
The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests

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Abstract

This article 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 conflicts of interest and that these should be addressed in political processes. The article proposes that the waiver process has the potential to become a forum for political debate which is open not only to economic interests, but also to other public interests and perspectives. The waiver decision which concludes such a process can provide a solution to conflicts of interest either by modifying the existing rules of WTO law or by limiting the WTO's jurisdiction in favour of another international legal regime. These theses are explored with reference to the TRIPS and Kimberley waiver decisions.

1 Conflicts of Norms and Interests in the International Legal Order

Public international law today aims not only at the delimitation of sovereign spheres of influence, the reconciliation of opposed national interests, or the reciprocal exchange of benefits between subjects of international law. It increasingly pursues and protects

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societal interests and individual rights and engages in the regulation of social life which hitherto was exclusively the subject of domestic legislation.¹

Often such interests are pursued in separate international legal regimes,² a fact which leads to a fragmentation of the international legal order. However, while the legal regimes for the protection of public goods and interests such as the environment, human rights, or trade are institutionally separate, often mirroring a similar separation of government agencies domestically, their subject matters are interconnected and the interests pursued by each regime potentially conflict.

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 conflicting interests – the outcome being *the* public interest. On the international level, a global legislature which could legitimately engage in such balancing is not in sight. Moreover, functional differentiation has led to the situation that there are few fora in which debates across regime boundaries can take place. Political organs of international organizations or conferences of the parties to an international treaty often have a limited mandate which restricts discussions to issues within the ambit of the specific regime.

As a consequence values which are pursued and protected in one regime are neglected in another, leading to ever more situations of potential conflict. With respect to the World Trade Organization (WTO) these dangers of fragmentation have materialized in the following ways: on the one hand international regimes which foresee measures which affect trade are faced with claims that such measures are inconsistent with WTO law; on the other hand the narrow focus of WTO law on trade and intellectual property protection neglects the negative effects which this law – and in particular the TRIPS Agreement -- has on other internationally protected interests and values such as the human right to health care or indigenous traditional knowledge. Since the WTO has – due to mandatory dispute settlement – a relatively strong enforcement mechanism, WTO law is in case of conflict likely to prevail.³

Legal scholarship, which perceives the fragmentation of international law as problematic,⁴ is largely focussing on two ways to overcome the dangers of fragmentation.

¹ W. Friedmann, *The Changing Structure of International Law* (1964), at 62 ff; Cf. Weiler and Motoc, 'Taking Democracy Seriously: The Normative Challenge to the International System', in S. Griller (ed.), *International Economic Governance and Non-Economic Concerns* (2003), at 47, 63 ff.

² The term 'international legal regime' as used throughout this article encompasses international treaties, international organizations, and other international institutions, but also bodies of non-binding norms with or without an institutional structure.

³ Holger Hestermeyer refers to this as the 'factual hierarchy of regimes': H. Hestermeyer, *Human Rights and the WTO. The Case of Patents and Access to Medicines* (2007), at 193 ff.

⁴ While Eyal Benvenisti and George W. Downs cite American authors (with the exception of Martti Koskeniemi and Päivi Leino) to support their thesis that few legal theorists view fragmentation as a serious problem (Benvenisti and Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', 60 *Stanford L Rev* (2007) 598, at 600–604) legal scholarship in Europe draws a different picture. There PhD theses on the effects of fragmentation and avenues to achieve coherence abound. To name just a few, see, e.g., M. Böckenförde, *Grüne Gentechnik und Welthandel* (2004); Hestermeyer, *supra* note 3; N. Matz, *Wege zur Koordinierung völkerrechtlicher Verträge* (2005); J. Pauwelyn, *Conflict of Norms in Public International Law* (2003); S. Vöneky, *Die Fortgeltung des Umweltvölkerrechts in Internationalen Bewaffneten Konflikten* (2001).

On the one hand scholars emphasize legal doctrine and the legal tools which general international law provides to address potential norm conflict. Conflict norms are employed, as are rules of interpretation, and frequently evidence is given of a hierarchization of international legal norms.⁵ On the other hand scholarship increasingly focuses on institutional law to further cooperation and coordination between different actors during the process of norm creation which will help prospectively to avoid conflict. Reactively, institutional solutions to conflicts are proposed which do not aim to reconcile norms doctrinally, but rather explore the potential of various institutional arrangements to mitigate the effects of conflict.⁶ With regard to the WTO institutional proposals frequently focus on dispute settlement, and in particular on questions such as the composition of panels or the treatment of submissions by NGOs or other international organizations.⁷

While this doctrinal and institutional research is important it often presents the proper relationship of different norms and different international institutions as a matter of legal logic or proper coordination. It conceals the fact that the conflicts arising from fragmentation are not only due to a lack of information and coordination, but frequently an expression of underlying interest and value conflicts.⁸ Consequently it neglects the importance of political processes and political law-making to solve such conflicts.⁹

Writings on the WTO are no exception. Law-making by the political organs is largely ignored by legal scholars. The predominant view is that the political organs are paralysed due to the practice of consensus decision-making.¹⁰ This has somewhat changed with two relatively recent decisions of the WTO that have brought the WTO waiver process into the focus of attention of those who seek to find ways to overcome

⁵ These works focus by and large on the doctrinal tools to address norm conflict which were also presented in the International Law Commission, *Fragmentation of International Law. Difficulties Arising From the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, A/CN.4/L.682 (13 Apr. 2006).

⁶ See, e.g., Matz, *supra* note 4, at 340–389; for a work focussing on international tribunals see Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003).

⁷ An example is the proposal to include non-trade experts, such as for example cultural experts, in panels which adjudicate on cases in which cultural interests are at stake: see Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO', 9 *J Int'l Economic L* (2006) 553, at 571 ff; for suggestions on institutional solutions to conflicts between the TRIPS Agreement and human rights see Hestermeyer, *supra* note 3, at 287–288.

⁸ On fragmentation as resulting from differences in normative preferences and policy conflicts and not lack of coordination cf. Koskenniemi, 'What is International Law for', in M.D. Evans (ed.), *International Law* (2nd edn, 2006), at 57, 76; for the view that the reason for fragmentation lies in contradictions between society-wide institutionalized rationalities see Fischer-Lescano and Teubner, 'Regime-Collisions. The Vain Search for Unity in the Fragmentation of Global Law', 25 *Michigan J Int'l L* (2004) 999, at 1004; for an explanation of fragmentation as a function of powerful states' strategies to pursue their interests see Benvenisti and Downs, *supra* note 4, at 595–631. Despite their differences all of these authors recognize that fragmentation, and more specifically norm conflict, is a reflection of conflicts in society.

⁹ For the view that social conflict needs to be solved by political means cf. Scobbie, 'Wicked Heresies or Legitimate Perspectives? Theory and International Law', in Evans (ed.), *supra* note 8, at 83, 86.

¹⁰ Cf. only T. Broude, *International Governance in the WTO: Judicial Boundaries and Political Capitulation* (2004).

the allegedly too narrow focus of the WTO on economic matters. One is the decision by the General Council in 2003 on the implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health – the TRIPS Waiver.¹¹ The other is the Kimberley Waiver,¹² which was also adopted by the General Council in 2003. Even though these decisions have been a welcome stimulation and object of further writings, scholars have so far largely focused on the specific constellations leading to the adoption of these waivers and the pros and cons of the particular decisions.¹³

In this article I will argue that the waiver competence of the WTO bears a specific potential to open the WTO for political debates on the coordination and reconciliation of competing norms and interests. Such debates may result in two different legal instruments. On the one hand, the waiver power allows for a general modification of WTO norms to take better account of non-economic interests; on the other hand it can also restrict the WTO's jurisdiction with respect to specific measures which are mandated by another international legal regime and affect trade.

2 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 to change or concretize existing or to create new obligations. These are the power to adopt authoritative interpretations (Article IX(2) of the WTO Agreement),¹⁴ the power to adopt amendment decisions (Article X(1) of the WTO Agreement),¹⁵ and the waiver power (Article IX(3) of the WTO Agreement).¹⁶ To date, no explicit authoritative

¹¹ General Council, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Decision of 30 Aug. 2003, WT/L/540 (2 Sept. 2003).

¹² General Council, Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, Decision of 15 May 2003, WT/L/518 (27 May 2003). The waiver was extended in 2006 by General Council Decision of 15 Dec. 2006, WT/L/676 (19 Dec. 2006).

¹³ On the TRIPS Waiver see, e.g., Hestermeyer, *supra* note 3, at 261–272; Abbott, 'The WTO Medicines Decision', 99 *AJIL* (2005) 317. On the Kimberley Waiver see, e.g., 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, and E. Bürgi, *Human Rights and International Trade* (2005), at 391; Pauwelyn, 'WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for "Conflict Diamonds"', 24 *Michigan J Int'l L* (2003) 1177.

¹⁴ 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)(1) WTO Agreement).

¹⁵ The adoption of an amendment decision does not immediately modify legal obligations since an amendment becomes effective only when the acceptance requirements set out in Art. X WTO Agreement are met.

¹⁶ In addition to these specific decision-making powers, Art. IV(1)(3) WTO Agreement provides for a general decision-making power of the Ministerial Conference: '[t]he 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 Kuijper, 'Some Institutional Issues Presently before the WTO', in D.L.M. Kennedy and J.D. Southwick (eds), *The Political Economy of International Trade Law* (2002), at 81, 82.

interpretation has been adopted,¹⁷ and only one amendment proposal has been submitted to the membership for acceptance.¹⁸ Each year, however, several waivers are granted.¹⁹

The legal basis for the adoption of waiver decisions is Article IX(3) of the WTO Agreement which authorizes the Ministerial Conference to waive an obligation of the WTO Agreement or any of the Multilateral Trade Agreements.²⁰ A waiver decision, according to this provision, needs to be adopted by three-quarters of the members.²¹ While under the GATT 1947 waiver decisions and decisions on accessions were routinely taken by vote,²² this practice was abandoned with the establishment of the WTO. Waiver decisions are now exclusively taken by consensus.²³ The only substantive requirement for waivers set out in Article IX(3) of the WTO Agreement is the existence of exceptional circumstances. This requirement has never been specified and in the past did not prove to be a substantive limitation on the waiver power.²⁴ According to Article IX(4) of the 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.²⁵

¹⁷ Some authors have interpreted the Doha Declaration on Public Health and the TRIPS Agreement as one; for this view see, e.g., Hestermeyer, *supra* note 3, at 281 (with further references).

¹⁸ General Council Decision of 6 Dec. 2005, WT/L/641 (8 Dec. 2005), proposing an amendment to the TRIPS Agreement.

¹⁹ Each Annual Report of the WTO contains a list of waivers granted under Art. IX (3) WTO Agreement during the period covered by the report. For example, the WTO Annual Report 2008 lists at 18 6 waiver decisions which were adopted in 2007; it is available at: www.wto.org/english/res_e/reser_e/annual_report_e.htm (last visited 28 May 2009).

²⁰ 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).

²¹ 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.

²² Art. XXV(5) GATT, the waiver competence under the GATT, required a two-thirds majority of the votes cast, representing more than half of the contracting parties.

²³ On 15 Nov. 1995 the General Council agreed that decisions concerning waivers and accessions would be taken in accordance with Art. IX(1) WTO Agreement by consensus; only when consensus cannot be arrived at is voting to take place; see General Council, *Decision-Making Procedures under Arts. IX and XII of the WTO Agreement*, Decision of 15 Nov. 1995, WT/L/93 (24 Nov. 1995). The statement also specifies that a member may request a vote at the time the decision is taken. Further procedural requirements are set out in Art. IX(4) WTO Agreement, the Understanding in Respect of Waivers of Obligations under the GATT 1994, and 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.

²⁴ For the GATT 1947 see J.H. Jackson, *World Trade and the Law of GATT* (1969), at 544; Marinberg, 'GATT/WTO Waivers: "Exceptional Circumstances" as Applied to the Lomé Waiver', 19 *Boston U Int'l LJ* (2001) 129 is critical of the waiver practice under the WTO.

²⁵ 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.

The wording of the waiver competence, especially the requirement that there be ‘exceptional circumstances’, suggests that the waiver competence is intended 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 by the Appellate Body with reference to the legal texts.²⁶ An interpretation of the waiver as a narrow exception can further be supported by a contextual interpretation which contrasts the waiver power with the powers to issue authoritative interpretations and to propose amendments to WTO law. 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. Finally, the negotiating history of the waiver power supports the view that the waiver is intended to address temporary situations of urgency which prevent members from complying with certain obligations. During the London Preparatory Conference for an International Trade Organization the delegate from the United States commented that the waiver power was meant to ‘cover cases which were exceptional and caused particular hardship to any particular member’.²⁷ The *travaux préparatoires* do not reveal any contrary views and it seems that this interpretation was commonly accepted. It thus does not come as a surprise that the qualification as an exception or exit option for members is the prevailing view in the literature.²⁸

From the waiver practice under the GATT 1947 and within the WTO it appears, however, that the ability to request waivers not only serves 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. Waivers have been granted *inter alia* to allow for regional economic integration, to justify non-reciprocal trade preferences for products from developing countries, or to enable members to adapt their goods schedules to (changes in) the Harmonized System, the product nomenclature of the World Customs Organization.²⁹

²⁶ Panel Report, *US – Sugar Waiver*, BISD 37S/228, at para. 5.9; Appellate Body Report, *EC – Bananas III*, WT/DS27/AB/R, at para. 185; Appellate Body Report (Art. 21(5) DSU), WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW/USA, at para. 382.

²⁷ UN Economic and Social Council Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report of the Ninth Meeting of Committee V held on 7 Nov. 1946, E/PC/T/C.V/PV/9, at 8; the French delegate at the same meeting stated that the waiver power should allow for merely temporary exemptions (*ibid.*, at 9).

²⁸ See, e.g., W. Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht* (1990), at 164; Marinberg, *supra* note 24, at 129; Gold, “Dispensing” and “Suspending” Powers of International Organizations’, in J. Gold, *Legal and Institutional Aspects of the International Monetary System. Selected Essays* (1979), at 352; ILC Special Rapporteur A. Pellet, Fifth report on reservations to treaties (2000), A/CN.4/508/Add. 1, at para. 138. John Jackson, however, called the waiver power under the GATT 1947 ‘[p]erhaps the most important single power of the CONTRACTING PARTIES’: see J. Jackson, *World Trade and the Law of GATT* (1969), at 541.

²⁹ For a table of waivers granted in the WTO until 30 June 2001 and grouped into waivers concerning the Harmonized System, waivers concerning Regional Trade Agreements, and other waivers see WTO, *Analytical Index I, Marrakesh Agreement* (2003), at para. 183. For a table of waivers granted under the GATT 1947 see WTO, *Analytical Index, Guide to GATT Law and Practice* (1995), ii, at 892–906.

Moreover, waivers are not granted just to individual members. Collective waiver decisions are also adopted which suspend obligations for (potentially) all or groups of members. These waiver decisions differ in the description of the measures or situations for which they are granted. Accordingly, two types of collective waiver decisions can be distinguished. First, there are collective waivers which are granted for concretely defined measures or situations. These have been granted to coordinate WTO law with other international legal regimes. They legalize measures mandated by another legal regime and thus avoid norm conflict. The Kimberley waiver, which will be discussed in the next section, is an example of a waiver decision falling into this group.³⁰ Secondly, waiver decisions have been adopted to legalize abstractly defined measures for all or groups of members. These include the 1971 waivers to legalize preferential tariff treatment by developed contracting parties under the Generalized System of Preferences,³¹ and among developing countries,³² which were both succeeded by the Enabling Clause in 1979; the 1999 waiver to enable developing country members to maintain trade preferences for products from least developed countries;³³ and the 2003 TRIPS waiver, which will be discussed below. These waiver decisions result in a general modification of rules. All of the collective waiver decisions which fall into this group were adopted to address claims by developing countries that GATT/WTO law takes insufficient account of their needs.

3 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 that 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. The Kimberley waiver resolves the potential conflict between the KPCS and WTO law by excepting trade measures provided for by the KPCS from the application of several GATT norms. The TRIPS waiver mitigates the tension between patent obligations and the human right to health care by modifying certain legal rules of the TRIPS Agreement.

³⁰ Other waivers that can be placed into this category are the collective Harmonized System waivers which suspend Art. II GATT to enable members to implement a specific set of Harmonized System changes: see, e.g., WT/L/674. Collective waiver decisions are also discussed as a mechanism to coordinate WTO law and Multilateral Environmental Agreements which provide for trade measures: see WTO Secretariat, 'Multilateral Environmental Agreements (MEAs) and WTO Rules. Proposals made in the Committee on Trade and Environment (CTE) from 1995–2002', TN/TE/S/1 (23 May 2002).

³¹ CONTRACTING PARTIES, Decision of 25 June 1971, L/3545 (28 June 1971).

³² CONTRACTING PARTIES, Decision of 26 Nov. 1971, L/3636 (30 Nov. 1971).

³³ General Council Decision of 15 June 1999, Preferential Tariff Treatment for Least-Developed Countries, WT/L/304 (17 June 1999). On 12 May 2009 the General Council approved a 10-year extension of this waiver: see www.wto.org/english/news_e/news09_e/good_12may09_e.htm (last visited 28 May 2009).

A Coordination of Legal Regimes through Exception – the Kimberley Waiver

The Kimberley Process Certification Scheme for Rough Diamonds³⁴ aims at the suppression of trade in so-called conflict or blood diamonds.³⁵ Conflict diamonds are defined as ‘rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments’.³⁶ The aim of the KPCS – to prevent rebels financing their weapons through the diamond trade – is 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.³⁷ After non-governmental 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.³⁸ 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).³⁹

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.⁴⁰ In 2000, the unanimously adopted General Assembly Resolution 55/56 on the role of diamonds in fuelling conflict called upon UN members to devise effective and pragmatic measures to address the problem of trade in conflict diamonds.⁴¹ After the Interlaken Declaration had given effect to the KPCS, it was endorsed in General Assembly and Security Council resolutions.⁴²

³⁴ The KPCS Document is available at: www.kimberleyprocess.com/documents/basic_core_documents_en.html (28 May 2009).

³⁵ For a detailed account of the connection between diamond-mining and trading and violent conflicts and of how public awareness was raised by NGOs such as Global Witness and Canada Africa Partnership and led to action of the international community see Nadakavukaren Schefer, *supra* note 13, at 391, 391–416. A connection was also made between diamond trade and the financing of international terrorism: see references in Pauwelyn, *supra* note 13, at 1186, n. 38.

³⁶ KPCS, Section I, the definition of conflict diamonds refers to relevant SC resolutions and the definition of conflict diamonds in GA Res 55/56, at recital 2.

³⁷ Interlaken Declaration of 5 Nov. 2002 on the Kimberley Process Certification Scheme for Rough Diamonds, *supra* note 34, at recital 1.

³⁸ *Ibid.*, recital 6 of 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 is available at: www.kimberleyprocess.com/home/index_en.html (28 May 2009).

³⁹ *Ibid.*

⁴⁰ SC 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 SC Res 1176 (1998); SC 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).

⁴¹ GA Res 55/56 (2000); see also GA. Res 56/263 (2002).

⁴² See, e.g., GA Res 57/302 (2002) and SC Res 1459 (2003).

The KPCS is not an international treaty, but a non-binding instrument.⁴³ The main requirements are: participants *should* ensure that only rough diamonds which are accompanied by a so-called Kimberley Process Certificate⁴⁴ are imported and exported;⁴⁵ and participants *should* neither import rough diamonds from non-participants nor export rough diamonds to non-participants.⁴⁶

For its effectiveness⁴⁷ the KPCS depends on implementation of the substantive non-binding requirements through binding domestic legislation and enforcement of this legislation.⁴⁸ Since the obligations set out in the KPCS are non-binding, participants which do not comply do not violate international law, and thus do not incur any state responsibility under general international law. However, non-compliance is sanctioned by exclusion from the market. States which 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. Whether the minimum requirements are met is assessed by the Participation Committee.⁴⁹ 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.⁵⁰

Already during the drafting stage participants in the Kimberley Process were aware of potential conflicts between the prohibition of trade with non-participants and WTO norms, in particular the prohibition of quantitative restrictions (Article XI(1) of GATT), the obligation to administer quantitative restrictions non-discriminatorily (Article XIII(1) of GATT), and the obligation to grant most-favoured nation treatment (Article I(1) of GATT).⁵¹ While some WTO members, in particular Switzerland and

⁴³ Cf. Ruggie, 'Business and Human Rights: The Evolving International Agenda', 101 *AJIL* (2007) 819, at 839.

⁴⁴ The KPCS 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' (Section IV(a)). The certificate thus shall ensure that only diamonds which come from areas which are controlled by the legitimate government of a country enter the market.

⁴⁵ Section III(a) and (b).

⁴⁶ Section III(c).

⁴⁷ For criticism of the effectiveness of the KP see Partnership Africa Canada and Global Witness, *Illicit Diamond Flows, Kimberley Process, Note for Plenary*, Nov. 2007, available at: www.globalwitness.org/media_library_detail.php/604/en/illicit_diamond_flows (last visited 28 May 2009).

⁴⁸ The European Communities have implemented the KPCS by Council Reg 2368/2002, OJ (2002) L358/28, the US by the Clean Diamond Trade Act (Public Law 108-19 (25 Apr. 2003)).

⁴⁹ See Terms of Reference of the Participation Committee, Administrative Decision on Participation Committee of 29 October 2004, available at: www.kimberleyprocess.com/structure/working_group_en.html (last visited 28 May 2009). Para. 4.3 of the Terms of Reference reads: '[i]f 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'.

⁵⁰ For a list of KPCS Participants who meet the minimum requirements see www.kimberleyprocess.com/structure/participants_world_map_en.html (last visited 28 May 2009).

⁵¹ See Chairman of the Kimberley Process, Non-Paper, Kimberley Process Workshop on WTO Conformity, 15–17 Feb. 2002 (revised version 14 Mar. 2002), available at: www.kimberleyprocess.com/download/getfile/42 (last visited 29 May 2009). 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.

the EC, were of the view that the trade bans *vis-à-vis* non-participants were justified under WTO law,⁵² other WTO members did not want to proceed with the implementation of the KPCS unless the potential violation by these measures of GATT norms was addressed and justified by a waiver decision.⁵³

Consequently a waiver was requested on 11 November 2002 by three WTO members⁵⁴ and, after formal and informal discussions and consultations,⁵⁵ granted by the General Council on 15 May 2003.⁵⁶ It suspends Articles I(1), XI(1), and XIII(1) of GATT retroactively as of 1 January 2003 (the date the KPCS was launched) and until 31 December 2006. The waiver decision was extended until 31 December 2012 by a second decision of 15 December 2006.⁵⁷ 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.⁵⁸ 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'.⁵⁹ The waiver does not cover measures restricting trade in rough diamonds with participants since these were held to be consistent with WTO law. To accommodate those members which were of the view that the trade bans *vis-à-vis* non-participants were also consistent with WTO law and a waiver decision therefore unnecessary, the decision notes in the preamble that the waiver is granted for legal certainty and does not pre-judge the consistency with WTO law of domestic measures which are taken consistent with the KPCS.⁶⁰

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 norms and resolves potential conflict in favour of the KPCS. It does not take a stance on the compatibility of KPCS

⁵² It also seems to be the predominant view in the literature that the trade bans are justified under the general exceptions in Art. XX GATT or the security exception in Art. XXI GATT. See, e.g., Price, 'The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate', 12 *Minnesota J Global Trade* (2003) 1, at 48 ff; Pauwelyn, *supra* note 13, at 1189 ff; Nadakavukaren Schefer, *supra* note 13, at 418 ff; more critical as to the justification of the trade restrictions under GATT exceptions is Gray, 'Conflict Diamonds and the WTO: Not the Best Opportunity to Be Missed for the Trade-Human Rights Interface', in Cottier, Pauwelyn, and Bürgi (eds), *supra* note 13, at 451.

⁵³ See Price, *supra* note 52, at 5.

⁵⁴ Communication from Canada, Japan, and Sierra Leone, Kimberley Certification Scheme for Rough Diamonds – Request for a WTO Waiver, 11 Nov. 2002, G/C/W/431 (12 Nov. 2002).

⁵⁵ See the minutes of the meetings of the Council for Trade in Goods on 22 Nov. 2002, G/C/M/66 (4 Dec. 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 on 23 Jan. 2003 and 26 Feb. 2003, G/C/M/68 (6 Mar. 2003) (these minutes refer to consultations on 16 Jan. 2003 with 30 delegations (para. 1.2) and an open-ended informal meeting on 18 Feb. 2003 (para. 1.4)).

⁵⁶ General Council, *supra* note 12. By that time Australia, Brazil, Israel, the Philippines, Thailand, the United Arab Emirates, and the US had joined the waiver request: see G/C/W/431/Corr. 1 and Corr. 2.

⁵⁷ General Council Decision of 15 Dec. 2006, WT/L/676 (19 Dec. 2006).

⁵⁸ WT/L/518, at paras 1, 3; WT/L/676, at paras 1, 3.

⁵⁹ WT/L/518, at para. 1 on exports, at para. 2 on imports.

⁶⁰ WT/L/518, preamble, recital 4; WT/L/676, preamble, recital 5.

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 to WTO law for these measures.⁶¹

B Reconciliation of Competing Interests through Norm Change – the TRIPS Waiver

By contrast to the Kimberley waiver, which merely suspends the application of certain GATT norms to particular measures set out in the KPCS, the TRIPS waiver suspends obligations for abstractly defined situations and couples the suspension with certain terms and conditions. By modifying the existing norms and adapting them (to a certain extent) to the needs of developing countries, the waiver responds to allegations that the TRIPS Agreement illegitimately restricts access to essential medicines.

Since the entry into force of the WTO Agreements, the TRIPS Agreement has increasingly come under attack. There are serious contentions within the membership as to the illegitimacy of the TRIPS Agreement in light of values and interests recognized and protected in other international legal regimes, such as human rights treaties, the World Health Organization, or the Convention on Biological Diversity. The limitations which the TRIPS Agreement poses on access to essential medicines received particular attention in light of the expiry of the transitional period on 1 January 2005 for developing countries, such as Brazil, South Africa, India, and Thailand, which were important producers of generic medicines. It was argued, *inter alia*, that the TRIPS Agreements' restrictions on access to affordable medicines impede the fulfillment of human rights, such as the right to life (Article 6 of the ICCPR) and the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12 of the ICESCR).⁶²

The tension between the promotion of public health through affordable access to essential medicines on the one hand and the protection of intellectual property rights to provide incentives for research and development on the other hand was the subject of intensive debate outside⁶³ and eventually also within the WTO.⁶⁴ One particularly

⁶¹ In order to safeguard WTO members' interests the waiver provides for consultations between members benefiting from the waiver and a member which considers that a measure covered by the waiver unduly impairs benefits accruing to it under the GATT. If 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 (WT/L/518, at para. 6). Finally, the waiver makes it clear that recourse to consultation and dispute settlement by affected members pursuant to Arts XXII and XXIII GATT shall not be precluded (para. 7).

⁶² For a detailed analysis of whether international law gives rise to a human right to access to medicines and how the TRIPS Agreement interferes with this right see Hestermeyer, *supra* note 3, chs 3 and 4; see also Howse and Teitel, 'Beyond the Divide. The Covenant on Economic, Social and Cultural Rights and the World Trade Organization', *Friedrich-Ebert-Stiftung Occasional Paper*, No. 30/Apr. 2007, at 10.

⁶³ On the debate outside the WTO, in other international institutions such as the WHO, the UN General Assembly, or the Human Rights Commission see Hestermeyer, *supra* note 3, at 76 ff.

⁶⁴ For the minutes of the special discussion on intellectual property and access to medicines, held during the meeting of the TRIPS Council on 18–22 June 2001 see IP/C/M/31 (10 July 2001).

contentious issue was the question whether WTO members were allowed under the TRIPS Agreement to produce and export medicines without the permission of the patent holder if a health crisis in another WTO member needed to be addressed and affordable medicines were otherwise not available.

Some members were of the opinion that this should be allowed under Article 30 of the TRIPS Agreement, which provides for limited exceptions to the exclusive rights conferred by a patent.⁶⁵ This view was, however, not shared by developed country members.⁶⁶ Another avenue to produce and sell patented medicines without permission of the patent holder is provided for in Article 31 of the TRIPS Agreement. This provision allows members under certain conditions to grant compulsory licences which authorize the use of the subject matter of a patent, e.g. to produce or sell the patented product, without the consent of the patent holder. However, Article 31(f) imposes the limitation that a compulsory licence shall authorize the use 'predominantly for the market of the member authorizing such use'. Since many of the developing countries in urgent need of essential medicines do not themselves have the manufacturing capacity to produce these medicines, they do depend on imports from other members. These other members are, however, due to Article 31(f), not allowed to grant compulsory licences for the production of medicines for export.

The issue of restrictions on access to essential medicines by the TRIPS Agreement was addressed by the Doha Declaration on the TRIPS Agreement and Public Health, which the Ministerial Conference adopted on 14 November 2001.⁶⁷ The Declaration 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.⁶⁸ Paragraph 6 of the declaration recognizes the difficulties which WTO members with insufficient or no manufacturing capacity for pharmaceutical products may face when they wish to make effective use of compulsory licensing under the TRIPS Agreement. In this paragraph the Ministerial Conference instructed the TRIPS Council 'to find an expeditious solution to this problem and to report to the General Council before the end of 2002'.

In August 2003, after long and controversial discussions in the TRIPS Council, paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health was eventually implemented by a waiver decision which modifies the rules on

⁶⁵ See the 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).

⁶⁶ See Statement of the representative of the United States, minutes of the meeting of the TRIPS Council on 5–7 Mar. 2002, IP/C/M/35 (22 Mar. 2002), at para. 84. In the only panel report which to date has interpreted Art. 30, the provision was interpreted narrowly: see Report of the Panel, *Canada – Patent Protection of Pharmaceutical Products*, 17 Mar. 2002, WT/DS114/R, at paras 7.39 ff.

⁶⁷ Ministerial Conference, Doha Declaration on the TRIPS Agreement and Public Health, adopted on 14 Nov. 2001, WT/MIN(01)/DEC/2 (20 Nov. 2001).

⁶⁸ *Ibid.*, at paras 4, 5.

compulsory licensing.⁶⁹ The debates centred on the substantive questions of 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 was also extensively discussed. While some developing countries initially favoured an authoritative interpretation of Article 30,⁷⁰ most industrialized countries supported a modification of Article 31(f). Some wanted to achieve this modification through an amendment coupled with an interim solution of a waiver or moratorium on dispute settlement;⁷¹ others believed that a waiver would be a suitable final solution.⁷²

In December 2002 a consensus on a draft text of a waiver decision – the so-called Motta Draft named after the then chairman of the TRIPS Council, Ambassador Motta – failed due to opposition by the US to the scope of application. 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.⁷³ Subsequently, discussions continued and the issue was at last resolved in August 2003 when the TRIPS Council approved a draft decision – which was identical to the Motta Draft – to be forwarded to the General Council for adoption.⁷⁴

The General Council adopted the waiver decision on 30 August 2003.⁷⁵ It waives the requirement that a compulsory licence shall authorize use of a patent predominately for the supply of the domestic market (Article 31(f) of the TRIPS Agreement) and the obligation to pay adequate remuneration to the right holder when a compulsory licence is issued (Article 31(h) of the TRIPS Agreement) 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.⁷⁶ Eligible importing

⁶⁹ On the process which eventually led to the adoption of the waiver decision see Abbott, *supra* note 13.

⁷⁰ See the communication of Brazil, *supra* note 65.

⁷¹ See minutes of the meeting of the TRIPS Council held 17–19 Sept. 2002, IP/C/M/37 (11 Oct. 2002), e.g. at para. 67 (statement of the representative of the EC), para. 65 (statement of the representative of Norway).

⁷² *Ibid.*, at 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 Mar. 2002, IP/C/W/340 (14 Mar. 2002).

⁷³ See minutes of the meeting of the TRIPS Council on 25–27, 29 Nov. 2002 and 20 Dec. 2002, IP/C/M/38 (5 Feb. 2003), at para. 34 (statement by the representative of the United States). On 20 Dec. 2002 the US 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 Jan. 2003).

⁷⁴ Minutes of the meeting of the TRIPS Council on 28 Aug. 2003, IP/C/M/41 (7 Nov. 2003), at para. 3.

⁷⁵ Minutes of the meeting of the General Council on 30 Aug. 2003, WT/GC/M/82 (13 Nov. 2003), at para. 31. The waiver decision was accompanied by a statement of the chairman (*ibid.*, at para. 29) which, however, does not form part of the waiver decision.

⁷⁶ General Council Decision of 30 Aug. 2003, *supra* note 11, at para. 1(a). The scope of diseases was thus not limited as had been proposed by the US.

members are any least-developed country member and any other WTO member which has notified the TRIPS Council of its intention to use the system as an importer.⁷⁷

Article 31(f) of the TRIPS Agreement is waived for the exporting country member on the condition that an eligible importing member notifies the TRIPS Council that it has insufficient or no manufacturing capacity in the pharmaceutical sector for the product in question,⁷⁸ and has itself granted a compulsory licence or intends to do so if the product is also patented within its territory.⁷⁹ With respect to the compulsory licence granted by the importing country the obligation to remunerate the right holder is waived.⁸⁰ The decision further includes terms to ensure transparency and prevent trade diversion⁸¹ and a special provision which waives Article 31(f) for exports from developing country members and least-developed country members which are party to a Regional Trade Agreement to other developing or least-developed parties to this agreement.⁸²

The waiver decision does not specify a termination date as required by Article IX(4) of the WTO Agreement; instead it states that it will terminate for each member when the amendment replacing the decision takes effect for that member.⁸³ On 6 December 2005 the General Council adopted an amendment decision based on a proposal by the TRIPS Council which will formally incorporate the August 2003 decision – the contents of which will remain unchanged – into the TRIPS Agreement.⁸⁴ The deadline for acceptance of the amendment, which was originally set for 1 December 2007, was extended by a decision of the General Council to 31 December 2009.⁸⁵

The system, which was established by the waiver, was harshly criticized, in particular by non-governmental organizations such as Médecins sans Frontières for being overly burdensome and inefficient.⁸⁶ Indeed, only in 2007 did the first WTO members, namely Canada and Rwanda, notify the TRIPS Council that they intended to make use of the decision. Rwanda gave notice that it wished to import a certain amount of an AIDS medication from Canada and Canada that it had issued a compulsory licence

⁷⁷ *Ibid.*, at para. 1(b). A number of developed country members who will not use the system set out in the decision are mentioned in footnote 3 to para. 1(b).

⁷⁸ *Ibid.*, at para. 2(a)(ii). This requirement does not apply to LDC members.

⁷⁹ *Ibid.*, at para. 2(a).

⁸⁰ *Ibid.*, at para. 3; the decision states in para. 3(1) that the exporting member when paying remuneration in accordance with Art. 31(h) shall take into account the economic value to the importing member of the use which was authorized by the exporting member.

⁸¹ *Ibid.*, at paras 2, 4, 5.

⁸² *Ibid.*, at para. 6. In addition the decision imposes certain obligations on all members which cannot be characterized as conditions or terms according to Art. IX(3) WTO 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).

⁸³ *Ibid.*, at para. 11. A second deviation from Art. IX(4) is the stipulation in para. 8 that an annual review by the TRIPS Council fulfils the review requirements of Art. IX(4) which provides for the annual review of waivers by the General Council.

⁸⁴ General Council, Amendment of the TRIPS Agreement, Decision of 6 Dec. 2005, WT/L/641 (8 Dec. 2005). On the negotiating history see Hestermeyer, *supra* note 3, at 272–274.

⁸⁵ General Council Decision of 18 Dec. 2007, WT/L/711 (21 Dec. 2007).

⁸⁶ On the amendment decision see ICTSD, 'Members Strike Deal on TRIPS and Public Health; Civil Society Unimpressed', 9 *Bridges Weekly Trade News Digest*, 7 Dec. 2005.

to produce and export this medication.⁸⁷ It is true that an interpretation of Article 30 of the TRIPS Agreement would have been preferable from a human rights and development perspective.⁸⁸ It has to be welcomed, however, that in light of the extremely divergent interests on this issue, some norm change in favour of public health in developing countries was achieved within the WTO.⁸⁹

C Formal Law-making in a Political Process

No matter whether waiver decisions take the form of an exception or a rule-making instrument, they share a common feature. They are binding legal instruments which are the outcome of a political process. In the following sections I will elaborate on the desirability of political debate and then explore the potential of the waiver procedure to create a space for political law-making within the WTO. After this discussion I will return once more to the different legal instruments which can be the result of the waiver process – exceptions or rule-making instruments – and their respective advantages, in particular as compared to other legal decisions such as authoritative interpretations or amendment decisions.

1 The Desirability of Political Debate

The desirability of political processes which are open to non-economic interests and perspectives from other international institutions becomes apparent if it is acknowledged that many situations of norm conflict or other frictions between international legal regimes are an expression of underlying interest conflicts in society. This political dimension of fragmentation is veiled by international scholarship which presents solutions to conflict as a matter of applying legal logic or of better bureaucratic cooperation and coordination.

From a doctrinal perspective the solution to conflict often appears as a matter of the technical application of interpretation rules embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties⁹⁰ or of conflict rules of general international law. I attempt to clarify this point by reference to the most prominent proposal by Joost Pauwelyn on the application of conflict norms to solve conflicts between obligations of WTO law and other international legal obligations.⁹¹ With respect to the relationship between WTO norms and norms of subsequent human rights or environmental law treaties Pauwelyn argues that – absent any express provisions on the relationship – the latter shall take precedence over conflicting WTO norms according to the *lex posterior* rule as embodied in Article 30 VCLT.⁹² This is the case as between states which are both

⁸⁷ On these notifications see Hestermeyer, 'Canadian-made Drugs for Rwanda: The First Application of the WTO Waiver on Patents and Medicines', 11 *ASIL Insights*, Issue 28 (10 Dec. 2007).

⁸⁸ Cf. C.M. Correa, *Implications of the Doha Declaration on the TRIPS Agreement and Public Health* (2002), at 28–30, available at: www.who.int/medicines/areas/policy/WHO_EDM_PAR_2002.3.pdf.

⁸⁹ For a positive view on the TRIPS waiver see, e.g., Abbott, *supra* note 13.

⁹⁰ For a critical view and demonstration that treaty interpretation is political see Klabbbers, 'On Rationalism and Politics: Interpretation of Treaties and the WTO', 74 *Nordic J Int'l L* (2005) 405.

⁹¹ Pauwelyn, 'The Role of Public International Law in the WTO. How Far Can We Go?', 95 *AJIL* (2001) 535.

⁹² For the prevalence of the KPCS over WTO law see Pauwelyn, *supra* note 13, at 1193 ff.

parties not only to the WTO, but also to the subsequent treaty. This result is achieved by conceptualizing WTO norms as being of a bilateral structure which allows WTO members *inter se* to contract out of these norms without affecting the rights of third states.⁹³ However, not only subsequent obligations, but also obligations preceding WTO law can – according to Pauwelyn – prevail over WTO obligations in case of conflict. Multilateral human rights or environmental treaties are conceptualized by Pauwelyn as ‘continuing treaties’ which makes it – in his view – inappropriate to apply the later in time rule if obligations in such treaties conflict with WTO obligations.⁹⁴ Rather the relationship between WTO law and conflicting norms in such multilateral treaties shall be determined by reference to the intentions of the parties. Where the intentions are not explicit, the implicit intentions have ‘to be deduced from general principles of law or logic’.⁹⁵ Applied, for example, to trade restrictions in multilateral environmental agreements which precede the WTO, logic – according to Pauwelyn – supports the conclusion that the relevant obligation of the environmental treaty prevails over conflicting prohibitions on trade restrictions in the GATT.⁹⁶

While Pauwelyn’s theory may be welcomed, since it will in many instances lead to a prevalence of human rights or environmental law obligations over WTO obligations, it is highly questionable whether this outcome can really be justified as an application of legal logic. To claim that logic can be used to give expression to states’ implicit intentions presupposes that states aim at coherence in their foreign relations. This, however, often appears not to be the case. States may pursue conflicting aims in different venues, and do so purposefully to satisfy different domestic constituencies. When it is acknowledged, however, that norm conflicts cannot always be reconciled in a way which gives expression to the intentions of states, but that the application of legal principles to norm conflict as well as interpretation entails a choice between conflicting interests, the reconciliation of competing norms becomes less a question of legal logic than one of policy.⁹⁷

The recognition of the political dimension of legal doctrine will not, however, discredit doctrinal approaches which adhere to the ideal of international law as a coherent system of norms. As is convincingly argued by George Downs and Eyal Benvenisti, the conceptualization by legal scholars and legal practitioners of international law as a coherent legal system is important because it may serve to restrict powerful states’ opportunities for venue shifting.⁹⁸ This benefit is well demonstrated by Pauwelyn’s thesis that WTO dispute settlement organs should apply conflicting (and prevailing) international law norms. If WTO dispute settlement bodies followed his line of

⁹³ Pauwelyn, *supra* note 91, at 545. On the conceptualization of most WTO norms as bilateral see Pauwelyn, ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature’, 14 *EJIL* (2003) 907.

⁹⁴ Pauwelyn, *supra* note 91, at 545–546.

⁹⁵ *Ibid.*, at 546.

⁹⁶ *Ibid.*, at 546–547.

⁹⁷ For a discussion of treaty conflict on the premise that treaty conflicts are often a result of value clashes see J. Klabbbers, *Treaty Conflict and the European Union* (2009), at 1–112.

⁹⁸ Downs and Benvenisti, *supra* note 4, at 630–631; see also Benvenisti, ‘The Conception of International Law as a Legal System’, 50 *German Yrbk Int’l L* (2007) 393.

argument members could not evade their commitments under non-WTO law simply by claiming that within the WTO their other commitments are of no relevance.

Doctrinal approaches to norm conflict are often complemented by institutional proposals for coordination, information exchange, and institutional linkage to avoid or mitigate norm conflict.⁹⁹ These approaches first advocate better coordination and cooperation of different government departments at the national level. Secondly, it is proposed that institutional linkages at the international level should be strengthened. The most common suggestions in this regard relate to information exchange between international institutions, especially through the granting of observer status and cooperation between secretariats.¹⁰⁰ Where conflicts have materialized information from other institutions will help adjudicators to find an adequate solution to such conflict. Thus, it is argued that dispute settlement panels in the WTO should seek advice from other international organizations on the basis of Article 13 of the DSU. Another line of suggestion goes further and aims at the integration of 'external' perspectives within sectoral regimes. Thus, it is proposed with respect to WTO dispute settlement that experts from non-economic fields, such as human rights, environmental protection, or culture should be included in dispute settlement panels.¹⁰¹

However, just as the interest and value clashes which underlie many norm conflicts cannot be solved by applying legal logic, neither can they be solved merely through coordination. States often deliberately cause conflicts and tensions between regimes, for example by initiating negotiations in one institutional setting in order to pursue certain aims which they see frustrated in another.¹⁰² Examples of this behaviour abound. One is the initiation of negotiations on the Convention on the Protection and Promotion of the Diversity of Cultural Expression in UNESCO. The initiating states believed that they would be able more successfully to pursue their aim of cultural protection within UNESCO than they had been within the WTO.¹⁰³ Another instance of venue shifting occurred in the early 1960s. When developing countries realized that the powerful countries within the GATT, in particular the US, were not willing to allow for exceptions to the most-favoured nation obligation, they shifted their efforts to negotiate a Generalized System of Preferences to the UN which led to the formation of the United Nations Conference on Trade and Development.¹⁰⁴ Finally, to come back to the tension between patent protection and access to essential medicines, it is not

⁹⁹ See *supra* notes 6 and 7.

¹⁰⁰ See suggestions in European Communities, Submission to the Committee on Trade and Environment, dated 22 Mar. 2004, *The Relationship between WTO Rules and MEAs in the Context of the Global Governance System*, TN/TE/W/39 (24 Mar. 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 Jan. 2007).

¹⁰¹ Hestermeyer, *supra* note 3, at 288; Graber, *supra* note 7, at 571; for such suggestions to enhance the sensitivity to environmental concerns within the WTO see O. Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (2004), at 96 ff.

¹⁰² Generally on venue shifting as a strategy of powerful states see Benvenisti and Downs, *supra* note 4, at 614–619.

¹⁰³ On the failure of the EC and Canada to introduce a cultural exception doctrine into WTO law see Graber, *supra* note 7, at 554 ff.

¹⁰⁴ Cf. R. Hudec, *Developing Countries in the GATT Legal System* (1987), at 39 ff.

plausible to explain the strictures of the TRIPS Agreement with a deficit of information on the part of the negotiators on the state of international human rights law or a lack of coordination with the World Health Organization or human rights treaty bodies. Rather, the setting of the Uruguay Round enabled the US and the EC to pursue their objective of strong intellectual property protection more successfully than during previous attempts within the World Intellectual Property Organization.¹⁰⁵

In light of the conflicts of interest which lead to the fragmentation of international law and with regard to the inadequacy of doctrinal and institutional approaches to addressing these conflicts, it is the plea of this article that legal scholarship should not exclusively focus on these proposals. Instead legal scholars should pay attention to opportunities in international relations for political debates which are not limited by the perspectives, rationales, and objectives of one sectoral regime and thus have the potential to bridge fragmentation.¹⁰⁶

Within the WTO the waiver power has the potential to open the WTO to an inclusive political debate which goes beyond trade objectives and takes into account perspectives from other international institutions. Since the waiver power provides for a law-making procedure this debate need not remain mere talk without any effect on the law of the WTO, but can result in binding law-making. The resulting legal instruments have the further advantage that they can not only adapt WTO law, but may also have the effect of restricting WTO law's reach in favour of other international legal regimes. These points will be addressed in the following sections.

2 *The Waiver Power as a Link between Political Debate and Binding Law*

Inclusive political debates may serve to make conflicts of interest more transparent and may even lead to persuasion or compromise. However, for such outcomes to have an immediate effect on treaty law there is a need for procedures which translate the results of political debates into binding law.

Soft law, by contrast, which is often hailed for its flexibility, has only very limited potential to address the conflicts at issue here. In a highly legalized regime such as the WTO which has a mandatory dispute settlement system and which views legality – and the predictability and security it provides – as a principal value,¹⁰⁷ 'non-binding law' will be able neither to modify binding treaty law nor to provide a solution to the question which of two conflicting norms shall prevail.

This need for legal security was neglected by a US proposal for the implementation of paragraph 6 of the Doha Declaration on Public Health and the TRIPS Agreement in the TRIPS Council. The US suggested that WTO members adopt a memorandum of understanding according to which they would refrain from dispute settlement with

¹⁰⁵ Benvenisti and Downs, *supra* note 4, at 616, n. 60.

¹⁰⁶ Supporting the importance of international organizations as 'public realms in which international issues can be debated and, perhaps, decided' is Klabbers, 'Two Concepts of International Organization', 2 *Int'l Orgs L Rev* (2005) 277, at 282.

¹⁰⁷ Cf. Art. 3(2)(1) DSU which states that '[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system'.

respect to specified measures.¹⁰⁸ The adoption of memoranda of understanding is not provided for in the WTO Agreement. In public international law the term memorandum of understanding refers to a non-binding soft law instrument.¹⁰⁹ Such an instrument would consequently bind neither WTO members nor panels and the Appellate Body. Without a binding rule, however, it is not guaranteed that a panel – if established – will decline its jurisdiction to hear a case brought by a WTO member. Instead a panel might refer to its responsibility to the Dispute Settlement Body and proceed to hear the case.¹¹⁰ Moreover, even if a ban on dispute settlement were made legally binding, legal security would still not be fully achieved. This is because it could not preclude any private actions on the basis of WTO law if such actions were admissible according to the domestic legal system of a WTO member.¹¹¹ Finally, since a moratorium on dispute settlement does not address the question of the legality of the respective measures, it does not prevent allegations of illegality. Such allegations may, however, have negative reputational consequences for the WTO member which adopts them.

It should be noted that legal security as to the content and applicability of WTO norms is of particular importance to developing country members. Dispute settlement – and even only the threat thereof – imposes considerable costs. Litigation costs are not negligible and the insecurity as to the outcome of litigation can be used by the claimant to extract concessions from the defendant. While developed country 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.¹¹²

Waiver decisions constitute acts of secondary law which are binding on all WTO members as well as dispute settlement organs. The waiver power thus provides for an avenue to conduct a political debate which may result in a legally binding decision.

3 The Potential for Political Debate in the Waiver Process

Compared to an ideal of political deliberation understood as an exchange of arguments which is determined neither by substantive legal rules nor by coercion and

¹⁰⁸ Communication of the United States, dated 8 Mar. 2002, IP/C/W/340 (14 Mar. 2002), proposing a moratorium on dispute settlement. For a similar proposal in the Committee on Trade and Environment see Committee on Trade and Environment, Report (1996), WT/CTE/1 (12 Nov. 1996), at para. 178. In the Committee on Trade and Environment it was suggested that disputes between two WTO members which are both parties to the same Multilateral Environmental Agreement and which concern measures mandated by that MEA be submitted to the compliance mechanism provided for in the MEA.

¹⁰⁹ A. Aust, *Modern Treaty Law and Practice* (2nd edn, 2007), at 32.

¹¹⁰ In *EC – Chicken Classification* the panel argued that Art. 11 DSU prevented it from abdicating its responsibility to the DSB by referring the dispute to the WCO's Harmonized System Committee: see Panel Report, *EC – Chicken Classification*, WT/DS269, 286/R, at para. 7.56.

¹¹¹ Cf. Minutes of the meeting of the TRIPS Council held 17–19 Sept. 2002, IP/C/M/37 (11 Oct. 2002), at para. 61 (statement of the representative of Brazil). The same does not hold true in the case of a waiver decision since a waiver suspends WTO obligations, and thus a private claim could not be based on the suspended obligation.

¹¹² Robert Hudec reports that under the GATT 1947 developing countries regularly requested waivers prior to the imposition of tariff surcharges to address balance of payments difficulties. By contrast, when developed countries started to impose tariff surcharges *contra legem* in the 1960s, they did so without requesting waivers to legalize the surcharges: R.E. Hudec, *The GATT Legal System and World Trade Diplomacy* (1975), at 227.

which is aimed at persuasion,¹¹³ current decision-making processes in the WTO fare badly. Waiver processes are no exception. They mostly evidence a lack of transparency and representativeness, and in many instances they are characterized by bargaining rather than argumentation.¹¹⁴ Thus, many of the general proposals for procedural rules to enhance transparency, representativeness, and accountability of decision-making within the WTO¹¹⁵ are also valid with respect to the waiver process. While I will come back to some of these below, it is, however, not the main aim of this article to propose specific procedural rules which would bring the waiver process nearer to the ideal of political deliberation. Rather, I wish to demonstrate that, from a normative as well as a policy perspective, the waiver power, as it stands, has the potential to address norm and interest conflicts in a political process which is not mere power politics, but provides for a forum for the contestation of the legitimacy of WTO norms and debate on the proper balance of public interests across regimes.

One important feature of the waiver process which is a necessary – albeit not sufficient – condition for an inclusive debate on the reconciliation of competing interest is its openness to non-legal as well as non-economic arguments. When the debate centres around the question whether WTO norms are to be suspended – either to legalize measures mandated by another international regime or for abstractly defined measures – the scope of admissible arguments is not limited to arguments on the question to what extent a certain decision would further WTO objectives nor to legal arguments as to how a certain norm of WTO law should be interpreted. By contrast, in discussions on treaty amendments or the adoption of authoritative interpretations arguments will be more successful if phrased as legal arguments – in the event of a debate on interpretation – or remain within the (purportedly economic) rationality of the WTO.

It is true that the objectives of the WTO are not fixed and that they can already now be interpreted as including manifold public interests. Nonetheless it is probable that during an amendment process delegates will attempt to disqualify arguments on the basis that they allegedly do not fall within the proper competence of the WTO. This has for example been the case in the debate on the inclusion of labour rights protection within the WTO.¹¹⁶

The range of admissible arguments is even more restricted in debates on the adoption of an authoritative interpretation according to Article IX(2) of the WTO Agreement. In an exercise of interpretation successful arguments will have to present the

¹¹³ For a theory of argumentation in international relations see Risse, ‘“Let’s Argue!”: Communicative Action in World Politics’, 54 *Int’l Org* (2000) 1.

¹¹⁴ For the allegation that debates about waivers involve a lot of ‘horse trading’ see statement of the representative of the Philippines, TRIPS Council, Minutes of the Meeting on 17–19 Sept. 2002, *supra* note 71, at para. 79.

¹¹⁵ Among recent literature on the WTO see, e.g., Bonzon, ‘Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues’, 11 *J Int’l Economic L* (2008) 751.

¹¹⁶ The view that labour standards do not fall within the objectives of the WTO is expressed in para. 4 of the Singapore Ministerial Declaration, adopted on 13 Dec. 1996 (WT/MIN(96)/DEC (18 Dec. 1996)) which reads in part: ‘[t]he 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’.

favoured outcome as a possible legal interpretation. This is underlined by Article IX(2) (3) of the WTO Agreement which states: '[t]his paragraph shall not be used in a manner that would undermine the amendment provisions in Article X'. Thus in a debate on an authoritative interpretation delegates will try to justify their position by referring to the wording of the provision being interpreted as well as the provision's and the Agreement's overall object and purpose. Despite the observation that the boundaries of possible interpretations are wide,¹¹⁷ the mere fact that arguments have to be formally phrased as legal arguments as to the proper interpretation of a particular provision of WTO law weakens non-legal arguments which refer, for example, to the desirability of trade measures mandated by another legal regime from a human rights or environmental perspective.

Since debates on amendments as well as on authoritative interpretations are conducted merely from a WTO perspective, it will be difficult to introduce into this debate perspectives and rationalities from other institutions which will not risk being disqualified as falling outwith the logic of the amendment or interpretation process.

By contrast, during a debate on the question whether WTO norms should be temporarily suspended – either in favour of norms from another legal regime or for abstractly described measures – arguments can be presented which both go beyond legal argument and need not be related to trade interests. Ethical and non-economic arguments are admitted, as well as arguments referring to the greater competence or legitimacy of other international legal regimes with regard to the issue in question. This is particularly true for debates on the possible coordination of WTO law with other international legal norms by way of exception. Since such a waiver decision restricts the reach of WTO law in favour of another international legal regime it would be difficult to exclude arguments which refer to the other regime's objectives and rationality.

To make sure that the whole breadth of perspectives and arguments on the proper solution to a conflict is represented, the (potential) openness of the waiver process with respect to the admissible arguments should be matched by an openness of the process for actors representing different public interests and constituencies. In this respect the suggestions for institutional linkage and municipal coordination come to bear. Other international institutions should be represented as observers (and commentators), and delegates should coordinate with all affected government departments or even be accompanied to the meetings at the WTO by officials from non-trade departments.

To enable other actors which are not admitted to the waiver procedure as participants or observers nonetheless to play a part in the decision-making process, it should be more transparent and conducted in formal meetings.¹¹⁸ If transparency is ensured, civil society actors can play an important role in informing, scrutinizing, and critiquing the waiver process.¹¹⁹

¹¹⁷ For the proposition that interpretations adopted under Art. IX(2) WTO may modify legal rules see Ehlermann and Ehring, 'The Authoritative Interpretation under Article IX:2 of the Agreement Establishing the World Trade Organization', 8 *J Int'l Economic L* (2005) 803, at 808 ff.

¹¹⁸ Many discussions on waiver requests are currently conducted in informal meetings. An example is the discussion on the request for a waiver to legalize measures implementing the KPCS: see *supra* note 55.

¹¹⁹ On the role of NGOs in providing non-politicized information to the WTO see Perez, *supra* note 101, at 100.

It was indeed a noteworthy aspect of the debates on the implementation of paragraph 6 of the Doha Declaration on Public Health that they evidenced the greater openness of the WTO to external views and actors.¹²⁰ For example, in formal meetings of the TRIPS Council a member's delegation referred to an expert opinion from an NGO.¹²¹ One of the observing international organizations, the World Health Organization, even introduced a very specific proposal regarding the most suitable mechanism to implement paragraph 6,¹²² and UNAIDS provided information on the impact of AIDS on African countries.¹²³ After the veto of the draft waiver decision of chairman Motta by the US delegation this position was very outspokenly criticized by a statement of the observer of the Holy See 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'.¹²⁴

Apart from the potential for openness to non-legal and non-trade perspectives, the waiver power has another advantage over other forms of political law-making in the WTO. This advantage lies in the circumstance that Article IX(3) of the WTO Agreement grants each WTO member the right to request a waiver of any obligation of the WTO Agreements. This procedural right enables WTO members, developed and developing members alike, to put 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 and indicates the reasons why a waiver is requested.¹²⁵ The ability to place an issue on the agenda by making use of a procedural right which is specifically provided for in the WTO Agreement is of particular importance to developing country members. These members might otherwise have difficulties making their concerns heard and having them discussed in formal meetings.¹²⁶ Since Article IX(3)(b) of the WTO Agreement sets out a time frame for the consideration of waiver requests which is not to exceed

¹²⁰ Cf. Howse, 'From Politics to Technocracy and Back Again: The Fate of the Multilateral Trading System', 96 *AJIL* (2002) 94, at 117.

¹²¹ 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 para. 6 written by Professor Frederick Abbott for the Quaker United Nations Office in Geneva and which had been distributed to the delegates, IP/C/M/35 (22 Mar. 2002), at para. 125.

¹²² See statement of the representative of the WHO in the meeting of the TRIPS Council held on 17–19 Sept. 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, IP/C/M/37 (11 Oct. 2002), at para. 5.

¹²³ 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), at paras 124 ff.

¹²⁴ Minutes of the meeting of the TRIPS Council held on 25–27, 29 Nov. 2002 and 20 Dec. 2002, *supra* note 73, at para. 47.

¹²⁵ Para. 1 of the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994 requires that a waiver request 'describe the measures which the Member proposes to take, the specific policy objectives which the Member seeks to pursue and the reasons which prevent the Member from achieving its objectives by measures consistent with its obligations under GATT 1994'.

¹²⁶ On the difficulties of weak states in convening negotiations on treaty amendments see Downs and Benvenisti, *supra* note 4, at 612.

90 days, it ensures that discussion of the request is not unduly delayed.¹²⁷ The rules of procedure of the councils of the Multilateral Trade Agreements provide that matters on which no consensus is reached shall be transferred to the General Council.¹²⁸ This procedural rule serves as a safeguard that a matter remains on the agenda. If no consensus is achieved in the competent council which initially deals with the waiver request, the issue is transferred to the General Council. Referral from the specialized body of trade experts to the General Council helps the request to gain visibility and further politicizes the matter.

The right to request a waiver not only enables members effectively to place an issue on the agenda, it can also serve to concretize a question and separate it from general rules negotiations. This separation and concretization has the advantage that the debate becomes more focused and transparent. The focus on one specific issue will enable developing countries to concentrate their resources on the issue at hand – something which, due to their limited means, is difficult during the multilateral negotiation rounds in which many issues are discussed in parallel.

Furthermore the specification of an issue in a waiver request makes it easier for external actors to inform, scrutinize, and potentially criticize the process. The isolation of issues from multilateral trade negotiations will enable the concentration of the discourse on specific questions, and thus facilitate scrutiny. When confronted, for example, by 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.

This point is again supported by the debates 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.¹²⁹ There are however instances in which the argument that patent protection is indispensable to spurring research hides the pharmaceutical industry's main interest in profit maximization. For example, the first research on AIDS medication, for which pharmaceutical companies later obtained patent rights, was conducted by public institutions and mainly publicly funded, and not spurred by the prospect of patent protection.¹³⁰ The presentation of special interests of a small and powerful constituency such as the pharmaceutical industry as public interests becomes more difficult the more specifically the debate is framed. Thus, while it may be hard to deny a causal link between patent protection and research and development in general, there are good reasons why loosening this protection in

¹²⁷ Consideration of the EC's request for a waiver for trade preferences granted under the Cotonou Agreement was, however, substantially delayed, since members opposing the waiver argued that the request did not meet the procedural requirements: see Statement of the Chairman in the Meeting of the Council for Trade in Goods on 7 July and 16 Oct. 2000, G/C/M/44 (30 Oct. 2000), at 18.

¹²⁸ 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 Aug. 1995), Rule 33.

¹²⁹ See, e.g., Doha Declaration on the TRIPS Agreement and Public Health, *supra* note 67, at para. 3.

¹³⁰ See Hestermeyer, *supra* note 3, at 2 ff.

certain areas is possible without impeding necessary research. The concentration of the debate in the TRIPS Council on the specific question of patent protection for essential medicines forced participants to focus their arguments on these reasons and made it more difficult for them to revert to generalizations on the link between patent protection and innovation. While it cannot be ignored that the outcome of the negotiations on the implementation of paragraph 6 was also to a large extent influenced by special interests of the pharmaceutical industry,¹³¹ this influence arguably was weaker than in the negotiation of the TRIPS Agreement during the Uruguay Round.¹³²

It can be concluded that the waiver procedure – as compared to the amendment procedure and the procedure for the adoption of authoritative interpretations – bears a specific potential to allow for political debate which includes the views of weaker states as well as perspectives from outside the WTO.

4 *The Waiver Decision: Exception or Norm Change*

While the previous sections dealt with the decision-making process, I will now come back once more to the different forms that a waiver decision can take. As was already shown above, waiver decisions can address norm and interest conflicts in two different ways. First, a waiver decision can address potential norm conflict, which arises because another legal regime provides for measures which affect trade, by legalizing such measures. I have referred to this solution as a real exception granted by the WTO which grants deference to the other legal regime. Secondly, a waiver decision can address allegations that WTO norms take insufficient account of the internationally recognized concerns and needs of its members by modifying WTO norms. Such adaptation by a waiver decision takes the form of a suspension of norms which are seen as unduly restrictive for abstractly defined situations or measures.

In what follows I will first present arguments why it will in certain circumstances be desirable to limit the WTO's jurisdiction in favour of another legal regime by way of exception. Secondly, I will explore the waiver's potential as a more flexible rule-making instrument than amendment decisions.

(a) Deference through Exception

The Kimberley waiver has been strongly criticized as an inadequate solution to clarify the relationship between the norms of the Kimberley Process Certification Scheme and WTO norms. It has been argued that it constitutes a missed opportunity to deal 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.¹³³ Pauwelyn moreover expressed the opinion that the adoption of the waiver was a sign of the WTO's 'superiority complex'. This was in his view evidenced by the fact that the WTO not only felt the need to

¹³¹ Fleck, 'No Deal in Sight on Cheap Drugs for Poor Countries', 81 *Bull WHO* (2003) 307.

¹³² On the role of the pharmaceutical industry during the Uruguay Round see Sell, 'Industry Strategies for Intellectual Property and Trade. The Quest for TRIPS, and Post-TRIPS Strategies', 10 *Cardozo J Int'l & Comp L* (2002) 79.

¹³³ For such criticism see Nadakavukaren Schefer, *supra* note 13, at 447 ff, and Pauwelyn, *supra* note 13, at 1198 ff.

address potential conflict by way of a waiver (instead of acknowledging that the KPCS could add to or override WTO law), but that by adopting a waiver it also gave rise to a presumption of illegality of the trade bans provided for in the KPCS.¹³⁴

In my view these criticisms misinterpret the waiver decision when they see it as a verdict by the WTO that the trade bans provided for by the KPCS with respect to non-participants are not justified under the general exceptions. At the same time they ignore the fact that the decision can be read as an acknowledgement of the greater competence and legitimacy of the KPCS with respect to issues of human security.

First, it should be noted that a waiver decision need not give rise to a presumption of illegality of the measures for which it was granted. In the past several waivers were adopted even though there was no consensus on the illegality of the measures for which the waivers were requested.¹³⁵ Rather than verdicts of illegality, these waivers were a means to ensure legal security in the light of uncertainty due to divergent views on the legality of certain measures. In the case of the Kimberley Waiver it was emphasized by the General Council that it represents no consensus of the WTO membership that the trade bans mandated by the Kimberley Process Certification Scheme are not justified under the general exceptions in Article XX of GATT or the security exception in Article XXI of GATT. The waiver decision makes this very clear by stating in its preamble: '[n]oting that this Decision does not prejudge 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'.¹³⁶ Thus, due to its clear wording and in the light of the waiver practice, the waiver decision should not be interpreted as implying the illegality of the measures for which it was granted.

Secondly, the waiver decision can be interpreted as giving expression to the view that panels and Appellate Body should not – where a dispute arises – inquire into the legality of the measures under WTO law. Thus the emphasis lies less on the question whether the measures provided for by the KPCS can or cannot be justified under WTO law, but rather on the question which institution should decide whether the measures are desirable and adequate or not. A waiver decision has the important advantage that – even though it is a decision by the WTO – it can answer this question in favour of another international institution. Thus, in the event of a dispute about the legality of trade bans *vis-à-vis* non-participants in the KPCS – neither panels nor the Appellate Body will engage in an interpretation of the applicable GATT exceptions and their application to the measures at hand. Instead they will merely examine whether the measures at issue are covered by the waiver decision, that is whether they are measures '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'.¹³⁷

¹³⁴ Pauwelyn, *supra* note 13, at 1198 ff.

¹³⁵ With respect to practice under the GATT 1947 see Jackson, *supra* note 24, at 544.

¹³⁶ WT/L/518, preamble, recital 4; WT/L/676, preamble, recital 5.

¹³⁷ WT/L/518, at para. 1; WT/L/676, preamble, at para. 1.

This deference has two advantages: most importantly, the waiver recognizes the specific competence of the KPCS with respect to questions about the adequacy of the measures and procedures on implementation. Moreover, as a further benefit, it maintains the coherence of legal doctrine on the interpretation of Article XX of GATT at a time when a coherent doctrine with respect to the application of Article XX of GATT to internationally mandated trade measures has yet to be developed. These two points will be clarified by reference to the questions which dispute settlement organs would have to address if asked to determine the legality under WTO law of trade bans *vis-à-vis* non-participants.

The trade bans would most likely be justified under Article XX(b) of GATT – the public morals exception.¹³⁸ To be justified under Article XX measures have to pursue one of the objectives acknowledged in Article XX, they may not be more trade restrictive than necessary to achieve the desired level of protection, and the application of the measure may not discriminate between WTO members in which the same conditions prevail. There are good reasons why the least-restrictive measure analysis should also inquire whether the perceived risk is addressed in a consistent way.¹³⁹ If this is not the case, for example because measures are taken with respect to some products which pose a risk but not with respect to others which pose the same risk, this lack of consistency can call into doubt the claim that the measure is indeed necessary to achieve the desired level of protection.¹⁴⁰

In light of these requirements the compatibility with WTO law of the trade bans mandated by the KPCS is not beyond doubt. First, the KPCS is inconsistent in the sense that it is limited to trade in rough diamonds and does not extend to processed diamonds. Thus a non-participant is not hindered in exporting processed diamonds which may – like rough diamonds – stem from illegitimate sources. Another inconsistency lies in the fact that the KPCS addresses only cross-border trade but is silent on diamond trade within the participating states. These weaknesses of the system are vehemently criticized by NGOs which are active in the fight against blood diamonds.¹⁴¹ A more provocative question would be whether it is not greatly inconsistent to claim that the protection of public morals requires trade bans on rough diamonds, while every day and often knowingly consumers in developed countries through their consumption choices contribute to massive human rights violations. In this context it should be mentioned that – after NGOs had raised awareness of the problem of blood

¹³⁸ Pauwelyn argues that the trade bans would also be justified under the security exceptions in Art. XXI(b) and (c) GATT: see Pauwelyn, *supra* note 13, at 1184 ff. I find this interpretation doubtful. The trade bans do not appear necessary to protect the security interests of the member imposing the ban which speaks against a justification under Art. XXI(b). Secondly, neither the KPCS nor UN resolutions give rise to a binding obligation to implement such bans which mandates against a justification under Art. XXI(c) GATT. In general, Gray, *supra* note 52, is sceptical of a justification of the trade bans under GATT exceptions.

¹³⁹ For an explicit consistency requirement in the WTO Agreements see Art. 5.5 SPS Agreement.

¹⁴⁰ For an in-depth discussion of the Appellate Body's most recent interpretation of Art. XX GATT in *Brazil – Measures Affecting Imports of Retreaded Tyres* (DS322) see the contributions of Bown and Trachtman and of Weiler in 8 *World Trade Rev* (2009) 85 and 137.

¹⁴¹ On this criticism and with further references see Nadukavukaren Schefer, *supra* note 13, at 414–416.

diamonds – it was the diamond industry fearing a loss of profit which was the driving force behind the Kimberley Process.¹⁴² These comments should not be misunderstood. While they are not meant to call into doubt the desirability of the KPCS to promote human security in Africa, they are rather meant to point at the problem of presenting a coherent argument that the trade bans are necessary to protect public morals in – for instance – the US or the EC.

Secondly, the ban on imports of rough diamonds from non-participants applies to all rough diamonds no matter by whom they were mined and by whom they are being traded, and there is no possibility for non-participants to demonstrate that the diamonds which are exported from their territory are 'clean'. Thus non-participants might argue that they are being discriminated against if their products are subjected to a trade ban even though they are able to demonstrate that they control their diamond trade to make sure that no blood diamonds are being sold. In order to determine whether the application of the trade bans constitutes arbitrary or unjustifiable discrimination it may become necessary for dispute settlement organs to inquire into how non-participant status is determined. In general, states become participants by adopting the Interlaken Declaration. However, participants which do not implement the minimum requirements set out in the KPCS can be considered non-participants, with the consequence that the complete trade ban applies. Whether the minimum requirements are met is assessed by the Participation Committee.¹⁴³ Thus for dispute settlement organs properly to assess the application of the trade ban it would be necessary to inquire into the practice of the Participation Committee with respect to the determination of non-participant status.

Two insights may be drawn from this rough sketch of the issues raised by the application of Article XX of GATT to a domestic measure which implements a trade ban *vis-à-vis* non-participants in the KPCS. First, the doctrine on the application of the general exceptions in Article XX of GATT to trade measures as developed for domestic measures raises difficulties with respect to measures which are the outcome of multilateral international negotiations. Due to the difficulties in negotiating multilateral solutions to global problems, such measures will often address only very narrowly defined issues and include many compromises. Therefore international legal regimes will often mandate measures which do not meet the standards of consistency and non-discrimination that are legitimately set for measures which are the outcome of a domestic legislative process. As of now there has, however, not been developed a coherent doctrine on the interpretation and application of Article XX of GATT with respect to measures which were agreed in international negotiations. Secondly, and more importantly, the above was meant to demonstrate that a determination whether the trade bans are justified under Article XX GATT would require dispute settlement

¹⁴² On the role of the diamond industry in the Kimberley Process see Woody, 'Diamonds on the Souls of Her Shoes: The Kimberley Process and the Morality Exception to WTO Restrictions', 22 *Connecticut J Int'l L* (2007) 335, at 342–344.

¹⁴³ See Chair's Notice, End of Toleration Period in the Kimberley Process, 31 July 2003, available at: www.kimberleyprocess.com/documents/basic_core_documents_en.html.

organs to look not only at the measure as implemented by domestic legislation, but also at the institutional law and practice of the KPCS, in particular the determination of participant status.

Against this background the waiver solution appears preferable to potential dispute settlement on the legality of trade bans, as well as to an authoritative interpretation which determines their legality. The waiver decision maintains the coherence of legal doctrine on the interpretation of Article XX of GATT. It achieves this by a political decision that the trade bans cannot be challenged as illegal. By contrast, an authoritative interpretation decision purports to give a certain interpretation in a specific case without clarifying how this interpretation can be reconciled with the existing legal doctrine. Moreover the waiver decision has the consequence of delimiting the WTO's jurisdiction in favour of that of other international institutions. It acknowledges that the KPCS, as well as the UN with which the KPCS closely cooperates, has greater expertise, and is more representative of and accountable to the affected constituencies as far as the prevention of blood diamonds remaining the fuel of cruel conflicts is concerned. Due to this greater expertise, representativeness, and accountability these institutions have greater legitimacy to answer questions on the adequacy of measures to prevent trade in conflict diamonds as well as their application and enforcement. In a non-hierarchical and fragmented international legal order such self-restraint of one international institution in favour of other institutions which are more competent, representative, and accountable should be welcomed as enhancing the legitimacy of international governance.¹⁴⁴

As an exercise of such restraint 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 favour of other regimes.¹⁴⁵ The precedential effect of the Kimberley Waiver is particularly important, since frequently during negotiations on international instruments which may have an effect on trade, negotiators point to the potential inconsistency of the instrument with WTO law in order to 'water down' the content of the negotiated texts.¹⁴⁶ The Kimberley Waiver now provides negotiators with an argument that WTO law can show some flexibility in avoiding potential norm conflict through the adoption of a waiver.

I wish to add a last note on the feasibility of further waivers for measures mandated by another international legal regime. This obviously depends on whether consensus can be achieved among the WTO membership. However, consensus will be more easily achieved on a waiver decision than on an authoritative interpretation.

¹⁴⁴ See, arguing for a corresponding principle of horizontal subsidiarity, Howse and Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?', in M Verweij and T Josling (eds), 'Deliberately Democratizing Multilateral Organization', 16 *Governance* (special issue) (2003) 73, at 86 ff; cf. also Trachtman, 'The Constitutions of the WTO', 17 *EJIL* (2006) 623, at 634 ff (Trachtman speaks of functional subsidiarity).

¹⁴⁵ Cf. S. A. Aaronson and J. M. Zimmermann, *Trade Imbalance. The Struggle for Human Rights Concerns in Trade Policy-Making* (2007), at 43, citing the Canadian Trade Minister for the view that the adoption of the Kimberley Waiver shows the WTO's flexibility with regard to human security and development.

¹⁴⁶ See Pauwelyn, *supra* note 13, at 1200 ff.

While it is very likely that discussions with respect to an authoritative interpretation will not only revolve round the specific case, but also the potential precedential effect of the interpretation in 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 may nevertheless abstain from vetoing a waiver, for example because its commercial interests are not affected.¹⁴⁷ It would, however, be much harder for such member not to veto an authoritative interpretation which makes a positive statement about the legality of the measure under WTO law.

(b) Adaptation through Flexible Norm Change

While the Kimberley Waiver is an example of the use of a waiver decision to determine the relationship between WTO law and other international norms, the TRIPS waiver demonstrates that waivers can also be rule-making instruments. These are of particular importance in the WTO in order to address claims by a substantial part of the membership that WTO law takes insufficient account of their needs. Since such claims – as in the case of access to essential medicines – mainly refer to the undue restrictiveness of certain norms, they can be addressed through the suspension of such norms.

There are several advantages of a waiver decision as an interim solution before a more permanent treaty amendment is adopted and enters into force. First, the waiver competence enables members to achieve such norm change more quickly than through treaty amendment, since the requirements which exist with respect to the entry into force of an amendment need not be met for a waiver to take effect.¹⁴⁸ Thus, the TRIPS Waiver, with its adoption by the General Council, put in place new rules with immediate effect. The amendment will replace these rules once it enters into force without any interruption of the legal regime established by the waiver.¹⁴⁹

Secondly, 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 provided for in Article IX(4) WTO Agreement provides for a forum in which the rules set out in a waiver could be evaluated and modifications discussed.¹⁵⁰

Finally, a waiver can modify and make new rules for only a part of the WTO membership while leaving intact the existing rules for members which do not wish to be

¹⁴⁷ Where the commercial interests of a member are affected that member may be compensated. Similarly Pascal Lamy in his proposal for an exception in WTO law for collective preferences suggested that such an exception should be coupled with compensation for affected members: see Lamy, 'The Emergence of Collective Preferences in International Trade: Implications for Regulating Globalisation', 15 Sept. 2004, available at: http://trade.ec.europa.eu/doclib/docs/2004/september/tradoc_118929.pdf (last visited 29 May 2009), at 11 ff.

¹⁴⁸ Nonetheless, however, domestic legislation may be required so that the rules laid down in a waiver become effective domestically.

¹⁴⁹ According to Art. X(3) WTO Agreement the amendment will take effect upon acceptance by two thirds of the members for those members only.

¹⁵⁰ So far no meaningful reviews of waiver decisions have taken place within the WTO.

subjected to the changed rules. It can thus be used to achieve what has been termed ‘variable geometry’.¹⁵¹ In a way the TRIPS Waiver is an expression of such variable geometry by leaving it up to the WTO members 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.¹⁵² Another example of such variability is provided by the waiver which was granted in 1966 to allow Australia to grant general tariff preferences to products from developing countries and territories.¹⁵³ The decision was granted while discussions on a Generalized System of Preferences were still continuing in UNCTAD. It can be seen as a precursor to the general exception to the most-favoured nation obligation which was enacted in 1971 through the adoption of the waiver decision which legalized the Generalized System of Preferences.¹⁵⁴

4 Concluding Remarks

The article started with the observation that international law’s fragmentation into functionally defined regimes is largely caused by severe interest and value conflicts within societies and among states. These conflicts lead to the situation that regimes not only complement, but often contradict and impede, each other. With respect to the WTO this situation manifests itself in an increasing number of potential conflicts between WTO law and norms of other international legal regimes and claims that WTO law frustrates the realization of internationally acknowledged interests and values within WTO members, in particular developing country members.

International lawyers have been and are struggling to address these contradictions and have made a variety of proposals as to how the unity of the international legal order can be constructed doctrinally and how in practice conflict can be mitigated through information exchange, coordination, and institutional cooperation. While these proposals are important, they do not openly address the underlying conflicts of interest. Rather they sometimes seem to pretend that they do not exist.

It is my plea in this article that international lawyers should be idealistic and should not give up on the idea that political debate in international relations is possible in a sense which is not reducible to mere power politics. Scholarship should, in my view, start to explore more intensively avenues for political debate which is not limited by the perspective or objectives of individual regimes and powerful states, but which transcends functional fragmentation and takes into account the perspectives of weak states as well as the views of other international institutions.

¹⁵¹ The term was originally coined with regard to European integration of varying degrees 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 Howse and Nicolaidis, *supra* note 145, at 16.

¹⁵² WT/L/540, footnote 3 to para. 1(b).

¹⁵³ CONTRACTING PARTIES, Tariff Preferences for Less-Developed Countries, Decision of 28 Mar. 1966, BISD 14S/23.

¹⁵⁴ *Supra* note 31.

At the same time I believe that pragmatism is required and that one should not jump from the realization that global political debate is desirable to devise models for a world legislature. Research should focus on existing procedures within international institutions which may allow for inclusive political processes and which can translate the outcomes of such processes into binding law.

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. This potential is linked to the form which waiver decisions can take: exceptions for measures mandated by another international legal regime from the application of WTO law or the suspension of WTO norms for abstractly defined measures or situations. Since waiver decisions thus do not aim at legal interpretation and – since they suspend law – need not aim at the furtherance of WTO objectives, arguments raised by participants in the waiver process cannot easily be dismissed as bad legal argument or as not promoting trade objectives.

This openness to non-legal and non-economic arguments and perspectives needs to be matched by the inclusion of external actors, in particular of other international institutions. The more transparently the process is conducted, the greater the likelihood that it can be further informed and also scrutinized by civil society actors, and – ideally – be accompanied by discourses within domestic publics.

As an exception a waiver can be an important instrument to restrict the WTO's jurisdiction in favour of that of other international legal regimes which may have greater competence and legitimacy than the WTO to deal with certain issues. As an abstract suspension a waiver can be a significant tool to bring about norm change and eventually, maybe, a change in the perception of the organizations' objectives. The right which each WTO member has to request a waiver provides an important opportunity for developing countries to place their concerns on the WTO's agenda and to have them debated. In light of the current state of international politics the waiver's potential should not be overestimated. Likewise it should not, however, be ignored.