiver. I will proceed to an evaluation of the waiver’s potential in these and comparable cases (IV).

## II. The WTO’s waiver competence

The WTO has no general law-making competence. There are however three competences which authorize the Ministerial Conference to engage in law-making and to change or concretize existing or to create new obligations. These are the power to adopt authoritative interpretations (Art. IX:2 WTO Agreement)<sup>12</sup>, the power to adopt amendment decisions (Art. X:1 WTO Agreement),<sup>13</sup> and the waiver power (Art. IX:3 WTO Agreement).<sup>14</sup> To date, no authoritative interpretation has been adopted, and only one amendment proposal has been submitted to the membership for acceptance.<sup>15</sup> Each year, however, several waivers are granted.<sup>16</sup>

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<sup>12</sup> While all of these powers can be exercised by the General Council which conducts the functions of the Ministerial Conference between meetings (Art. IV:2 WTO Agreement), the power to adopt interpretations is explicitly granted not only to the Ministerial Conference, but also to the General Council (Art. IX:2, cl. 1 WTO Agreement). Even though Art. IX:2 cl. 4 states that “[t]his paragraph shall not be used in a manner that would undermine the amendment provisions in Article X” it has been proposed that interpretations adopted under Art. IX:2 WTO may indeed modify legal rules, see C. D. Ehlermann/L. Ehling, *The authoritative interpretation under Article IX:2 of the Agreement Establishing the World Trade Organization*, 8 *Journal of International Economic Law* (2005), 803, 808 *et seq.*

<sup>13</sup> The adoption of an amendment decision does not immediately modify legal obligations since an amendment only becomes effective when the acceptance requirements that are set out in Art. X WTO Agreement are met.

<sup>14</sup> In addition to these specific decision-making powers, Art. IV:1 cl 3 WTO Agreement provides for a general decision-making power of the Ministerial Conference: “The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and the relevant Multilateral Trade Agreement.” Whether decisions taken in accordance with Art. IV:1 WTO are legally binding is open to interpretation, see P. J. Kuijper, *Some institutional issues presently before the WTO*, in: D. L. M. Kennedy/J. D. Southwick (eds), *The Political Economy of International Trade Law*, 2002, 81, at 82.

<sup>15</sup> General Council, Decision of 6 December 2005, WT/L/641 (8 December 2005), proposing an amendment of the TRIPS Agreement. This amendment -- if and when it enters into force -- will replace the waiver decision, which was adopted on 30 August 2003 in order to implement paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (TRIPS waiver) (WT/L/540).

In the following I will briefly present the legal basis and procedure for the adoption of waivers, as well as the waiver practice which demonstrates that the waiver power has not only been used in order to grant exceptions to individual Members in cases of urgency, but that in fact it has been used very pragmatically and creatively to address a variety of different situations. In particular it has been used to address conflicts of interest by granting exceptions to legalize measures mandated by another international legal regime – this is the case of the Kimberley waiver – and by modifying the rules of WTO law – this is the case of the TRIPS waiver.

The legal basis for the adoption of waiver decisions is Art. IX:3 WTO Agreement which authorizes the Ministerial Conference to waive an obligation of the WTO Agreement or any of the Multilateral Trade Agreements.<sup>17</sup> Between the meetings of the Ministerial Conference, the General 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.<sup>18</sup> While under the GATT 1947 waiver decisions and decisions on accessions were routinely taken by vote, this practice was abandoned with the establishment of the WTO and waivers are now exclusively taken by consensus.<sup>19</sup> Requests for waivers – according to Art. IX:3 (b) WTO Agreement -- shall be submitted to the Ministerial Conference, the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, depending on the obligation to be waived. The competent organ shall consider such a request within a time period that shall not

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<sup>16</sup> Each Annual Report of the WTO -- published by the WTO Secretariat -- contains a list of waivers granted under Art. IX WTO Agreement during the period covered by the respective report. For example, the WTO Annual Report 2008 lists on page 18 six waiver decisions that were adopted in 2007; it is available at: [http://www.wto.org/english/res\\_e/reser\\_e/annual\\_report\\_e.htm](http://www.wto.org/english/res_e/reser_e/annual_report_e.htm) (4 December 2008).

<sup>17</sup> The Multilateral Trade Agreements are the agreements and associated legal instruments included in Annexes 1, 2 and 3 of the WTO Agreement (Art. II:2 WTO Agreement); these are the Multilateral Agreements on Trade in Goods (Annex 1A), the General Agreement on Trade in Services (Annex 1B), the Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C), the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2) and the Trade Policy Review Mechanism (Annex 3).

<sup>18</sup> 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.

<sup>19</sup> On 15 November 1995 the General Council agreed that decisions concerning waivers and accessions would be taken in accordance with Art. IX:1 WTO by consensus; only when consensus cannot be arrived at, voting should take place in accordance with the relevant provisions, see 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 (24 November 1995). The statement also specifies that a member may request a vote at the time the decision is taken.

exceed 90 days.<sup>20</sup> The only substantive requirement for waivers set out in Art. IX:3 WTO Agreement 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.<sup>21</sup> According to Art. IX:4 WTO Agreement waiver decisions have to have a termination date, shall be reviewed annually by the Ministerial Conference, if granted for more than one year, and can be subject to terms and conditions.<sup>22</sup>

The wording of the waiver competence in Art. IX:3 WTO Agreement and especially the requirement set out therein that there be “exceptional circumstances” suggests that the waiver competence intends to legalize non-compliant measures taken by individual members in concrete situations of urgency in which compliance is not a feasible option. This exceptional nature of waiver decisions has been stressed by a panel established under the GATT 1947 and the Appellate Body with reference to the legal texts. Both concluded that waiver decisions should be interpreted narrowly.<sup>23</sup> Such an interpretation as exception can be supported by a contextual interpretation which contrasts the waiver power with the powers of the Ministerial Conference to issue authoritative interpretations (Art. IX:2 WTO Agreement) and to propose amendments to WTO law (Art. X WTO Agreement). While the latter two are instruments to modify the legal rules in an abstract way and for the whole membership, the waiver power – it could be argued -- addresses the need to modify obligations in individual cases and concrete situations.<sup>24</sup> Finally, the negotiating history of Art. XXV:5 GATT – which was the general waiver power under the GATT 1947<sup>25</sup> – provides arguments for the view that the waiver is intended to address temporary

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<sup>20</sup> Further procedural requirements are set out in a decision of the CONTRACTING PARTIES of 1956, Guiding Principles to be Followed by the CONTRACTING PARTIES in Considering Applications for Waivers from Part I or Other Important Obligations of the Agreement, BISD 5S/25.

<sup>21</sup> For the GATT 1947 see Jackson, *World Trade and the Law of GATT*, 1969, 544; critical with respect to the waiver practice under the WTO, D. Marinberg, GATT/WTO Waivers: “Exceptional Circumstances” as Applied to the Lomé Waiver, *Boston University International Law Journal* 19 (2001), 129.

<sup>22</sup> 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.

<sup>23</sup> Panel Report, *US – Sugar Waiver*, BISD 37S/228, para. 5.9; Appellate Body Report, *EC – Bananas III*, WT/DS27/AB/R, para. 185; cf. Appellate Body Report (Art. 21.5 DSU), WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW/USA, para. 382.

<sup>24</sup> See *supra* note 12.

<sup>25</sup> Art. XXV:5 GATT has been superseded by Art. IX:3 WTO Agreement as the general waiver competence (Art XVI:3 WTO Agreement).

situations of urgency which prevent members from complying with certain obligations.<sup>26</sup> It thus does not surprise that the qualification as an exception or exit option for members is the prevailing view in the literature, which mostly – if at all – deals with the waiver power as an exception and in this function frequently compares it with escape clauses.<sup>27</sup>

From the waiver practice under the GATT 1947 and within the WTO<sup>28</sup> it appears, however, that the possibility to request waivers does not only serve the function of a safety valve when individual members are unable to perform their obligations, but that the waiver power is used much more broadly. For example, the largest group of waivers are waivers that suspend Art. II GATT in order to enable WTO members to implement changes to the Harmonized Commodity Description and Coding System domestically when their GATT schedules have not yet been adapted to these changes.<sup>29</sup> These waivers have become an important part of the procedure of schedule adaptation and are often granted collectively, i.e. one waiver decision is adopted for all members that wish to make use of this waiver.<sup>30</sup> The second largest group consists of waiver decisions that suspend Art. I GATT for specific preferences granted in preferential trade arrangements that do not meet the requirements of Art. XXIV GATT and the Enabling Clause and which are often granted for historical reasons.<sup>31</sup> The practice shows that neither the

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<sup>26</sup> Secretariat Note to Group on Environmental Measures and International Trade, Agenda Item 1: Trade Provisions Contained in Existing Multilateral Environmental Agreements vis-vis GATT Principles and Provisions, TRE/W/18 (1 October 1993), paras 8 and 9 with reference to the report of the First Session of the Preparatory Committee in London in 1946.

<sup>27</sup> See e.g. W. Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht*, 1990, 164; D. Marinberg, *supra* note 21, 129; J. Gold, “Dispensing” and “Suspending” Powers of International Organizations, 29 *Nederlands Tijdschrift voor Internationaal Recht*, (1972), 169-200; also published in: *Legal and Institutional Aspects of the International Monetary System: Selected Essays*, 1979, 352; ILC Special Rapporteur A. Pellet, Fifth report on reservations to treaties (2000), A/CN.4/508/Add. 1, para. 138.

<sup>28</sup> Under the GATT 1947 the CONTRACTING PARTIES granted 115 waivers. This number does not include the frequent decisions to amend or extend waivers. For information on the practice of the CONTRACTING PARTIES under Art. XXV:5 GATT 1947 see Analytical Index, Guide to GATT Law and Practice, 1995, Vol. 2, Article XXV, pp. 892-905. Between the entry into force of the WTO and September 2002, 138 waiver decisions and decisions extending existing waivers have been taken, see Note by the WTO Secretariat to the TRIPS Council, Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Information on Waivers, IP/C/W/387, 2 (24 October 2002).

<sup>29</sup> On the need of WTO members 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 Committee on Market Access, Minutes of the Meeting of 15 March 2002 and the resumed Meeting of 12 June 2002, G/MA/M/31 (26 June 2002), para. 4.1.

<sup>30</sup> I. Feichtner, The Administration of the Vocabulary of International Trade: The Adaptation of WTO Schedules to Changes in the Harmonized System, 9 *German Law Journal* (2008), 1481, 1505 *et seq.*

<sup>31</sup> See e.g. the Waiver granted to the European Communities for the ACP-EC Partnership Agreement, Ministerial Conference, Decision of 14 November 2001, WT/L/436 (7 December 2001).

requirement of exceptional circumstances has delimited the kind of measures for which waivers have been granted nor that waiver decisions have been limited in their application to individual members and concrete measures.<sup>32</sup>

In the context of the question whether the waiver has the potential to reconcile competing interests and conflicting international legal regimes two types of waivers are relevant. Firstly, waiver decisions have been taken to legalize abstractly defined measures for all or groups of members. These are the 1971 waivers to legalize preferential tariff treatment in accordance with the Generalized System of Preferences,<sup>33</sup> and preferential trade arrangements among developing countries,<sup>34</sup> which were both succeeded by the Enabling Clause in 1979, the 1999 waiver to enable developing countries to maintain trade preferences vis-à-vis least developed countries<sup>35</sup> and also the 2003 TRIPS waiver.<sup>36</sup> These waiver decisions have given rise to new rules of WTO law by modifying existing rules. A modification of rules is achieved in that the waiver suspends a legal rule under certain conditions. E.g. the 1999 waiver decision waives Art. I:1 GATT to the extent necessary to allow developing country Members to provide preferential tariff treatment to products of least-developed countries on a generalized, non-reciprocal and non-discriminatory basis.<sup>37</sup> In the next sections I will deal in more detail with the waiver as a rule-making instrument by reference to the TRIPS waiver decision.

Secondly, waivers have been discussed -- and one waiver, namely the Kimberley waiver,<sup>38</sup> has been granted – as a device to coordinate the WTO legal order with other international legal regimes without a general modification of WTO norms. A waiver decision can achieve such coordination by legalizing measures mandated by another international legal regime which otherwise might violate WTO norms. Such a waiver provides a linkage between the WTO and

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<sup>32</sup> Disregarding the waiver practice the Appellate Body stated in its recent Art. 21.5 report in *EC – Bananas III*: “the function of a waiver is to relieve a Member, for a specified period of time, from a particular obligation ... Its purpose is not to modify existing provisions in the agreements, let alone create new law...”, *supra* note 23, para. 382.

<sup>33</sup> CONTRACTING PARTIES, Decision of 25 June 1971, L/3545 (28 June 1971).

<sup>34</sup> CONTRACTING PARTIES, Decision of 26 November 1971, L/3636 (30 November 1971)

<sup>35</sup> General Council, Decision of 15 June 1999, Preferential Tariff Treatment for Least-Developed Countries, WT/L/304 (17 June 1999).

<sup>36</sup> General Council, Decision of 30 August 2003, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 (2 September 2003) and WT/L/540/Corr. 1 (29 July 2005).

<sup>37</sup> *Supra* note 35, paras 1 and 2.

<sup>38</sup> General Council, Decision of 15 May 2003, WT/L/518 (27 May 2003); General Council, Decision of 15 December 2006, WT/L/676 (19 December 2006) (extension decision).

another regime by way of exception. It excepts measures mandated by the other regime from the disciplines of WTO law. The Kimberley waiver will be discussed in the following sections as an example of a waiver that coordinates potentially conflicting legal regimes by way of exception. Whether it serves as an exception or a rule-making instrument, a waiver decision is always preceded by a political process. The potential of this process to indeed be a forum in which competing interests can be voiced and their proper reconciliation addressed will be discussed in section IV.

### **III. Reconciliation of conflicting norms and interests by way of exception and rule-making: the cases of the Kimberley and the TRIPS waivers**

The interface between WTO law and the Kimberley Process Certification Scheme for Rough Diamonds (KPCS) and the interface between the TRIPS Agreement and the human right to access to essential medicines can be seen as manifestations of norm and interest conflicts in international law. Both instances have been addressed within the WTO by waiver decisions. In the first case a waiver has been granted that suspends the application of the most-favored nation principle in Art. I GATT to domestic measures taken to implement the Kimberley Process Certification Scheme. This waiver resolves the potential conflict between the KPCS and WTO law by excepting the measures foreseen by the KPCS from the discipline of Art. I GATT. In the second constellation the conflict between the TRIPS disciplines for patents on pharmaceutical products and human rights norms that give rise to a right to access to essential medicines has been addressed by a waiver that modifies the legal rules of the TRIPS Agreement in order to take better account of the interests protected by the human right to health care.<sup>39</sup>

#### ***1. Coordination of legal regimes by exception -- the Kimberley Waiver***

##### **(a) The Kimberley Process – an international regime for the protection of peace, security and human rights**

Diamond trade has been and continues to be a major source of revenue with which rebel movements in Africa finance weapons and landmines. It thus indirectly contributes to conflicts –

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<sup>39</sup> For a characterization of the relationship between the patent law of the TRIPS Agreement and the human right to access to medicines as one of norm conflict, see H. Hestermeyer, *Human Rights and the WTO. The Case of Patents and Access to Medicines*, 2007, pp. 169 *et seq.*

such as those in Angola, Sierra Leone, The Democratic Republic of the Congo and Liberia – which often lead to the destabilization of whole regions and in the course of which massive and large-scale human rights violations take place, such as mutilations, rape, murder and the conscription of children as child soldiers.<sup>40</sup>

The Kimberley Process Certification Scheme for Rough Diamonds<sup>41</sup> aims at the suppression of trade in so-called conflict or blood diamonds. Conflict diamonds are defined as “rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments” as described in relevant United Nations Security Council or General Assembly resolutions.<sup>42</sup> The aim of the KPCS to prevent rebels to finance their weapons through the diamond trade intends to contribute to the larger objective of maintaining and restoring peace and security and to prevent gross human rights violations perpetrated in armed conflicts between governments and rebel movements.<sup>43</sup> After nongovernmental organizations had drawn public attention to the role of the diamond trade in these conflicts, African diamond-producing countries in 2000 initiated the Kimberley Process, a multi-stakeholder initiative in which governments, industry and civil society representatives participate.<sup>44</sup> The KPCS was adopted by a ministerial declaration, the Interlaken Declaration of 5 November 2002 on the Kimberley Process Certification Scheme for Rough Diamonds (Interlaken Declaration).<sup>45</sup>

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<sup>40</sup> For a detailed account of the connection between diamond-mining and trading and these conflicts and how public awareness was raised by NGOs such as Global Witness and Canada Africa Partnership and led to action of the international community see K. Nadakavukaren Schefer, *Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process*, in: T. Cottier, J. Pauwelyn, E. Bürgi, *Human Rights and International Trade*, 2005, 391, 391-416. Recently a connection has been made between diamond trade and the financing of international terrorism, see references in J. Pauwelyn, *WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for “Conflict Diamonds,”* 24 *Michigan Journal of International Law* (2003) 1177, 1186, fn. 38.

<sup>41</sup> The KPCS Document can be found at:

[http://www.kimberleyprocess.com/documents/basic\\_core\\_documents\\_en.html](http://www.kimberleyprocess.com/documents/basic_core_documents_en.html) (11 July 2008)

<sup>42</sup> KPCS, Section I, the definition of Conflict Diamonds in addition refers to relevant SC resolutions and the definition of conflict diamonds in General Assembly Resolution A/Res/55/56, recital 2.

<sup>43</sup> Recital 1, Interlaken Declaration of 5 November 2002 on the Kimberley Process Certification Scheme for Rough Diamonds, at [http://www.kimberleyprocess.com/documents/basic\\_core\\_documents\\_en.html](http://www.kimberleyprocess.com/documents/basic_core_documents_en.html) (11 July 2008).

<sup>44</sup> Interlaken Declaration (*supra* note 43), recital 6 which notes “the important contribution made by industry and civil society to the development of the Kimberley Process Certification Scheme;” Information on the Kimberley Process can be found on its website at [http://www.kimberleyprocess.com/home/index\\_en.html](http://www.kimberleyprocess.com/home/index_en.html) (11 July 2008).

<sup>45</sup> *Supra* note 43.

The Kimberley Process is closely linked to the United Nations. Before the Kimberley Process started, the Security Council, acting under Chapter VII, had decided upon embargoes on the importation of diamonds from Angola and Sierra Leone.<sup>46</sup> In 2000 General Assembly Resolution 55/56 on the role of diamonds in fuelling conflict was adopted unanimously and called upon UN members to devise effective and pragmatic measures to address the problem of trade in conflict diamonds.<sup>47</sup> After the Interlaken Declaration had given effect to the KPCS, it was endorsed in General Assembly and Security Council resolutions.<sup>48</sup> So far the Chair of the Kimberley Process has reported annually to the General Assembly<sup>49</sup> and the Kimberley Process cooperates with UN bodies in their activities against illicit diamond production and trade in Côte d'Ivoire and Liberia.<sup>50</sup>

From the language adopted in the Interlaken Declaration and in the KPCS itself it becomes clear that the KPCS is not an international treaty, but a non-binding instrument.<sup>51</sup> The adopting states and the EC are not called parties, but “Participants,”<sup>52</sup> the declaration does not refer to the entry into force of the scheme, but its “launch”<sup>53</sup> and – most significantly – the KPCS does not use mandatory language with respect to the requirements on trade in rough diamonds which it sets out. Instead participants “should ensure” that certain requirements for the trade in rough diamonds are met.<sup>54</sup> The main requirements are: Participants *should* ensure that only rough

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<sup>46</sup> S/Res/1173 (1998) instituted an embargo on the importation of diamonds from Angola, which were not certified by the Government of Unity and National Reconciliation (para. 12 (b)), see also S/Res/1176 (1998); S/Res/1306 (2000), embargo on imports of rough diamonds from Sierra Leone which are not certified by Sierra Leone’s certification of origin regime (paras. 1, 5).

<sup>47</sup> A/Res/55/56 (2000); see also A/Res/56/263 (2002).

<sup>48</sup> See e.g. A/Res/57/302 (2002) and S/Res/1459 (2003).

<sup>49</sup> See e.g. Report of the Kimberley Process Certification Scheme to the General Assembly pursuant to resolution 61/28, A/62/543, annex, and A/62/543/Add.1 (2007).

<sup>50</sup> See A/Res/60/182 (2006), paras 7 and 9 (cooperation of Kimberley Process and United Nations in the assessment of the volume of rough diamonds produced in and exported from Côte d’Ivoire and cooperation of the KP with the Security Council Committee established pursuant to resolution 1521 (2003) concerning Liberia).

<sup>51</sup> For the view that the KPCS is not a treaty, but a voluntary scheme, see J. G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 *American Journal of International Law* (2007) 819, 839.

<sup>52</sup> A further explanation for the use of the term Participant, apart from the intended non-binding character, is the participation of NGOs and industry representatives in the Kimberley Process and their ongoing involvement, e.g. through a voluntary system of industry self-regulation. However, the norms of the KPCS are merely addressed to states and regional economic organization and only these are included in the definition of the term Participant in Section I of the KPCS.

<sup>53</sup> Interlaken Declaration, para. 2. This paragraph also provides that for applicants that join after this date, the scheme takes effect following notification to the Chair in accordance with Section VI, para. 9.

<sup>54</sup> See Section II (on the Kimberley Process Certificate), Section III (on Undertakings in Respect of the International trade in Rough Diamonds), Section IV (on Internal Controls), Section V (on Cooperation and Transparency). It is



diamonds that are accompanied by a so-called Kimberley Process Certificate are imported and exported,<sup>55</sup> and participants should neither import rough diamonds from non-participants nor export rough diamonds to non-participants.<sup>56</sup> The KPCS also sets out certain requirements for the process of issuing certificates. Most importantly, participants should “establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory”.<sup>57</sup> The certificate thus shall ensure that only diamonds which come from areas that are controlled by the legitimate government of a country enter the market. Section IV of the KPCS foresees that it is complemented with a voluntary system of industry self-regulation which provides for a system of warranties to ensure the full traceability of rough diamond transactions by government authorities.<sup>58</sup> The scheme further sets out procedural rules concerning decision-making and compliance verification. These have been changed and supplemented over the last years; a peer review system has been introduced and a participation committee has been established.<sup>59</sup>

For its effectiveness the KPCS depends on municipal implementation of the material non-binding obligations<sup>60</sup> through binding legislation and enforcement of this legislation.<sup>61</sup> The

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interesting to note that with respect to administrative matters regulated in Section VI the KPCS mostly uses mandatory language, e.g. it sets out that participants are to reach decisions by consensus (para. 5).

<sup>55</sup> Section III (a) and (b). The minimum requirements that a Kimberley Process Certificate has to meet -- such as being named as such, indication of country of origin, issuing authority, carat weight/mass and being tamper and forgery resistant -- are set out in Annex I. While participants *should* ensure that certificates meet the minimum requirements, a Kimberley Process Certificate in order to qualify as such *has* to meet the minimum requirements set out in Annex I.

<sup>56</sup> Section III (c).

<sup>57</sup> Section IV (a).

<sup>58</sup> For a criticism of the insufficiency of US jewelry retailers’ policies to prevent trade in conflict diamonds, see Global Witness and Amnesty International, *Conflict Diamonds. US Jewelry retailers still not doing enough, Summary of US Results of Global Witness and Amnesty International Survey*, February 2007, at [http://www.globalwitness.org/media\\_library\\_detail.php/519/en/global\\_witness\\_amnesty\\_international\\_us\\_diamond\\_re](http://www.globalwitness.org/media_library_detail.php/519/en/global_witness_amnesty_international_us_diamond_re) (11 July 2008)

<sup>59</sup> Administrative Decision on Peer Review of December 2007 (the KPCS Peer Review system was established at the Sun City Plenary meeting in October 2003) and Administrative Decision on Participation Committee of 29 October 2004 (which revises the administrative decision which established the Participation Committee of April 2003), both available at: [http://www.kimberleyprocess.com/structure/working\\_group\\_en.html](http://www.kimberleyprocess.com/structure/working_group_en.html) (11 July 2008). The Participation Committee consists of no more than 12 members. A maximum of 7 members are chosen from the participants of the KPCS and 2 from the Kimberley Process Observers, one from civil society and the other from industry.

<sup>60</sup> I use the term “non-binding obligation” to refer to the requirements set out in the KPCS which participants “should” comply with. I further use the term “mandated” with respect to these requirements even though they are non-binding.

European Communities have implemented the KPCS with Council Regulation No 2368/2002,<sup>62</sup> the US with the Clean Diamond Trade Act.<sup>63</sup> With respect to compliance control it is important to note the following: Since the obligations set out in the KPCS are non-binding, participants that do not comply do not violate international law and thus do not incur any state responsibility under general international law. However, states that do not implement the minimum requirements set out in the KPCS can be considered as non-participants with the consequence that exports from and imports to them should be forbidden according to Section III (c) KPCS.<sup>64</sup> Whether the minimum requirements are met is assessed by the Participation Committee.<sup>65</sup> Currently the KPCS has 48 participants – the EC and its member states counting as one – who represent the vast majority of trade in rough diamonds.<sup>66</sup>

**(b) The interface between the Kimberley Process Certification Scheme and WTO law**

Since the KPCS aims at the regulation of international trade in rough diamonds, there is an interface between this scheme and WTO law on international trade in goods which binds most of the 48 KPCS participants. First of all it should be noted that throughout the Kimberley Process it was stated that “the legitimate trade in diamonds makes a critical contribution to economic development in many countries worldwide,”<sup>67</sup> and that measures implementing an international certification scheme should be consistent with international trade law.<sup>68</sup> In the preamble to the KPCS the participants recognize “that the international certification scheme for rough diamonds must be consistent with international law governing international trade”<sup>69</sup> and according to

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<sup>61</sup> For criticism of the effectiveness of the KP see Partnership Africa Canada and Global Witness, *Illicit Diamond Flows, Kimberley Process, Note for Plenary*, November 2007, at:

[http://www.globalwitness.org/media\\_library\\_detail.php/604/en/illicit\\_diamond\\_flows](http://www.globalwitness.org/media_library_detail.php/604/en/illicit_diamond_flows) (11 July 2008).

<sup>62</sup> 2002 O.J. (L 358) 28-35.

<sup>63</sup> Public Law 108-19 (25 April 2003).

<sup>64</sup> See Terms of Reference of the Participation Committee, Administrative Decision on Participation Committee of 29 October 2004. available at: [http://www.kimberleyprocess.com/structure/working\\_group\\_en.html](http://www.kimberleyprocess.com/structure/working_group_en.html) (11 July 2008). Para 4.3 of the Terms of Reference reads: “If the Committee concludes that the Participant no longer meets the said requirements it will inform the Chair in writing of the reasons for such a conclusion and may recommend any further action that the Committee believes is appropriate.”

<sup>65</sup> See Chair’s Notice, End of Tolerant Period in the Kimberley Process, 31 July 2003, available at: [http://www.kimberleyprocess.com/documents/basic\\_core\\_documents\\_en.html](http://www.kimberleyprocess.com/documents/basic_core_documents_en.html).

<sup>66</sup> For a list of KPCS Participants who meet the minimum requirements see [http://www.kimberleyprocess.com/structure/participants\\_world\\_map\\_en.html](http://www.kimberleyprocess.com/structure/participants_world_map_en.html).

<sup>67</sup> A/Res/55/56 (2000), recital 4.

<sup>68</sup> See e.g. A/Res/55/56 (2000), recital 7.

<sup>69</sup> KPCS preamble, recital 14.

paragraph 3 of the Interlaken Declaration implementing measures shall also be consistent with international trade rules.<sup>70</sup>

Already during the drafting stage participants in the Kimberley Process were aware of potential conflicts between the prohibition on trade with non-participants and WTO norms, in particular the prohibition on quantitative restrictions in Art. XI:1 GATT, the obligations in Art. XIII GATT to administer quantitative restrictions non-discriminatorily and in Art. I GATT to grant most-favored nation treatment.<sup>71</sup> With respect to the prohibition on trade in uncertified diamonds between participants the predominant view seemingly was that this prohibition was in conformity with WTO law.<sup>72</sup>

The literature on this question for the most part holds that the import and export restrictions foreseen by the KPCS for trade in rough diamonds between participants and between participants and non-participants are justified under the general exceptions in Art. XX or Art. XXI GATT.<sup>73</sup> There are, however, certain characteristics of the KPCS which could also support a different interpretation. In the following I will explore some of the problematic aspects of the legality of measures implementing the non-binding KPCS norms under GATT norms. These allow for the conclusion that there is potential conflict between GATT norms of non-discrimination and the import and export prohibitions of the KPCS. I conduct my analysis of the compatibility of KPCS implementing measures with WTO law with respect to the import and export bans foreseen in EC regulation 2368/2002 which implements the KPCS for the EC. Regulation 2368/2002 prohibits the import of rough diamonds into the Community unless the rough diamonds are

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<sup>70</sup> Paragraph 3 of the Interlaken Declaration reads: “We will ensure that the measures taken to implement the Kimberley Process Certification Scheme for rough diamonds will be consistent with international trade rules.”

<sup>71</sup> See Chairman of the Kimberley Process, Non-Paper, Kimberley Process Workshop on WTO Conformity, 15-17 February 2002 (revised version 14 March 2002), available at: [www.kimberleyprocess.com/download/getfile/42](http://www.kimberleyprocess.com/download/getfile/42) (17 July 2002).

<sup>72</sup> A waiver was only requested for domestic measures that are necessary to give effect to import and export restrictions outlined in section III (c) of the KPCS, see Communication from Canada, Japan and Sierra Leone to the Council for Trade in Goods, Kimberley Process Certification Scheme for Rough Diamonds, Request for a Waiver, 11 November 2002, G/C/W/431 (12 November 2002), para. 3.

<sup>73</sup> See e.g. T. M. Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 *Minnesota Journal of Global Trade* (2003), 1, 48 *et seq.*; J. Pauwelyn, *supra* note 40, 1189 *et seq.*; K. Nadakavukaren Schefer, *supra* note 40, 418 *et seq.*; more critical as to the justification of the trade restrictions under GATT exceptions is K. R. Gray, *Conflict Diamonds and the WTO: Not the Best Opportunity to Be Missed for the Trade-Human Rights Interface*. Commentary on Krista Nadakavukaren Schefer, in: T. Cottier, J. Pauwelyn, E. Bärger, *Human Rights and International Trade*, 2005, 451.

accompanied by a certificate validated by the competent authority of a participant (Art. 3a). It further prohibits the export from the Community of rough diamonds unless they are accompanied by a corresponding Community certificate issued and validated by a Community authority (Art. 11 a). Since the regulation specifies that the Community authority may only issue a Community certificate to an exporter when it has established that the rough diamonds are effectively destined for arrival in the territory of a participant (Art. 12 para. 1 (c)), the export of rough diamonds to non-participants is in effect prohibited. The import ban on uncertified rough diamonds can be differentiated into a ban on all rough diamonds from non-participants (since they cannot provide exporters with a valid Kimberley Process Certificate) and a ban on uncertified rough diamonds from participants.

The import and export bans for all rough diamonds from and to non-participants and for uncertified rough diamonds from and to KPCS participants amount to “prohibitions ... made effective through ... import or export licenses or other measures ... maintained ... on the importation ... or on the exportation .. of any product” that are prohibited by Art. XI:1 GATT unless they are justified under one of the general exceptions contained in Articles XX and XXI GATT.<sup>74</sup> In addition, the complete import ban on rough diamonds with respect to non-participants, if not justified, would constitute a violation of Art. XIII and Art. I GATT since rough diamonds originating in non-participating WTO members are treated less-favorably than rough diamonds originating in participating countries since the latter may be imported when certified.

The exceptions in Art. XX(a) GATT for measures necessary to protect public morals, Art. XX (b) GATT for measures necessary to protect human life and the security exception in Art. XXI

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<sup>74</sup> I do not want to dispute that the import and export bans fall under Art. XI GATT. I merely wish to point to a characteristic of the KPCS with respect to trade among participants which distinguishes the KPCS implementing measures from other import and export restrictions. The trade restrictions among participants are part of a scheme common to all participants with which they intend to prevent certain persons from engaging in trade with rough diamonds. Since there is no international authority which monitors trade in rough diamonds this aim has to be enforced in a decentralized manner. The means chosen are certification and a restriction on trade in uncertified diamonds which is enforced at the border. These characteristics liken the restrictions among participants to internal measures falling under Art. III:4 GATT. A strong argument, which in the end speaks against such an interpretation is, however, that the export and import restrictions are not complemented with restrictions on the internal sale of uncertified diamonds in the domestic markets of KPCS participants. See also Price, *supra* note 73, 52 *et seq*, who argues that Art. XI GATT is not applicable to multilaterally agreed import and export restrictions.

(c) GATT for action in pursuance of members' obligations under the UN Charter for the maintenance of international peace and security potentially provide for justifications of the import and export restrictions.<sup>75</sup> I will not engage in a detailed interpretation of these exceptions, but will merely make a few remarks in response to some interpretations put forward in the literature.

In my opinion it is doubtful whether a panel or the Appellate Body would find the restrictions to be justified under Art. XXI (c) GATT.<sup>76</sup> Art. XXI (c) GATT justifies a WTO member's "action in pursuance of its obligation under the United Nations Charter for the maintenance of international peace and security." Even though General Assembly resolutions called upon the international community to develop and implement a certification scheme and subsequent resolutions endorsed the KPCS, states are under no binding legal obligation – imposed by the UN Charter or Security Council resolutions under Chapter VII – to participate in the scheme and, if they do participate, to implement the non-binding obligations domestically.<sup>77</sup> However, an interpretation of the requirement that measures pursue "obligations under the UN Charter for the maintenance of peace and security" that only encompasses binding obligations of UN treaty or secondary law seems justified not only on the basis of the clear wording of Art. XXI (c) GATT, but also due to the great discretion which Art. XXI (c) GATT affords to WTO members once this requirement is fulfilled.<sup>78</sup> According to Art. XXI (c) GATT members may take "any action" in pursuance of such obligation. Therefore, Art. XXI (c) GATT should not be interpreted to justify measures implementing the non-binding obligations of the KPCS unless there is a binding SC resolution which obliges members to take such measures.

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<sup>75</sup> Pauwelyn is of the opinion that Art. XXI (b) GATT, the national security exception, also provides for a justification, *supra* note 40, 1185 *et seq.* I find an interpretation according to which, e.g. the EC measures are essential for EC member states' own security interests not plausible, in particular since the KPCS does not name the fight against international terrorism as one of its objectives. Also skeptical of a justification of the trade restrictions under Art. XXI(b) GATT is Gray, *supra* note 73, 458.

<sup>76</sup> That they would be justified under Art. XXI (c) GATT is argued by Pauwelyn, *supra* note 40, 1184 *et seq.*

<sup>77</sup> See *supra* section III.1.a.

<sup>78</sup> On the wide discretion under Art. XXI (b) GATT, see M. Hahn, *Vital Interests in the Law of GATT. An Analysis of GATT's Security Exception*, 12 *Michigan Journal of International Law* (1991), 558.

More likely, the trade restrictions at issue are justified under the public morals exception in Art. XX (a) GATT.<sup>79</sup> Implementation of the KPCS requirements can be seen as furthering public morals, defined by the panel in the *US -- Gambling* as “standards of right and wrong conduct maintained on behalf of a community or nation.”<sup>80</sup> It could be argued that the EC by becoming a participant of the KPCS gives expression to its citizens’ moral standards according to which it is wrong to contribute to cruel conflicts in Africa by buying diamonds or diamond jewelry.<sup>81</sup> With respect to the requirement that the measures be necessary and the requirements in the chapeau that the application of the measures shall not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail<sup>82</sup> one should distinguish between measures vis-à-vis KPCS participants and measures vis-à-vis non-participants.

I first turn to measures with respect to other KPCS participants. It has rightly been pointed out that the causal link between the trade in rough diamonds and human rights violations during armed conflicts is not immediate. Neither the product, nor its production poses a danger to human rights that is addressed by the KPCS.<sup>83</sup> Rather it is the persons who trade and the way they use the proceeds from such trade which poses the danger that the KPCS wants to contain. This would have to be problematized if the question was whether the trade restrictions are necessary to address human rights violations during violent conflicts in Africa. However, if the question is posed differently, namely whether the measures are necessary to ensure that diamonds sold on the EC internal market have not been traded by persons who use the proceeds to finance weapons which are distributed *i.a.* to children, then the link between the measures and the danger to public morals in the EC is more direct. It is then plausible to hold that certification is a necessary mean to ensure that diamonds are “clean.” Further characteristics of the measures which might be problematized when examining their justification under Art. XX GATT are that

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<sup>79</sup> It is highly doubtful whether Art. XX (b) GATT justifies measures to protect human health in other WTO members.

<sup>80</sup> Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, para. 6.465.

<sup>81</sup> However, the protection of public morals in Europe is certainly not the main objective of the KPCS, which is rather the maintenance of peace and security and the mitigation of humanitarian crises in Africa.

<sup>82</sup> For the differentiation in the interpretation of Art. XX GATT between the measure, which has to meet the requirements of the applicable paragraph, and the application of the measure which has to meet the requirements of the chapeau, see Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, pp 21, 22.

<sup>83</sup> K.N. Nadukavukaren Schefer has pointed out that also the production process is often characterized by serious human rights violations, *supra* note 40, 394 *et seq.* These however have not become the object of the Kimberly Process.

certification is only required for rough diamonds, not processed diamonds, and only for imports and exports, but not for internal trade.<sup>84</sup> These inconsistencies and the doubts they might raise with respect to the requirements of necessity and the chapeau can be addressed by taking the KPCS into account in the interpretation of Art. XX(a) GATT according to Art. 31: 3 (c) Vienna Convention on the Law of Treaties.<sup>85</sup> The agreement by WTO members in the KPCS on certain measures – so it could be argued – should guide the interpretation of the term necessary and the requirements of the chapeau and consequently the measures should be held to be justified under Art. XX(a) GATT.<sup>86</sup>

With respect to the justification of import and export bans on rough diamonds vis-à-vis non-participants under Art. XX (a) GATT it could be objected that the measure is not necessary and its application violates the chapeau of Art. XX GATT. First of all it should be reiterated that neither product nor production characteristics of rough diamonds are related to the harms which the KPCS intends to address which makes an undifferentiated ban on all rough diamonds seem unnecessary.<sup>87</sup> With respect to non-participants, who are not affected by internal conflict, the complete ban on exports of rough diamonds without the possibility to prove to the importing WTO member, e.g. on the basis of a different certification scheme, that the diamonds in question are no conflict diamonds, might be held to constitute an unjustifiable discrimination between countries in which the same conditions prevail. That the main reason for the complete import and

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<sup>84</sup> The fact that the requirement of a certificate only applies to international trade and not to trade within a country has been criticized as a weakness of the system, see K. N. Nadukavukaren Schefer, *supra* note 40, 415. Section IV of the KPCS states that “a voluntary system of industry self-regulation ... will provide for a system of warranties underpinned through verification by independent auditors of individual companies and supported by internal penalties set by industry, which will help to facilitate the full traceability of rough diamond transactions by government authorities.”

<sup>85</sup> On the role of Art. 31:3 (c) VCLT in WTO dispute settlement, see e.g. G. Marceau, A Call for Coherence in International Law. Praises for the Prohibition Against “Clinical Isolation” in WTO Dispute Settlement, 33 *Journal of World Trade* (1999), 87, 123 *et seq.*

<sup>86</sup> Pauwelyn has argued that participants could rely on these non-binding obligations directly as defense, *supra* note 40, 1193 *et seq.* Apart from the question whether a panel or the AB have jurisdiction to apply KPCS norms directly, this amounts to a legal construction which can hardly be reconciled with common legal doctrine. According to Pauwelyn it is irrelevant that the obligations contained in the KPCS are non-binding. What matters is that by adopting the KPCS through a ministerial declaration, participants agreed that they had the right to implement it and thus inter se contracted out of WTO obligations as far as they prohibited such implementing measures. For this argumentation to be convincing one would, however, have to conclude that the Interlaken Declaration is legally binding – even if it does not give rise to legally binding obligations. Given the language employed – of participants, scheme, launch – it is doubtful whether this was the intention of the participants.

<sup>87</sup> The ban is not a ban on all conflict diamonds, since uncertified diamonds need not at all be related to conflict, just because they are uncertified.

export ban on rough diamonds is to enhance participation in the KPCS supports such an interpretation. Comprehensive membership and effectiveness of an international regime is not in itself an objective acknowledged by Art. XX GATT. It has been argued – with reference to the Appellate Body report in *Shrimp—Turtle*<sup>88</sup> – that the KP is open to all countries that wish to participate, and that therefore differentiation between participants and non-participants did not constitute a discrimination that violated Art. XX GATT.<sup>89</sup> To this argument one could respond that the inclusive nature of the KP and its drafting history justifies the unilateral imposition of trade restrictions with respect to conflict diamonds also vis-à-vis non-participants, but that nonetheless these trade measures may not unjustifiably discriminate between participants and non-participants. Arguably the imposition of a complete trade ban without granting non-participants the opportunity to prove that the diamonds exported from their territory are not conflict diamonds constitutes such discrimination. It further has to be remembered that a participant may become a non-participants if it is determined that it does not meet KPCS minimum requirements.<sup>90</sup>

My intention in the foregoing was not to put forward the – in my view – best interpretation of WTO law with respect to the KPCS implementing measures. Instead I intended to substantiate the doubt – which was shared by some participants in the Kimberley Process – as to the WTO legality of the trade restrictions vis-à-vis non-participants that are foreseen in the KPCS. In my view there are good doctrinal reasons to hold that the trade restrictions vis-à-vis non-participants violate Articles XI, XIII and I GATT. According to such an interpretation there is a conflict between WTO law and the requirements of the KPCS with respect to trade with non-participants. Apart from problematizing the legality of the trade bans foreseen in the KPCS, I also wished to indicate the kind of questions which panels or AB would have to ask during the course of such interpretation, namely questions with respect to the objectives of the KPCS, the necessity of the measures to reach these objectives, the process of its negotiation, the determination of who

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<sup>88</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R. In this case the AB found the fact that the US did not attempt to negotiate its shrimp protection measures, but instead imposed them unilaterally to underscore their “discriminatory influence” and “unjustifiability” (para. 172).

<sup>89</sup> See e.g. Pauwelyn, *supra* note 40, 1190 *et seq.*

<sup>90</sup> See *supra* note 64.



counts as a participant and who does not. Panels and AB – so it will be argued – might not be able to deal with these questions competently and legitimately.

**(c) The Kimberley waiver**

The Kimberley waiver was requested on 11 November 2002 by three WTO members<sup>91</sup> and, after formal and informal discussions and consultations,<sup>92</sup> granted by the General Council on 15 May 2003.<sup>93</sup> It suspends Articles XI:1, I:1 and XIII:1 GATT retroactively as of 1 January 2003 (the date the KPCS was launched) and until 31 December 2006. The waiver decision was extended by a second decision of 15 December 2006<sup>94</sup> until 31 December 2012. The mentioned obligations are waived for all members which are listed in the annex to the waiver decision and members which notify the Council for Trade in Goods of their desire to be covered by the waiver.<sup>95</sup> They are waived with respect to measures taken by these members which are “necessary to prohibit the export of rough diamonds to [and import from] non Participants in the Kimberley Process Certification Scheme consistent with the Kimberley scheme.”<sup>96</sup> Hence, the waiver does not cover measures restricting trade in rough diamonds with participants since these were held to be consistent with WTO law.<sup>97</sup> Some WTO members, in particular Switzerland and the EC, were of the view that also the covered measures were justified under WTO law.<sup>98</sup> Therefore the waiver decisions note in the preamble that the waiver is granted for legal certainty and does not prejudice the consistency with WTO law of domestic measures which are taken consistent with the KPCS.<sup>99</sup>

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<sup>91</sup> Communication from Canada, Japan and Sierra Leone, Kimberley Certification Scheme for Rough Diamonds – Request for a WTO Waiver, 11 November 2002, G/C/W/431 (12 November 2002). Later further WTO members joined the request.

<sup>92</sup> See minutes of the meetings of the Council for Trade in Goods on 22 November 2002, G/C/M/66 (4 December 2002) (suggestion by the chairman that Canada carry out consultations and that the Council for Trade in Goods revert to the issue at a later time (para 6.16)) and 23 January 2003 and 26 February 2003, G/C/M/68 (6 March 2003) (These minutes make reference to consultations on 16 January 2003 with 30 delegations (para. 1.2) and an open-ended informal meeting on 18 February 2003 (para. 1.4)).

<sup>93</sup> General Council, Decision of 15 May 2003, WT/L/518 (27 May 2003). By that time Australia, Brazil, Israel, the Philippines, Thailand, the United Arab Emirates and the United States had joined the waiver request (see G/C/W/431/Corr. 1 and Corr. 2).

<sup>94</sup> General Council, Decision of 15 December 2006, WT/L/676 (19 December 2006).

<sup>95</sup> WT/L/518, paras 1, 3; WT/L/676, paras 1, 3.

<sup>96</sup> WT/L/518, para. 1 on exports, para 2 on imports.

<sup>97</sup> J. Pauwelyn, *supra* note 40, 1183.

<sup>98</sup> Both, the EC and Switzerland, have, however, notified their desire to be covered by the waiver (G/C/25 (6 May 2003) and G/C/26 (8 May 2003).

<sup>99</sup> WT/L/518, preamble, recital 4: “Noting that this Decision does not prejudice the consistency of domestic measures taken consistent with the Kimberley Process Certification Scheme with provisions of the WTO Agreement, including any relevant WTO exceptions, and that the waiver is granted for reasons of legal certainty” ; WT/L/676,

In order to safeguard WTO members' interests the waiver provides for consultations between members benefitting from the waiver and a member which considers that a measure covered by the waiver unduly impairs benefits accruing to it under the GATT. In case such consultations do not lead to a satisfactory solution such member may bring the matter before the General Council which shall examine it and make recommendations.<sup>100</sup> Finally, the waiver clarifies that recourse to consultation and dispute settlement by affected members pursuant to Articles XXII and XXIII GATT shall not be precluded.<sup>101</sup> These safeguards for members' benefits relate to measures that are applied inconsistently as well as to measures that are applied consistently with the waiver decision.<sup>102</sup>

## ***2. Reconciliation of competing interests by rule-making – the TRIPS waiver***

### **(a) The limitations of the TRIPS Agreement on access to essential medicines**

The debate about the limitations which the TRIPS Agreement poses on the access to pharmaceuticals can also be framed as a debate about the interface between WTO law and international human rights norms.<sup>103</sup> On the one hand human rights obligations, in particular the obligation to protect the right to life (Art. 6 ICCPR) and the obligation to respect, protect and fulfill the right to the enjoyment of the highest attainable standard of physical and mental health (Art. 12 ICESCR), oblige states to take steps to provide and facilitate access to essential medicines.<sup>104</sup> On the other hand the TRIPS Agreement has the effect of restricting such access.<sup>105</sup>

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preamble, recital 5. On the basis of the wording of Art. XXV:5 GATT it could be questioned whether waivers may be granted without a determination that without the waiver the measure in question would violate WTO law. Art. XXV:5 GATT foresees that a waiver decision may be adopted in "exceptional circumstances not elsewhere provided for in this Agreement." Art. IX:3 WTO Agreement however merely refers to "exceptional circumstances" and arguably has superseded Art. XXV:5 GATT in this respect.

<sup>100</sup> WT/L/518, para. 6; WT/L/676, para. 6.

<sup>101</sup> WT/L/518, para. 7; WT/L/676, para. 7. That recourse to the procedures under Articles XXII and XXIII GATT is not precluded by waiver decisions is also clarified in paragraph 3 of the Understanding in Respect of Waivers of Obligations Under the General Agreement on Tariffs and Trade 1994.

<sup>102</sup> See paragraph 3 of the Understanding in Respect of Waivers of Obligations Under the General Agreement on Tariffs and Trade.

<sup>103</sup> Cf. H. Hestermeyer, *supra* note 39; R. Howse/R. G. Teitel, Beyond the Divide. The Covenant on Economic, Social and Cultural Rights and the World Trade Organization, *Friedrich-Ebert-Stiftung Occasional Paper*, No 30/April 2007, 10.

<sup>104</sup> See in particular Art. 12 para. 2 (c) and (d) ICESCR which provides as steps to be taken by the parties to the covenant "[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases" and "[t]he creation of conditions which would assure to all medical service and medical attention in the event of sickness."

<sup>105</sup> For a detailed analysis whether international law gives rise to a human right to access to medicines and how the TRIPS Agreement interferes with this right, see H. Hestermeyer, *supra* note 39, chapters 3 and 4.

I will shortly expose here the limitations which the TRIPS Agreement poses on the access to essential medicines, in particular in developing and least-developed countries.

According to the TRIPS Agreement patents shall be available in the municipal legal systems of WTO members for inventions, including pharmaceutical products, which meet certain requirements (Art. 27:1 TRIPS Agreement).<sup>106</sup> The rationale for the protection of intellectual property rights can be found in Art. 7 TRIPS Agreement which states as an objective of the protection and enforcement of intellectual property rights that this protection should contribute to the promotion of technological innovation. While members may exclude diagnostic, therapeutic and surgical methods from patentability (Art. 27:3 (a)), no such exception exists with respect to product patents for medicines. A medicine for which a patent is granted may only be produced and sold with the consent of the patent holder.<sup>107</sup>

Several developing countries, such as Brazil, South Africa, India and Thailand, who were important producers of generic medicines, in particular against HIV/AIDS, had to start granting patents for some of these medicines once the obligations of the TRIPS Agreement became effective for them (after expiry of the transition period for developing country members in Art. 65.4 on 1 January 2005). It was feared, especially by developing countries, that the granting of patents would result in an increase of prices for important medicines to treat diseases such as HIV/AIDS, since the pharmaceutical companies that hold the patents, for lack of competition, could charge higher prices.

Different possibilities have been discussed how these effects of patent protection could be mitigated. Articles 7 and 8 which set out the objectives and principles of the TRIPS Agreement state that the protection and enforcement of intellectual property rights should proceed in a manner “conducive to social ... welfare” (Art. 7) and that members may “adopt measures necessary to protect public health..., provided that such measures are consistent with the provisions of this Agreement.” (Art. 8:1). These provisions are important as they specify the

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<sup>106</sup> They must be new, involve an inventive step and be capable of industrial application (Art. 27:1 cl. 1 TRIPS Agreement).

<sup>107</sup> Patents are subject to the territoriality principle according to which patent protection is limited to the territory of the state that grants the patent.

object and purpose of the Agreement and have to be taken into account when interpreting other provisions. They cannot, however, be interpreted, as providing themselves the legal basis for exceptions to obligations set out in the TRIPS Agreement. The discussion, how – despite patentability – access to affordable medicines can be guaranteed, centered on the provisions of Art. 30 and Art. 31 TRIPS Agreement. According to Art. 30 members may provide limited exceptions to the exclusive rights conferred by a patent and Art. 31 allows for the issuance of compulsory licenses when certain requirements are met.

It can be argued that Art. 30 is stated vaguely enough to be interpreted as an exception which allows the production and export of medicines without the permission of a patent holder if a health crisis in a WTO member needs to be addressed and affordable medicines otherwise are not available.<sup>108</sup> Most developed WTO members are, however, of another view and hold that Art. 30 only allows exceptions such as research exemptions, prior user rights and pre-expiration testing, but does not allow exceptions for the export of patented pharmaceuticals. It is argued that the latter would seriously prejudice the rights and obligations of members under the TRIPS Agreement and therefore did not count as a limited exception provided for by Art. 30.<sup>109</sup> A compulsory license – as envisaged by Art. 31 TRIPS Agreement – is an authorization to use the subject matter of a patent, e.g. to produce or sell the patented product, which is granted without the consent of the patent holder. The issuance of a compulsory license with respect to a pharmaceutical product, in most cases would not, however, remedy the problem of restricted access to affordable medicines. Many of the developing countries in urgent need of such medicines do not have themselves the manufacturing capacities to produce these medicines and thus the issuance of a compulsory license by such a developing member which would be limited to its territory would be of no use. If, however, another member with manufacturing capacity issued a license for the production of medicines to be exported to the member which needs them, such importation would be restricted by Art. 31 (f). Art. 31 (f) states that a compulsory license shall authorize the use “predominantly for the market of the member authorizing such use.” Furthermore Art. 31 (h) obliges members that issue compulsory licenses to pay “adequate

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<sup>108</sup> See communication of Brazil, dated 21 June 2002, on behalf of the delegations of Bolivia, Brazil, Cuba, China, Dominican Republic, Ecuador, India, Indonesia, Pakistan, Peru, Sri Lanka, Thailand and Venezuela, IP/C/W/355 (24 June 2002).

<sup>109</sup> See Statement of the representative of the United States, minutes of the meeting of the TRIPS Council on 5-7 March 2002, IP/C/M/35 (22 March 2002), para. 84.

remuneration in the circumstances of each case, taking into account the economic value of the authorization.”

I will not elaborate further on the possible interpretations of the provisions of the TRIPS Agreement and the flexibilities it might provide in addressing the problem of affordable access to essential medicines. It suffices to state that there is no interpretation which would solve the problem of affordable access to essential medicines and on which WTO members could easily agree. This has been evidenced by the long lasting discussions within the WTO and in particular the TRIPS Council on this issue.

These discussions may be seen as one expression of the larger debate on the legitimacy of the TRIPS Agreement. There are serious contentions within the membership as to the illegitimacy of the TRIPS Agreement in light of values and interests recognized in other international legal regimes, such as human rights treaties, the World Health Organization or the Convention on Biological Diversity. The debate on the TRIPS Agreement and access to essential medicines can be conceptualized as a debate about legitimacy deficits of the TRIPS Agreement and how it should be interpreted or adapted so that it takes better account of internationally recognized public interests. The issue of restrictions to access to essential medicines by the TRIPS Agreement was eventually addressed in 2003 by a waiver decision which modified the TRIPS rules on compulsory licensing. In the following I will sketch the debate as it was conducted in the TRIPS Council and which resulted in the adoption of the waiver decision, and the contents of the decision itself.

**(b) The TRIPS waiver**

The debate on the proper balance between on the one hand exceptions to patents and patentability to promote public health and on the other hand the protection of intellectual property rights to provide for incentives for research and development was for the first time officially acknowledged and conducted within the WTO<sup>110</sup> when the TRIPS Council in June 2001 - following a request by Zimbabwe on behalf of the African Group - held a full day special

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<sup>110</sup> On the debate outside the WTO, in other international institutions such as the WHO, the UN General Assembly or the Human Rights Commission, see H. Hestermeyer, *supra* note 39, 76 *et seq.*

discussion on intellectual property and access to medicine.<sup>111</sup> Two specific items were discussed, namely the flexibility which members are entitled to under the TRIPS Agreement and the relationship between the TRIPS Agreement and affordable access to medicines.<sup>112</sup>

On 14 November 2001 the Ministerial Conference at Doha adopted the Declaration on the TRIPS Agreement and Public Health.<sup>113</sup> It acknowledges the serious health problems which many developing and least-developed countries face especially due to HIV/AIDS, tuberculosis, malaria and other epidemics and states that the TRIPS Agreement should not prevent WTO members from taking measures to protect public health. It acknowledges the flexibilities which the TRIPS Agreement provides for members to protect public health and promote access to medicine for all.<sup>114</sup> Paragraph 6 of the declaration recognizes the difficulties which WTO members with insufficient or no manufacturing capacity for pharmaceutical products might face when they wish to make effective use of compulsory licensing under the TRIPS Agreement. In this paragraph the Ministerial Conference instructs the TRIPS Council “to find an expeditious solution to this problem and to report to the General Council before the end of 2002.”

Discussions on the implementation of paragraph 6 of the Doha Declaration on Public Health were conducted throughout 2002 in formal and informal meetings of the TRIPS Council under chairman Ambassador Motta from Mexico. They centered on the substantive questions which products or processes should benefit from the solution; which WTO members should be the beneficiaries, which the supplying countries; on conditions, such as safeguards against trade diversion; on notification requirements and on the question of remuneration of the right holders. The legal mechanism to be chosen to implement paragraph 6 was also extensively discussed. While some developing countries initially favored an authoritative interpretation of Art. 30,<sup>115</sup> most industrialized countries supported a modification of Art. 31 (f). Some wanted to achieve

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<sup>111</sup> For the minutes of the special discussion on intellectual property and access to medicines, held during the meeting of the TRIPS Council from 18-22 June 2001, see IP/C/M/31 (10 July 2001).

<sup>112</sup> *Ibid.*, para. 1.

<sup>113</sup> Ministerial Conference, Doha Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001, WT/MIN(01)/DEC/2 (20 November 2001).

<sup>114</sup> *Ibid.* para. 4, 5.

<sup>115</sup> See communication of Brazil, dated 21 June 2002, on behalf of the delegations of Bolivia, Brazil, Cuba, China, Dominican Republic, Ecuador, India, Indonesia, Pakistan, Peru, Sri Lanka, Thailand and Venezuela, IP/C/W/355 (24 June 2002).

this modification through an amendment coupled with an interim solution of a waiver or moratorium on dispute settlement,<sup>116</sup> others believed that a waiver would be a suitable final solution.<sup>117</sup>

In December 2002 a consensus on a draft text of a waiver decision -- the so-called Motta Draft -- failed due to opposition by the US to the language concerning the scope of diseases. While the draft referred to paragraph 1 of the Doha Declaration on the TRIPS Agreement and Public Health which mentions HIV/AIDS, tuberculosis, malaria and other epidemics, the US had wished to restrict the application of the decision to HIV/Aids, malaria and tuberculosis.<sup>118</sup> Subsequently, discussions continued and the issue was at last resolved in August 2003. The TRIPS Council approved a draft decision -- which was identical with the Motta Draft -- and further gave its approval that together with the decision a statement would be forwarded to the General Council which would be made by the Chairman of the General Council prior to adoption of the decision.

The waiver decision was adopted by the General Council on August 30, 2003.<sup>119</sup> It waives the obligation that a compulsory license shall authorize use of a patent predominately for the supply of the domestic market (Art. 31 (f) TRIPS Agreement) and the obligation to pay adequate remuneration to the right holder when a compulsory license is issued (Art. 31 (h)) if certain conditions are met. The products covered are all patented products, or products manufactured under a patented process, of the pharmaceutical sector needed to address public health problems as recognized in paragraph 1 of the Doha Declaration.<sup>120</sup> Eligible importing members are any

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<sup>116</sup> See minutes of the meeting of the TRIPS Council held 17-19 September 2002, IP/C/M/37 (11 October 2002), e.g. para. 67 (statement of the representative of the EC), para. 65 (statement of the representative of Norway).

<sup>117</sup> Ibid. para. 63 (statement of the representative of the United States), para. 66 (statement of the representative of Australia), para. 69 (statement of the representative of Canada). The US had initially proposed to address the problem with a moratorium on dispute settlement, see communication of the United States, dated 8 March 2002, IP/C/W/340 (14 March 2002).

<sup>118</sup> See minutes of the meeting of the TRIPS Council held 25-27, 29 November 2002 and 20 December 2002, IP/C/M/38 (5 February 2003), para. 34 (statement by the representative of the United States). The United States wanted to restrict the scope of diseases to HIV/Aids, malaria and tuberculosis. On 20 December 2002 the United States declared a moratorium on dispute settlement, Communication by the United States to the TRIPS Council, Moratorium to Address Needs of Developing and Least-Developed members with no or Insufficient Manufacturing Capacities in the Pharmaceutical Sector, IP/C/W/396 (14 January 2003).

<sup>119</sup> Minutes of the General Council meeting, held on 30 August 2003, WT/GC/M/82 (13 November 2003), para. 31.

<sup>120</sup> Decision of 30 August 2003, *supra* note 36, para. 1 (a). The scope of diseases was thus not limited as had been proposed by US.

least-developed country member and any other WTO member that has notified the TRIPS Council of its intentions to use the system as an importer.<sup>121</sup>

Art. 31 (f) is waived for the exporting country member on the term that an eligible importing member notifies the TRIPS Council that it has insufficient or no manufacturing capacities in the pharmaceutical sector for the product in question,<sup>122</sup> and has itself granted a compulsory license or intends to do so if the product is also patented within its territory.<sup>123</sup> With respect to the compulsory license granted by the importing country the obligation to remunerate the right holder is waived.<sup>124</sup> The decision further includes terms to ensure transparency and prevent trade diversion<sup>125</sup> and a special provision that waives Art. 31 (f) for exports from developing country members and least-developed country members that are party to a Regional Trade Agreement to other developing or least-developed parties to this agreement.<sup>126</sup>

The statement of the chairman of the General Council<sup>127</sup> which was read out at the time of the adoption of the waiver says that members would ensure that the system should be used in good faith and not as an instrument to pursue industrial or commercial policy objectives. It encourages members to use best practices as developed by companies to prevent and discourage the diversion of medicines produced under compulsory licenses to other markets than that of the importing member and to allow for expeditious review within the TRIPS Council of any complaints concerning the use of the new system

The decision of 30 August 2003 is a binding legal decision which waives WTO obligations when certain terms and conditions are fulfilled. In addition the decision imposes certain obligations on all members that cannot be characterized as conditions or terms according to Art. IX:3 WTO

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<sup>121</sup> Ibid. para. 1 (b). A number of developed members are mentioned in footnote 3 to para. 1 (b) that will not use the system set out in the decision.

<sup>122</sup> Ibid. para 2 (a) (ii). This requirement does not apply to LDC members.

<sup>123</sup> Ibid. para. 2 (a).

<sup>124</sup> Ibid. para. 3; the decision states in paragraph 3 clause 1 that the exporting member when paying remuneration according to Art. 31 (h) shall take into account the economic value to the importing member of the use which was authorized by the exporting member.

<sup>125</sup> Ibid. paras 2, 4, 5.

<sup>126</sup> Ibid. para. 6.

<sup>127</sup> Minutes of the General Council meeting, held on 30 August 2003, WT/GC/M/82 (13 November 2003), para. 29



Agreement. These are the obligation on all developed members to provide technical and financial cooperation in order to facilitate implementation of the provision on the prevention of re-exportation and the obligation on all members to prevent the importation of diverted products produced under the system set out in the decision (para. 4).<sup>128</sup> As concerns the waivers contained in the decision, it is not in compliance with two legal requirements for waiver decisions set out in Art. IX:4 WTO Agreement. First it does not specify a termination date as required by Art. IX:4; instead it states in paragraph 11 that it will terminate for each member when the amendment replacing the decision takes effect for that member. Second, it stipulates that an annual review by the TRIPS Council fulfils the review requirements of Art. IX:4 which foresees the annual review of waivers by the General Council.

After the waiver decision was adopted there has been a long debate on how to transpose the decision permanently into the TRIPS Agreement.<sup>129</sup> On 6 December 2005 the General Council adopted a decision based on a proposal by the TRIPS Council that will formally incorporate the August 2003 decision – the contents of which will remain unchanged -- into the TRIPS Agreement.<sup>130</sup> The deadline for acceptance of the amendment, which was originally set for 1 December 2007, has been extended by a decision of the General Council to 31 December 2009.<sup>131</sup>

The system which was established by the decision of August, 2003 and adopted in the amendment decision has been harshly criticized, in particular by non-governmental organizations such as Médecins sans Frontières as being overly burdensome and inefficient.<sup>132</sup> Only in 2007 have the first WTO members, namely Canada and Rwanda, notified the TRIPS Council that they intend to make use of the decision. Rwanda notified that it wishes to import a certain amount of

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<sup>128</sup> The legal basis of these additional obligations is doubtful. Whether they can be based on Art. IV:1 cl 3 WTO is questionable, see *supra* note 14.

<sup>129</sup> The waiver decision envisaged that an amendment replacing the decision would be adopted by mid-2004, Decision of 30 August 2003, *supra* note 36, para. 11.

<sup>130</sup> General Council, Amendment of the TRIPS Agreement, Decision of 6 December 2005, WT/L/641 (8 December 2005). An issue of contention with respect to the amendment was the status of the chair's statement. While the US pressed for an inclusion, this was strongly opposed by developing country members. The amendment now contains no reference to the statement. On the negotiating history see H. Hestermeyer, *supra* note 39, 272-274.

<sup>131</sup> General Council, Decision of 18 December 2007, WT/L/711 (21 December 2007).

<sup>132</sup> See on the amendment decision ICTSD, Members Strike Deal on TRIPS and Public Health; Civil Society Unimpressed, 9 Bridges Weekly Trade News Digest, 7 December 2005. For a more positive view see e.g. F. M. Abbott, The WTO Medicines Decision, 99 American Journal of International Law (2005), 317.

an AIDS medication from Canada and Canada that it has issued a compulsory license to produce and export this medication.<sup>133</sup>

#### **IV. The WTO waiver and its potential to coordinate the WTO and other international legal regimes and to initiate norm change within the WTO**

##### ***1. Conceptualization of the Kimberley and TRIPS waivers -- deference and norm change***

The Kimberley waiver – by suspending GATT norms with respect to trade measures implementing the KPCS – immunizes these measures from claims of illegality under WTO law. It thus coordinates WTO law and KPCS and resolves potential conflict without taking a stance on the compatibility of KPCS implementing measures with WTO law, and in particular their justification under the general exceptions of the GATT. Since the waiver suspends the application of certain norms with respect to concretely defined measures, it constitutes a real exception from WTO law for these measures. It is a real exception because it cannot in an abstract and general way be conceptualized as

By contrast, the TRIPS decision suspends obligations with respect to abstractly defined situations and couples the suspension with terms and conditions. It thus modifies existing norms and consequently gives rise to new norms.

While both waiver decisions address (potential) interest and norm conflicts they do so in fundamentally different ways. In the Kimberley case the potential norm conflict between the non-binding norms of the KPCS and the norms of the GATT is addressed by granting deference to the KPCS without questioning the legitimacy of the respective GATT norms in general. The waiver is no expression of a consensus that Article XX GATT cannot adequately address tensions between trade and other social concerns, such as the protection of human security. Instead it manifests a decision in this specific instance to restrict the WTO's jurisdiction in favour of the norms and institutions of the KPCS. The normative and pragmatic potential of the

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<sup>133</sup> On these notifications see H. Hestermeyer, Canadian-made Drugs for Rwanda: The First Application of the WTO Waiver on Patents and Medicines, 11 *ASIL Insights*, Issue 28 (10 December 2007). Several WTO members have informed the WTO that their laws enable them to participate in the system established by the waiver and to export pharmaceutical products made under a compulsory license to eligible countries.

waiver as an instrument of coordination vis-à-vis other coordination devices will be explored in the next section (IV.2).

The TRIPS decision on the other hand addresses claims as to the illegitimacy of the TRIPS Agreement with respect to access to essential medicines which are made by a substantial part of the WTO membership.<sup>134</sup> The norms embodied in the TRIPS Agreement have much less legitimacy than the fundamental non-discrimination principles of the GATT if this legitimacy is seen to be based on acceptance by the membership, but also if judged by human rights standards and other values recognized by international law,<sup>135</sup> or principles of global justice.<sup>136</sup> There are strong allegations that developing countries only agreed to certain provisions since they were promised concessions in other areas, in particular trade in goods,<sup>137</sup> promises which have remained largely unfulfilled. Further claims hold that intellectual property rights cement the economic rift between developed and developing countries, that they hinder development, mainly protect special interests and are unfair because they protect certain intellectual achievements which are predominant in the industrialized world, but are on the other hand unsuitable to protect traditional knowledge of communities in developing countries.

While legal doctrine addresses such legitimacy deficits, e.g. by asking whether the TRIPS Agreement might be invalid due to duress in negotiations, such doctrinal analysis is insufficient to mitigate them.<sup>138</sup> Instead legitimacy can only be achieved through norm change. The potential of the waiver process and waiver decisions to initiate and realize norm change will be discussed in section IV.3.

## **2. The waiver as a coordination device**

The Kimberley waiver has been strongly criticized as an inadequate solution to the interface of WTO law and human rights. It has been argued that it constitutes a missed opportunity to deal

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<sup>134</sup> See minutes of the special discussion on intellectual property and access to medicines in the TRIPS Council, *supra* note 111.

<sup>135</sup> E.g. traditional knowledge as recognized in the Convention on Biological Diversity.

<sup>136</sup> T. Pogge, Montréal Statement on the Human Right to Essential Medicines, 16 *Cambridge Quarterly of Healthcare Ethics* (2007), 97.

<sup>137</sup> Or even only the prospect that the US would lift unilateral trade sanctions imposed on under section 301 of the Trade Act of 1974 for the refusal to grant patent protection which was not mandated by international law, see H. Hestermeyer, *supra* note 39, 39-41.

<sup>138</sup> Hestermeyer discusses this point, but comes to the – in my view – doctrinally correct conclusion that the Agreement is valid, *supra* note 39, 48, 49.

with the interface head on either by adopting an authoritative interpretation or letting the dispute settlement organs – in case of conflict – decide questions as to the conformity of measures implementing the KPCS with WTO law.<sup>139</sup>

In this section I will examine more closely three characteristics of the waiver solution to potential norm conflicts which distinguish it from the suggestions mentioned above, as well as other coordination devices. First, a waiver decision is a binding legal decision which formally suspends treaty law and thus provides for legal security (a). Second, the suspension of norms with respect to certain measures restricts the WTO's jurisdiction with respect to these measures and can be conceptualized as deference to the international legal regime that mandates these measures (b). Third, the waiver process is a political process in which the range of admissible arguments is neither limited to arguments on the correct interpretation of WTO law nor to arguments relating to the objectives of the WTO. In addition, arguments can be made with respect to the proper relationship between the WTO and the other international legal regime, including arguments as to their effectiveness and legitimacy (c).

**(a) Legal security**

A waiver suspends certain specified legal obligations for a definite period of time<sup>140</sup> and with respect to certain measures specified in the waiver decision. These measures cannot be challenged as being in violation of the suspended obligations.<sup>141</sup> Hence the waiver decision provides for legal security by immunizing the measures in question from claims that they are violating the suspended obligations and therefore should be brought into conformity with WTO law.<sup>142</sup>

This formal legal solution can be contrasted with suggestions made under the heading of mutual supportiveness, e.g. the proposal made with respect to the relationship of WTO law and MEAs

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<sup>139</sup> For such criticism see K. Nadakavukaren Schefer, *supra* note 39, 447 *et seq.*, and J. Pauwelyn, *supra* note 39, 1198 *et seq.*

<sup>140</sup> The requirement set out in Art. IX:4 WTO Agreement that a waiver decision has to state a termination date was arguably violated in the TRIPS waiver decision, see *supra* section III.2.b.

<sup>141</sup> They can however be challenged as being in violation with other obligations of the WTO Agreements which are not suspended by the waiver decision, see Appellate Body report, *EC--Bananas III*, WT/DS27/AB/R, para. 179 *et seq.*

<sup>142</sup> It does not immunize measures from non-violation claims. For waivers of GATT obligations this is clarified by para. 3 (b) of the Understanding in Respect of Waivers of Obligations Under the General Agreement on Tariffs and Trade 1994.

that disputes between two WTO members that are both parties to the MEA and that concern measures mandated by the MEA be submitted to the dispute settlement mechanism foreseen in the MEA.<sup>143</sup> Such proposals neglect that without a binding obligation to this effect it is not guaranteed that a WTO panel will not be established or that a panel if established will decline its jurisdiction to hear a case brought by a WTO member. Instead a panel might refer to Art. 11 DSU and argue, as a panel did in *EC – Chicken Classification*, that this provision "prevents a panel from abdicating its responsibility to the DSB" and it therefore does not have the authority to refer the dispute before it to another body.<sup>144</sup>

Related is the proposal that WTO members adopt a memorandum of understanding according to which they refrain from dispute settlement with respect to specified measures. Such a proposal has also been put forward in the context of the relationship between WTO rules and MEAs<sup>145</sup> and in the TRIPS and access to medicines debate.<sup>146</sup> The adoption of memoranda of understanding is not foreseen in the WTO Agreement. In public international law the term memorandum of understanding refers to a non-binding soft law instrument.<sup>147</sup> Such an instrument would consequently neither bind WTO members nor panels and Appellate Body. A memorandum further does not address any consequences which potential illegality might have domestically and cannot preclude any private actions on the basis of WTO law if such actions are admissible according to the domestic legal system of a WTO member.<sup>148</sup> The same does not hold true in case of a waiver decision since a waiver suspends WTO obligations and thus a private claim could not be based on the suspended obligation.<sup>149</sup> Finally, since a dispute settlement moratorium in the form of a memorandum of understanding does not address the question of the legality of the respective measures, it does not prevent allegations of illegality. Such allegations

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<sup>143</sup> Committee on Trade and Environment, Report (1996), WT/CTE/1 (12 November 1996), para. 178.

<sup>144</sup> In the case *EC – Chicken Classification* this other body was the WCO's Harmonized System Committee, see panel report, *EC – Chicken Classification*, WT/DS269, 286/R, para. 7.56.

<sup>145</sup> Secretariat, Multilateral Environmental Agreements (MEAs) and WTO Rules; Proposals made in the Committee on Trade and Environment (CTE) from 1995-2002, Note to the Committee on Trade and Environment, Special Session, TN/TE/S/1, page 3, para. 9.

<sup>146</sup> Communication of the United States, dated 8 March 2002, IP/C/W/340 (14 March 2002), proposing a moratorium on dispute settlement.

<sup>147</sup> A. Aust, *Modern Treaty Law and Practice*, 2<sup>nd</sup> edition, 2007, 32.

<sup>148</sup> Cf. Minutes of the meeting of the TRIPS Council held 17-19 September 2002, IP/C/M/37 (11 October 2002), para. 61 (statement of the representative of Brazil).

<sup>149</sup> It could however be based on implementing legislation which is not suspended by the waiver decision.

potentially have reputational consequences for the regime that mandates the measures as well as for the WTO member taking them.

Thus when there is consensus among the WTO membership that certain measures mandated by another international legal regime should not be challenged as illegal, a WTO waiver as a formal legal decision which excludes such claims of illegality is – due to the legal security it provides -- preferable to informal soft law instruments or solutions of institutional cooperation. The waiver not only provides legal security, but also ensures the coherence of international law by addressing potential norm conflict on the level of the primary obligations and not on the secondary level of state responsibility as does a moratorium on dispute settlement.

Legal security and coherence could also be achieved by an authoritative interpretation which, according to Art. IX:2, can be taken by the General Council or the Ministerial Conference by a three fourth majority and which also constitutes a legally binding decision.<sup>150</sup> With respect to the KPCS it was suggested by Pauwelyn that an authoritative interpretation should have been adopted which stated that “measures regulating or prohibiting the export and import of rough diamonds necessary to implement the Kimberley Process Certification Scheme will be presumed to fall under the exception in GATT Art. XXI.”<sup>151</sup> I will turn later to the normative reasons why an authoritative interpretation might be preferable to a waiver. At this point and with respect to legal security suffice it to say that an authoritative interpretation is only a feasible option to immunize measures mandated by another international legal regime from WTO claims if it is indeed a possible interpretation and not in fact an amendment (Art. IX:2 WTO Agreement). Admittedly, the boundaries of possible interpretations are wide, especially if there is a consensus, and it has been argued that authoritative interpretations may change legal rights and obligations under the WTO Agreements.<sup>152</sup> Nonetheless, an interpretation decision will not be immune from

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<sup>150</sup> To date the political organs of the WTO have not explicitly taken an interpretation decision. The Doha Declaration on Public Health and the TRIPS Agreement has by some been interpreted as one; for this view see D. Shanker, The Vienna Convention on the Law of Treaties, The Dispute Settlement System of the WTO and the Doha Declaration on the TRIPS Agreement, 36 *Journal of World Trade* (2002) 721, 722; C. Herrmann, TRIPS, Patentschutz für Medikamente und Staatliche Gesundheitspolitik: Hinreichende Flexibilität?, *Europäische Zeitschrift für Wirtschaftsrecht* (2002), 37, 42; H. Hestermeyer, *supra* note 39, 281.

<sup>151</sup> J. Pauwelyn, *supra* note 40, 1204.

<sup>152</sup> For the proposition that interpretations adopted under Art. IX:2 WTO may modify legal rules see C. D. Ehlermann/L. Ehring, *supra* note 24, 808 *et seq.*

allegations that it violates rules of general international law on treaty interpretation and thus the possibility that its validity is challenged exists.<sup>153</sup>

Lastly, it shall be noted that security as to the WTO legality of measures mandated by another international legal regime may be of particular importance to developing country members. Dispute settlement -- and even only the threat thereof -- imposes considerable costs even if the outcome is a determination of legality. Litigation costs are not negligible and the insecurity as to the outcome of litigation can be used by the claimant to extricate concessions from the defendant. While developed members might opt for the maintenance of measures held to be in violation of WTO law by the Dispute Settlement Body, this is often not an option for developing country members.

**(b) Deference**

The waiver competence of the Ministerial Conference on the one hand can affect the intra-institutional relationship between organs within the WTO and on the other hand waiver decisions can determine the inter-institutional relationship between the WTO and other international institutions. The waiver can have the effect to defer matters from the dispute settlement organs to the political organs of the WTO and the effect to pay deference to another international legal regime.

On the first point it shall only shortly be noted that in the highly judicialized system of the WTO with its mandatory dispute settlement system the waiver power may serve as an instrument of control of the political organs over panels and Appellate Body. While the General Council, acting as Dispute Settlement Body according to Art. 17:14 DSU, can merely decide not to adopt an Appellate Body Report, by means of a waiver the political organs can immunize certain measures against claims of illegality. Moreover, even once a dispute settlement report has been adopted that states the illegality of a measure, a waiver can be granted for such measure and thus settle the dispute for a certain period of time without contesting the judicial decision. The

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<sup>153</sup> For a challenge to an authoritative interpretation in a NAFTA Chapter 11 arbitration, see Pope and Talbott, Inc. v. Canada, Award in Respect of Damages, NAFTA Ch. 11 Arbitration Tribunal, 2002, available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/phases.aspx?lang=en> (15 July 2008).

Bananas dispute between the EC on the one side and the US and Ecuador on the other provides an example for the withdrawal of a highly politicized legal question from the realm of dispute settlement. In 2001 the Ministerial Conference adopted two waiver decisions which allowed the EC for a limited period of time to maintain tariff preferences<sup>154</sup> and preferential tariff quotas<sup>155</sup> for bananas from ACP countries which had previously been found by the Appellate Body to be in violation of WTO law.<sup>156</sup> These waivers constituted a part of a temporary political solution to the conflict. The use of the waiver power in this case had the further effect to multilateralize the dispute which before had been conducted in the bilateral framework of dispute settlement.<sup>157</sup>

More important for the question at hand, a waiver can also affect the inter-institutional balance in that it can have the effect that panels and AB will not inquire into the legality of a measure that implements obligations of another international legal regime.<sup>158</sup> Thus, the Kimberley waiver immunizes measures foreseen by and consistent with the KPCS from inquiry into their legality under WTO law by WTO dispute settlement organs. The Kimberley waiver has the effect of paying deference to the KPCS, and arguably also the UN who have endorsed the scheme. In this sense the waiver can be seen to further the principle of horizontal subsidiarity.

Horizontal subsidiarity has been suggested as a principle to guide the coordination of WTO law with other bodies of international law. The subsidiarity principle has traditionally addressed the vertical division and exercise of competences with the aim of protecting the autonomy of the lower level of government or governance.<sup>159</sup> However, with the increasing horizontal division of

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<sup>154</sup> Ministerial Conference, European Communities – The ACP-EC Partnership Agreement, Decision of 14 November 2001, WT/L/436 (7 December 2001).

<sup>155</sup> Ministerial Conference, European Communities – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, Decision of 14 November 2001, WT/L/437 (7 December 2001).

<sup>156</sup> Appellate Body Report, *EC – Bananas III*, WT/DS27/AB/R.

<sup>157</sup> This is acknowledged in one of the waiver decisions the fourth preambular recital of which reads: “*Taking into account* the exceptional circumstances surrounding the resolution of the bananas dispute and the interests of many WTO members in the EC banana regime”, *supra* note 155.

<sup>158</sup> This does not mean that such measures can never be at issue in dispute settlement proceedings in the WTO. Claims may arise that a measure allegedly is not a measure within the scope of the waiver and that obligations with respect to this measure are therefore not suspended, or that a measure within the scope of the waiver violates an obligation not suspended by the waiver decision, see *supra* note 141.

<sup>159</sup> On the principle of subsidiarity and its origins, *J. Isensee*, Subsidiarität—Das Prinzip und seine Prämissen, in: Blickle/Hüglin/Wyduckel, *Subsidiarität als rechtliches und politisches Ordnungsprinzip in Kirche, Staat und Gesellschaft*, 2002, 129.



governance competences on the international level, it has been argued that horizontal subsidiarity should be established as a relevant legitimacy principle.<sup>160</sup> According to such a principle competences should be exercised by that institution which has the greater expertise and accountability with respect to the subject area in question.<sup>161</sup>

With respect to the Kimberley constellation this means that questions whether restricting trade in conflict diamonds is a suitable measure to address violent conflicts initiated by rebel groups and whether the measures foreseen in the KPCS are effective and necessary to combat this trade should be answered by that institutional arrangement that has most expertise and provides for the largest participation of stakeholders. Since this is the Kimberley Process and not the WTO it follows that WTO panels or AB should not inquire into the necessity of measures implementing the KPCS to protect public morals or the protection of a member's essential security interests as they would do when interpreting Art. XX (b) or XXI (b) GATT. Greater legitimacy based on expertise and representation of interests cannot be achieved within the WTO merely by including non-trade experts in panels or by requiring panels to ask for and to consider opinions by other institutions.<sup>162</sup>

However, a strong argument is made against such deference. It is argued that it would prevent the development of a body of case law, in particular on the interpretation of the general exceptions provided for in WTO law. With respect to the Kimberley waiver it is argued that it should have been left to the dispute settlement organs to settle – in case of dispute -- the relationship between measures implementing the KPCS and GATT law.<sup>163</sup> Underlying this argument is the view that panels and AB would find measures implementing the KPCS to be consistent with WTO law. Any case law on this matter – so it is argued -- would contribute to a

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<sup>160</sup> Arguing for a principle of horizontal subsidiarity, R Howse/K Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, in: M Verweij/T Josling (eds), *Deliberately Democratizing Multilateral Organization*, 16 Governance (special issue) (2003) 73; see also J. P. Trachtman, *The Constitutions of the WTO*, 17 *European Journal of International Law* (2006), 623, 634 *et seq.* (Trachtman speaks of functional subsidiarity).

<sup>161</sup> R Howse/K Nicolaidis, *supra* note 160, 86 *et seq.*

<sup>162</sup> The Committee on Trade and Environment however holds the view that “all relevant expertise [is] available to WTO panels in cases involving trade-related environmental measures, including trade measures taken pursuant to MEAs. Article 13 and Appendix 4 of the DSU provide the means for a panel to seek information and technical advice from any individual or body which it deems appropriate and to consult experts, including by establishing expert review groups”, see Report (1996), *supra* note 143, para. 179.

<sup>163</sup> *Supra*, note 139.

better understanding of the scope of Art. XX GATT to accommodate measures taken to address non-economic, social concerns. It could even clarify the jurisdiction of the dispute settlement organs to rely on non-WTO international law as an independent defense. Clarification of the scope of the general GATT exceptions and the application of rules of international law in AB jurisprudence would mitigate public perceptions of legitimacy deficits of the WTO and also make it harder for negotiators of other international legal instruments to refer to WTO law as an argument to “water down” the content of the negotiated texts.<sup>164</sup> It is further argued that a waiver decision not only prevents the development of a body of case law, but carries with it a presumption of illegality of the measures for which it is granted and thus might even deepen the perception that the WTO insufficiently recognizes other public interests.<sup>165</sup>

While I believe that international lawyers are called upon to provide good arguments for a wide interpretation of Art. XX GATT to maintain and reinforce a culture of embedded liberalism<sup>166</sup> and avoid restrictions of municipal regulatory autonomy which go beyond the obligation not to discriminate, I believe that there are important pragmatic as well as normative and legal arguments in defense of the waiver solution in particular situations.

The pragmatic argument – that a waiver might be important to avoid costly dispute settlement – and the normative argument – based on a principle of subsidiarity – have already been stated. The legal or doctrinal argument holds that in certain cases Art. XX GATT cannot or should not be interpreted to justify measures mandated by an international legal regime. If in such a case WTO members agree nonetheless that such measures should not be held to be in violation of WTO law a waiver decision serves to maintain the integrity and coherence of legal doctrine on Art. XX GATT. The doubts with respect to the justification of the measures taken to implement the KPCS have been elaborated on above. One general aspect might be added. When the legality of measures depends on the interpretation of GATT provisions in light of other norms of international law or even their direct applicability, the limits of current international legal

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<sup>164</sup> On references to WTO law in international negotiations in order to water-down commitments, see Pauwelyn, *supra* note 40, 1200 *et seq.*

<sup>165</sup> Pauwelyn, *supra* note 40, 1199.

<sup>166</sup> Arguing for a reinvigoration of J. Ruggie’s concept of embedded liberalism within the WTO, see R. Howse, From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading System, 96 *American Journal of International Law* (2002), 94.

doctrine have to be considered. Thus it will be most difficult to argue that in case of conflict non-binding norms can – even when they constitute *lex posterior* and *lex specialis* – trump binding treaty obligations.<sup>167</sup> Furthermore it is not clear how much weight such non-binding norms should have in guiding the interpretation of WTO norms. While voluntary schemes like the KPCS are increasingly set up, international doctrine has not yet developed clear concepts on how they relate to the sources of international law as acknowledged in Art. 38 ICJ Statute.

One further characteristic of the waiver power should be mentioned. It does not preclude discussions about the economic effects of the measures in question. It can be acknowledged through a waiver decision that WTO members may take certain measures which without the waiver might violate WTO law and at the same time these members may be asked to compensate for an impairment of benefits which occurs due to such measures. Thus competence with respect to reciprocity of negotiated benefits remains within the WTO while it refers to other institutions' competences to evaluate necessity and effectiveness of the respective measures.<sup>168</sup>

In conclusion I wish to note that the waiver can be an important instrument to pay deference to another international legal regime with respect to measures for which this regime has greater expertise and accountability. The waiver in such circumstances is not a sign of a “superiority complex”<sup>169</sup> of the WTO, but acknowledges that the WTO's jurisdiction should be limited while at the same time it maintains the integrity of WTO legal norms. As such the Kimberley waiver can serve as an important precedent and acknowledgement that the WTO may cede its jurisdiction, and not insist on the applicability of its law, in favor of other regimes. It remains to be asked whether the decision-making process that precedes a waiver decision allows for deliberation on the proper relationship between the WTO and another international legal regime the norms of which potentially conflict with WTO law.

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<sup>167</sup> For a very sophisticated maneuver see Pauwelyn, who argues that while the KPCS does not impose binding obligations it does grant participants a right to implement the non-binding obligations., J. Pauwelyn, *supra* note 40, 1194 *et seq.* However, such a right can only be established by a binding instrument and in view of the characteristics of the KPCS outlined above (section III.1.a) it is highly doubtful whether it can be characterized as such.

<sup>168</sup> This emphasis on reciprocity of benefits within the WTO is of course also problematic and during a waiver process can be used to extricate concessions from members that wish to benefit from a waiver.

<sup>169</sup> For a characterization of the Kimberley waiver as expression of the WTO's “superiority complex,” see J. Pauwelyn, *supra* note 40, 1198 *et seq.*

**(c) Political deliberation**

In the following sections I wish to address the question why it may in certain circumstances be desirable to address the coordination of international legal regimes in political processes (aa), before I turn to the waiver's potential to enable deliberation on the reconciliation of WTO law with norms of other international legal regimes (bb).

**(aa) The desirability of politics with respect to the proper relationship between the WTO and other international legal regimes**

The desirability of politics in my view becomes apparent when it is compared with other avenues to address the interface and relation between regimes. One way to address the question of the relationship of legal norms is to leave it to judicial bodies to determine this relationship on the basis of legal doctrine. Proponents of this view hold that in many cases conflict rules will provide for an adequate solution and if they do not, it is the task of lawyers to identify and develop conflict norms which do. For example, with respect to the relationship between WTO norms and norms of subsequent human rights or environmental law treaties it is argued that the latter take precedence over conflicting WTO norms according to the *lex posterior* rule.<sup>170</sup> This shall be the case as between WTO members that are at the same time parties to the subsequent treaty, even if not all other WTO members are also parties to that treaty. It is argued that since WTO norms are of a bilateral and not collective or *erga omnes partes* structure, WTO members may *inter se* contract out of these norms. A subsequent conflicting treaty according to this view can be conceptualized as such a contracting out as long as it does not affect the rights of third parties. In my view this doctrinal approach does not always lead to appropriate results. While the precedence of human rights and environmental norms over trade norms might be welcome in many instances, it is achieved through a very technical concept of *erga omnes* norms which is based on the indivisibility of the subject matter and parallel compliance structure.<sup>171</sup> It leads to the strange result that any subsequent international legal norm which regulates an indivisible subject matter and gives thus rise to collective obligations would -- between the parties to the respective treaty -- take precedence over trade norms. In addition the conflict rules mentioned above are of no help in constellations such as the one discussed, where the KPCS foresees

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<sup>170</sup> For the prevalence of the KPCS over the WTO treaty, see J. Pauwelyn, *supra* note 40, 1193 *et seq*; in general on this question see J. Pauwelyn, The Role of Public International Law in the WTO. How Far Can We Go?, 95 *American Journal of International Law* (2001) 535.

<sup>171</sup> J. Pauwelyn, A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature, 14 *European Journal of International Law* (2003), 907, 917.

measures vis-à-vis non-participants that have not agreed to the scheme. Another complication arises when the later regime is voluntary and gives rise merely to non-binding norms. It is highly doubtful whether such a voluntary agreement can also be conceptualized as a contracting out.<sup>172</sup>

A more convincing concept is that of a hierarchy of norms which, however, as of now is in effect limited to a differentiation between very few norms of a *ius cogens* character and the remainder of international legal rules and thus is not helpful with respect to the solution of most norm conflicts. In my view it has therefore to be acknowledged that judicial bodies and legal doctrine may not in all cases adequately determine the relationship of legal norms, in particular when they are negotiated in different fora and with a view to differing objectives and in fact are an expression of political interest conflicts.

Another solution to norm conflict is that of institutional cooperation and coordination. Where the first concept in my view lays too much emphasis on doctrine and grants too much power to judicial bodies, this concept in my opinion unduly relies on international bureaucracies to determine the relationship between international legal regimes. It is increasingly acknowledged in scholarship – including legal scholarship – as well as in practice that in order to mitigate the negative effects of fragmentation such as norm conflict and overlapping jurisdictions of international tribunals not only doctrinal solutions have to be found, but also governance structures have to be addressed. Two claims are frequently voiced with respect to the latter, first that there should be better coordination and cooperation of government and administrative officials of different government departments at the national level and second that institutional linkages at the international level should be strengthened.

Better policy coordination at the national level is particularly important to avoid that conflicting instruments are the result of each government agency only following its own logic. With respect to institutional linkages the most common suggestions relate to information exchange between international institutions especially through the granting of observer status and cooperation between secretariats. This is also an important element to avoid conflict when new legal instruments are negotiated and drafted and may further mitigate or avoid conflict at the

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<sup>172</sup> See *supra* note 167.

interpretation stage.<sup>173</sup> Hence the debate focuses on coordination and information exchange. What is largely missing are suggestions with respect to political deliberation in particular on the international level. Such deliberation is however desirable when a conflict exists between norms of the WTO and another international regime. If a decision as to which norm should prevail is not taken in a political process it is most likely that that regime will prevail which has the more powerful enforcement mechanism. Most probably this will be the WTO. This has been termed the “factual hierarchy” of regimes.<sup>174</sup>

Against this background the waiver competence appears as an instrument which might bridge sectoral differentiation and open the WTO to political deliberation on the proper relationship between WTO norms and other norms of international law in concrete situations of (potential) conflict.

#### **(bb) The waiver’s potential to enable political deliberation**

I understand the term political deliberation here as referring to an exchange of arguments which is neither determined by substantive legal rules nor by coercion and which is aimed at persuasion. Political deliberation can be differentiated on the one hand from legal discourse on the proper interpretation of a legal norm and on the other hand from diplomatic bargaining with regard to a reciprocal exchange of concessions.

The circumstance that the waiver decision is a decision about whether and under what conditions to suspend an obligation of WTO law has implications for the waiver process. This process differs in important ways from other decision-making and rule-making processes within the WTO. The waiver process that leads to a suspension decision neither aims primarily at rule-making in pursuit of WTO objectives nor at legal interpretation. Thus the scope of admissible arguments is not limited to arguments that a decision furthers WTO objectives nor that a certain norm of WTO law should be interpreted in a certain way as is the case with respect to

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<sup>173</sup> See suggestions in European Communities, Submission to the Committee on Trade and Environment, dated 22 March 2004, The Relationship between WTO Rules and MEAs in the Context of the Global Governance System, TN/TE/W/39 (24 March 2004). For existing forms of information exchange between UNEP/MEAs and the WTO, see Note by the Secretariat to the Committee on Trade and Environment, TN/T/S/2/Rev. 2 (16 January 2007).

<sup>174</sup> H. Hestermeyer, *supra* note 39, 193 *et seq.*

amendments and authoritative interpretations. Rather, arguments can go beyond legal argumentation and need not be related to trade interests.

In light of the consensus practice an obvious argument to challenge the waiver as a feasible instrument to accommodate non-economic public interests is that any member may prevent such a consensus. With respect to the consensus requirement I wish once more to distinguish the waiver from an authoritative interpretation or a treaty amendment. While an authoritative interpretation formulates a rule, the waiver in this constellation does not formulate a rule, but merely suspends one. While it is probable that discussions with respect to an authoritative interpretation revolve not only around the specific case, but also the potential precedential effect of the decision for other constellations, the focus of the waiver process is narrower. Even if a member criticizes the measures referred to in the waiver and does not positively consent to the conflicting rule, it might abstain from vetoing a waiver. Given such criticism, it would be much harder not to veto an authoritative interpretation which makes a positive statement about the legality of the measure. The result of a waiver process neither needs to be complete deference to the other regime nor insistence that WTO obligations remain in force with respect to the measures mandated by the other regime, but it can be a differentiated result which suspends obligations under conditions. The possibility to impose conditions, the requirement that a waiver be time limited and the possibility to be compensated for any economic loss as a result of the waiver may facilitate consensus.

Finally, it should be noted that Art. XXV paragraph 5 (i), (ii) GATT provides for a competence to further frame the waiver process.<sup>175</sup> On the basis of this provision the Council for Trade in Goods could establish guidelines that specify characteristics of international legal regimes to which deference should be given by granting a waiver for implementation measures.<sup>176</sup> Such guidelines would have to be adopted by the General Council. It could also be decided that in specified circumstances the Ministerial Conference/General Council reverts to majority voting as foreseen in Art. IX:3 WTO Agreement.

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<sup>175</sup> This competence so far has never been used.

<sup>176</sup> A similar proposal has been made in the Committee on Trade and Environment, Secretariat note, *supra* note 145, page 2, para. 3.

As of now decision-making processes within the WTO are not exemplary of open deliberation, contestation and exchange of arguments. I will revert to this issue below where I discuss the potential of the waiver to initiate norm change. It should however be noted here that in many instances waiver processes are characterized by bargaining rather than argumentation.<sup>177</sup> More research needs to be done on the political economy of the waiver process, but a few suggestions can be made already now which would be conducive for a shift from bargaining to deliberation. To make sure that the whole breadth of arguments is represented the suggestions for institutional linkage and municipal coordination come into play. Other institutions should be represented as observers (and commentators) and delegates should coordinate with all affected government departments or even be accompanied by officials from other departments to the meetings at the WTO. To avoid “horsetrading” and to enable public scrutiny of the arguments put forward the decision-making process should be more transparent and conducted in formal meetings.<sup>178</sup>

**(d) Conclusion**

My discussion of the waiver as an instrument to reconcile WTO law with other international legal regimes was motivated by an interest to inquire into its specific potential in certain circumstances and to question the view that the Kimberley waiver might have done more harm with respect to the acknowledgement of human rights concerns within the WTO than if no waiver had been granted.

It was not meant to question the usefulness of a development of case law on the general exceptions and it also does not intend to contradict the need to conceptualize the WTO as a regime of embedded liberalism which does not give preference to economic interests over other public interests.<sup>179</sup> It might indeed be a worthwhile project in this respect to think about the inclusion of abstract norms in the WTO Agreements which further clarify the relationship between the WTO Agreements and other multilateral legal regimes, as is being considered in the Committee on Trade and Environment with respect to MEAs.<sup>180</sup>

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<sup>177</sup> For the allegation that debates about waivers involved a lot of “horse trading”, see statement of the representative of the Philippines, TRIPS Council, Minutes of the Meeting held 17-19 September 2002, *supra* note 116, para. 79.

<sup>178</sup> Discussions on the request for a waiver to legalize measures implementing the KPCS were mainly conducted during informal consultations and informal meetings, see Council for Trade in Goods, Minutes of the Meeting of 23 January and 26 February 2003, G/C/M/68 (6 March 2003), para. 1.4.

<sup>179</sup> Cf. R. Howse *supra* note 166.

<sup>180</sup> Cf. Article 104 NAFTA.



However, even when the wide scope of Art. XX GATT is recognized, there might be instances of interface with other regimes which give rise to norm conflict that cannot easily be solved through interpretation and which at the same time are not an expression of a general deficiency of WTO law, namely that it does not take sufficient account of non-trade interests. In such a case it is in my view preferable to address this conflict by open political deliberation than to leave its resolution to the factual hierarchy of regimes or to lawyers that present the solution of such norm conflict as a technical operation of conflict-norms. It was my intention to show in the sections above that the waiver has the potential to provide for a forum of political deliberation in which such conflicts can be addressed with the result of a formal legal decision that provides for legal certainty.

### ***3. The waiver as a rule-making instrument***

Contrary to the Kimberley waiver which suspends certain rules for a determined period of time, the TRIPS Waiver lays down new abstract rules of general applicability. It has been chosen as an interim solution until the entry into force of a treaty amendment. In the next sections I will investigate into the normative and pragmatic potential of the waiver as a rule-making instrument. I will begin with some general observations on the distinct characteristics of the waiver as a rule-making instrument (a) and then proceed to the decision-making process and how the waiver can be used in particular by developing countries to initiate norm change (b).

#### **(a) Flexible rule-making**

##### **(aa) Accelerated rule-making**

Since waiver decisions can combine a suspension with terms and conditions and in practice – as has been the case in the TRIPS decision – are even used to establish independent obligations, a waiver decision can be a rule-making instrument.<sup>181</sup> Norm change can be achieved quicker through the adoption of a waiver decision than through treaty amendment.

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<sup>181</sup> However, in spite of the waiver's potential for rule-making, it has to be acknowledged that this potential is limited when the creation of independent binding obligations is at issue. To give an example: The TRIPS Council is currently discussing – as mandated by paragraph 19 of the Doha Declaration (*supra* note 8) -- the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and more specifically the question how the provisions of the CBD on prior informed consent and benefit sharing with respect to traditional knowledge can be accommodated by the TRIPS Agreement. One proposal to address this question foresees that the TRIPS Agreement is changed so as to require patent applicants to disclose the origin of genetic resources and

The requirements which exist with respect to the entry into force of an amendment need not be met for a waiver to take effect.<sup>182</sup> Thus, the TRIPS waiver decision with its adoption by the General Council put into place new rules with immediate effect. The amendment will replace these rules once it enters into force without an interruption of the legal regime established by the waiver.<sup>183</sup>

### **(bb) Trial period**

The term of a rule-making waiver can serve as a test period during which modifications can be undertaken before a final solution is adopted by an amendment decision. The annual review of waivers which is foreseen in Art. IX:4 WTO Agreement provides for a forum in which the rules set out in a waiver can be evaluated and modifications discussed.

### **(cc) Variable geometry**

Finally, a waiver can modify and make new rules only for a part of the WTO membership while leaving intact the existing rules for members which do not wish to be subjected to the changed rules. It can thus be used to achieve what has been termed “variable geometry”.<sup>184</sup> In a way the TRIPS waiver is an expression of such variable geometry by leaving it up to the WTO members

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traditional knowledge in the invention for which they seek the patent. This – it is argued – would make the CBD provisions on prior informed consent and benefit-sharing more effective and would be one step to implement Art. 16.5 CBD which calls on the contracting parties to cooperate in order to ensure that intellectual property rights support and do not counteract the objectives of the CBD, see Communication from Norway, Amending the TRIPS Agreement to introduce an obligation to disclose the origin of genetic resources and traditional knowledge in patent applications, IP/C/W/473 (14 June 2006). Amendment of the TRIPS Agreement to include a disclosure obligation is also advocated by a group represented by Brazil and India that includes Bolivia, Columbia, Cuba, Dominican Republic, Ecuador, Peru, Thailand, the African Group and some other developing countries, see information by the WTO at: [http://www.wto.org/english/tratop\\_e/trips\\_e/art27\\_3b\\_background\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm) (16 July 2008). Now, while a waiver could waive for certain members the obligation to grant patents unless origin of genetic resources and traditional knowledge is disclosed and could thus clarify that members are permitted to introduce mandatory disclosure obligations, it would be difficult to impose through a waiver the obligation to do so.

<sup>182</sup> Nonetheless, however, domestic legislation may be required so that the rules laid down in a waiver become effective domestically.

<sup>183</sup> According to Art. X:3 WTO Agreement the amendment will take effect upon acceptance by two thirds of the members for those members only.

<sup>184</sup> The term was originally coined with regard to European integration of different intensity for different member states; on that discussion see e.g. C.-D. Ehlermann (ed.), *Der rechtliche Rahmen eines Europas in mehreren Geschwindigkeiten und unterschiedlichen Gruppierungen. Multi-speed Europe - the legal framework of variable geometry*, 1999. For the view that the WTO should allow for variable geometry, see R. Howse/K. Nicolaidis, *supra* note 160, 16.

whether they wish to make use of the decision as importing countries or not. Several developed members have indicated that they will not do so.<sup>185</sup>

**(b) The waiver as a tool to initiate norm-change**

I now turn to the waiver as an instrument to initiate norm change by providing a (potential) forum for political deliberation on WTO norms. Norm change poses a particular challenge within the WTO regarding the severe claims of illegitimacy waged against WTO law by civil society as well as part of the WTO's membership. These claims are particularly pronounced with respect to the TRIPS Agreement. While the TRIPS waiver can be interpreted as an important acknowledgement of human rights within the WTO, the TRIPS Agreement arguably still does not sufficiently account for human rights concerns.

Different means have been proposed to mitigate the negative impact of the TRIPS Agreement on the realization of human rights and other values such as the protection of traditional knowledge. The most commonly voiced is the interpretation of TRIPS norms by panels and AB in the light of human rights or even the direct application of human rights norms as a defense in dispute settlement.<sup>186</sup> Another line of argument proposes to strengthen cross-linkages between regimes,<sup>187</sup> by including experts from the human rights fields in dispute settlement panels or having panels seek advice from other international organizations on the basis of Art. 13 DSU.<sup>188</sup> However there is strong resistance against such proposals, in particular against the direct application of other than WTO norms in dispute settlement and the stronger involvement of the WTO with issues of human rights.<sup>189</sup>

My argument is that from a normative as well as a policy perspective the potential of the waiver power to address claims of illegitimacy in a political process in order to achieve a satisfactory

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<sup>185</sup> Decision of 30 August 2003, *supra* note 36, footnote 3 to para. 1 (b).

<sup>186</sup> For a discussion of these options, see H. Hestermeyer, *supra* note 39, chapter 5.

<sup>187</sup> For a discussion of the role of institutional solutions to norm conflict in public international law which does not specifically refer to the TRIPS Agreement, see N. Matz, *Wege zur Koordinierung völkerrechtlicher Verträge. Völkervertragsrechtliche und institutionelle Ansätze*, 2005, 340 *et seq.*

<sup>188</sup> H. Hestermeyer, *supra* note 39, 288; for such suggestions to enhance the sensitivity for environmental concerns within the WTO, see O. Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict*, 2004, 96 *et seq.*

<sup>189</sup> See e.g. para. 4 of the Singapore Ministerial Declaration, adopted on 13 December 1996 (WT/MIN(96)/DEC (18 December 1996)) which reads in part: "The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them."

balance of competing public interests within WTO law has not been fully acknowledged, yet. The waiver process in my view can be an important step towards further norm change by creating a forum for the contestation of the legitimacy of WTO norms and deliberation on the proper balance of public interests.

**(aa) Agenda setting**

Art. IX:3 WTO Agreement can be interpreted as granting to each WTO member the right to request a waiver of any obligation of the WTO Agreements. This right enables WTO members, developed and developing members alike, to bring a matter on the agenda of the competent council or committee as long as it is phrased as a request for the suspension of an obligation. Since legitimacy concerns often attach to the restrictiveness of a certain obligation – as was the case with respect to the restrictions of TRIPS norms on access to essential medicines – such concerns can be formulated as a request for the suspension of the obligation which is held to be unduly restrictive. This possibility to place an issue on the agenda by making use of a right which is specifically provided for in the WTO Agreement is of particular importance to developing countries who might otherwise have difficulties to make their concerns heard and to have them discussed in formal meetings.

Since Art. IX:3 (b) WTO Agreement sets out a time frame for the consideration of and decision on waiver requests which shall not exceed 90 days it is ensured that discussion of the request is not unduly delayed. Furthermore, the rules of procedure of committees and the councils of the Multilateral Trade Agreements foresee that matters on which no consensus is reached shall be transferred to the General Council.<sup>190</sup> This can serve as a safeguard that a matter remains on the agenda and if no consensus is achieved in the competent lower body that it gains visibility by transfer to the higher level. Thus not only the community of trade experts in the specialized bodies takes notice of the matter, but it is being politicized.

**(bb) Specification of issues**

The right to request a waiver not only enables members to effectively place an issue on the agenda, it can also serve to concretize a question and separate it from general rules negotiations.

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<sup>190</sup> See e.g. General Council, Rules of Procedure for Meetings of the Council for Trade in Goods, adopted on 31 July 1995, WT/L/79 (7 August 1995), Rule 33.

This point shall be clarified by reference to the negotiations on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health. The tension between the protection of intellectual property rights and the human right to health is often presented as a conflict between two public interests: the interest to spur research and development and the interest in public health.<sup>191</sup> Frequently however special interests of the pharmaceutical industry in profit maximization are presented as public interests in innovation even when the two do not coincide. E.g., it has been revealed that the first research on AIDS medication, for which pharmaceutical companies later obtained patent rights, was conducted by public institutions and not spurred by the prospect of patent protection.<sup>192</sup> Such presentation of special interests of a small and powerful constituency such as the pharmaceutical industry as public interests becomes more difficult the more specific the question which is debated. While there have been allegations that the outcome of the negotiations on the implementation of paragraph 6 to a large extent were influenced by special interests of the pharmaceutical industry<sup>193</sup> this influence arguably was weaker than in the negotiations of the TRIPS Agreement during the Uruguay Round.<sup>194</sup>

A further potential advantage of the isolation of a specific question from a more general debate on norm change, for example during multilateral trade negotiations, is that it will be more unlikely that the specific question is connected to other unresolved questions and that abstention from vetoing a waiver is exchanged for agreement to another unconnected issue which is discussed elsewhere. These however are questions which need to be studied further.

In light of the political economy of rule negotiations, norm change might in certain situations be initiated more easily by addressing specific instances of rule application. If the question is posed whether in a specific instance and for a specific period of time a waiver shall be granted to specific members which so request, it might be less easy for special interests to hide behind the formulation of an opposed public interest. At the same time a decision with respect to a concrete situation might trigger further reaching and more general norm change in the future.

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<sup>191</sup> See e.g. Doha Declaration on the TRIPS Agreement and Public Health, *supra* note 113.

<sup>192</sup> See H. Hestermeyer, *supra* note 39, 2 *et seq.*

<sup>193</sup> F. Fleck, No Deal in Sight on Cheap Drugs for Poor Countries, 81 *Bulletin of the World Health Organization* (2003), 307.

<sup>194</sup> On the role of the pharmaceutical industry during the Uruguay Round, see S. K. Sell, Industry Strategies for Intellectual Property and Trade. The Quest for TRIPS, and Post-TRIPS Strategies, 10 *Cardozo Journal of International & Comparative Law* (2002), 79.

**(cc) The role of the international public: scandalization and control**

If a legitimacy concern has been specified in a waiver request, treatment of this matter during the waiver process can be subjected more easily to control than if it is part of a general and abstract discourse. Control by public opinion within WTO Members and international civil society requires, however, transparency of the waiver process. To date, this process is still characterized by informality and intransparency and therefore does not allow for detailed scrutiny. If however the process was conducted in formal meetings of which detailed minutes were publicly available, the requesting members' positions as well as opposing members' positions could be closely examined and members would be hard-pressed to frame their arguments as public interest arguments.

Civil society and other international institutions could also play an important role in informing the waiver process.<sup>195</sup> This role is all the greater since deliberation during the waiver process is not limited to legal arguments. Also ethical arguments are admitted as well as arguments referring to other international legal regimes that might demand or propose a certain solution to the issue under discussion. Thus civil society actors, such as NGOs, and other international institution can introduce their specific expertise into the deliberation.

This has been a noteworthy aspect of the negotiations on paragraph 6 of the Doha Declaration on Public Health. In formal meetings of the TRIPS Council reference was made to an expert opinion from an NGO<sup>196</sup> and one of the observing international organizations, the World Health Organization, has even made a very specific proposal as to the most suitable mechanism to implement paragraph 6.<sup>197</sup> After the veto of the draft waiver decision of chairman Motta by the US delegation this position has been very outspokenly scandalized by a statement of the observer

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<sup>195</sup> On the role of NGOs in providing non-politicized information to the WTO, see O. Perez, *supra* note 188, 100.

<sup>196</sup> See statement by the Norwegian Representative in the meeting of the TRIPS Council, held on 5-7 March 2002, who drew attention to a report on paragraph 6 written by Professor Frederick Abbott for the Quaker United Nations Office in Geneva and which had been distributed to the delegates, *supra* note 109, para. 125.

<sup>197</sup> See statement of the representative of the WHO in the meeting of the TRIPS Council, held on 17-19 September 2002, which endorsed the provision of a limited exception under Art. 30 TRIPS Agreement as the solution most consistent with a basic public health principle, *supra* note 116, para. 5. Information on the impact of AIDS on African countries was provided by UNAIDS, see e.g. statement of the representative of UNAIDS in the meeting of the TRIPS Council, held on 25-27 June 2002, IP/C/M/36 (18 July 2002), paras 124 et seq.

of the Holy Sea who reported “that Pope John Paul II, in his message on the theme of peace, had stressed that the promises made to the poor must be respected and the implementation of those promises was a moral problem.”<sup>198</sup>

These observations shall serve to show that during a waiver process deliberation on the reconciliation of public interests might be possible which takes into account other than trade interests which are introduced by delegations as well as observers and in which arguments are not only scrutinized by the membership, but also by public opinion.<sup>199</sup>

#### **(dd) Conclusion**

To summarize this argument: the possibility to request waivers from general norms in specific instances provides an opportunity for a political discourse on the question of the legitimacy of WTO norms in a concrete case. If the matter is one which is highly disputed such as the issue of access to essential medicines it will be accompanied by public opinion domestically and internationally which feeds and scrutinizes discussions within the WTO. The specificity of the constellation for which a waiver is requested will weaken arguments which might be strong in abstract discussions about the amendment of substantive WTO norms or far reaching procedural changes. The isolation of issues from multilateral trade negotiations will enable a concentration of the discourse on specific questions and thus facilitate scrutiny of this discourse by civil society. It might enhance the possibility of political deliberation also within the WTO. When held e.g. against their human rights commitments members will have to justify in concrete terms how they think that opposition to a waiver and their professed human rights commitments can be reconciled. The waiver option is of particular importance to developing countries since they can refer to their treaty right to request a waiver in order to discuss their concerns in an institutional forum and secondly because they have much less than developed members the possibility to simply breach WTO norms without grave consequences.<sup>200</sup>

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<sup>198</sup> Minutes of the meeting of the TRIPS Council held 25-27, 29 November 2002 and 20 December 2002, *supra* note 118, para. 47.

<sup>199</sup> Robert Howse has observed that the TRIPS debate was evidence of a greater openness of the WTO, R. Howse, *supra* note 166, 117.

<sup>200</sup> Robert Hudec reports that under the GATT 1947 developing countries regularly requested waivers prior to the imposition of tariff surcharges to counter balance of payments difficulties, while when developed countries started imposing tariff surcharges as well in the 1960s they did so without requesting waivers, R. E. Hudec, *The GATT Legal System and World Trade Diplomacy*, 1975, 227.

## **V. Concluding remarks**

This paper was an initial analysis of the waiver's potential to address norm and interest conflicts in a political process which results in a binding legal decision. Political processes are important because interest and norm conflicts are frequently the result of political choice and manifestation of political conflict. Such political conflict can neither be overcome by applying legal doctrine nor by cooperation of international bureaucracies. It should instead be addressed by political processes that include views from different international institutions as well as different views represented within societies.

In my view research in this respect should be (not only, but also) pragmatic and focus on existing procedures and instruments within international institutions that might enable such processes. The waiver competence which has been used pragmatically and creatively throughout the history of the GATT and the WTO has the potential to provide for such a procedure.

The waiver process has the potential of becoming a process of political deliberation and exchange of arguments. One necessary – albeit not sufficient -- condition for such deliberation is met by the waiver process. Namely that it does not exclude certain public interest arguments because these interests arguably do not fall within the scope of the WTO. The process has thus the potential to be representative of various perspectives and interests on the question how conflicts should be resolved. To be sure many characteristics of waiver processes in practice shed doubts on their deliberative character. The political economy of waiver processes and means to improve this process to make it more conducive to an open exchange of public interest arguments require further research.

In a highly legalized system such as the WTO it is further important -- in order to maintain law's normativity -- that there are procedures which provide for a formal coupling of politics and law so that the political process can find a preliminary end in a binding legal decision. The waiver process provides for such a coupling since it results in a binding legal decision on the waiver request. The waiver's potential should not be overestimated, likewise it should, however, not be ignored.