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Why study the WTO waiver?

International law and institutions increasingly not only deal with transactions across the borders of sovereign states, but instead promote and protect transnational societal interests. To give but a few examples: international legal regimes obligate states to limit greenhouse gas emissions by national households and industry, to put into place administrative and judicial procedures for the protection of intellectual property rights, or they restrict domestic governmental powers to adopt policies that encroach upon human rights or impede international trade.

The observation that international law promotes transnationally shared societal interests, such as interests in a clean environment, cross-border trade, property or human rights protection does not implicate a value judgment. It does not follow that such law is beyond criticism and exclusively for the good of human kind. Rather it implicates trade-offs – trade-offs between economic and non-economic interests, for example, or trade-offs between individual freedom and public interest policies. The extension of the scope of international law and governance in their subject matters as well as their intrusiveness in domestic administrative, legislative and judicial processes brings to the fore a number of tensions. These include the tension between international governance and domestic government, the tension between societies at different stages of economic development and with different forms of government, the tension between international legal regimes that promote overlapping or contradictory objectives, and finally the tension between, on the one hand, the constant flux of societal preferences and realities and, on the other hand, the rigidity of traditional international law-making instruments, in particular international treaties.

In this book I inquire into the potential of the WTO waiver power – i.e. the power of the WTO Ministerial Conference to suspend any legal obligation of the WTO Agreement or the annexed Multilateral Trade Agreements – to address these tensions. My inquiry is based on two assumptions. Firstly, that the formal validity of international law is a

value that should not be given up lightly; that law should not be perceived merely as an instrument to achieve objectives outside the law, such as economic development or environmental protection, but that the legal form constitutes a value in itself that merits protection. The second assumption is that international law and governance should be accompanied by a transnational political debate concerning the trade-offs between societal interests which such law and governance entail.

In light of these assumptions the WTO's waiver power appears as a promising instrument. It is promising firstly, because the waiver may be used to flexibilize international law and thus address the tensions identified above; secondly, because the waiver process is a political process which potentially allows for debate about trade-offs between competing societal interests; thirdly, because the waiver procedure is a law-making procedure and the waiver a binding legal act which formally suspends legal obligations and thus allows for non-compliance without putting into question the law's validity.

In light of these characteristics it is surprising that the waiver power and waiver decisions to date have not received much attention in the literature on the WTO and public international law in general, and all the more so since the practice of granting waivers is – compared with the remainder of the decision-making practice of the WTO's political organs – extensive.

This study proceeds as follows: Part I presents what I call the stability/flexibility challenge in international law and develops the thesis that formal international law-making processes are important to flexibilize international law and at the same time maintain its validitity. In this part I also discuss different conceptualizations of WTO law, and defend my view that WTO law should be perceived as a body of public law that aims at securing market conditions and at ensuring legitimate trade governance. From such a perspective a number of flexibility demands may be directed towards WTO law.

Part II addresses the waiver's potential to meet these flexibility demands. It analyses in detail the waiver competence, the drafting history, waiver practice, legal requirements for the adoption of waiver decisions, decision-making process, implementation, interpretation and review. It suggests a typology of waivers as individual exception, general exception and rule-making instrument and presents a doctrinal reconstruction of the waiver according to the general categories of international institutional law.

Part III inquires into the potential of the waiver power as compared to other legal mechanisms to flexibilize international legal regimes: on the one hand to take account of individual parties' needs and preferences

and on the other hand to respond to needs and preferences shared transnationally. It will conclude with an assessment of the politics of the waiver process, in particular its potential to allow for an inclusive debate on the reconciliation of competing societal interests.

As Joseph Weiler frequently points out, there are law books and books about the law. This book aims at being both. As a law study it presents, in Part II, a systematic doctrinal analysis of the waiver power and waiver decisions and systematizes the waiver practice in order to distil therefrom a typology of waivers. As a study about the law, the book, in particular Parts I and III, aims to clarify the relationship between law and politics as well as the waiver's potential and limits for addressing the need for flexibility and adaptability in public international law and WTO law in particular.

PART I

The stability/flexibility challenge in public international law and particularly the WTO

In the first part of this book I set out the premises, as well as the research questions, which inform my analysis of the WTO's waiver power. Chapter 2 briefly presents the flexibility challenges that arise if transnational societal interests are protected or promoted through international law in a way that restricts domestic self-government.[1] Such challenges concern, first, the relationship between domestic and international governance, second, the adaptability of legal norms to transnational needs and preferences and, third, the coordination and linkage of different international legal regimes. While these challenges arise from international governance through law, the claim is not to do away with law or to 'soften' it. Instead, it is argued that law performs an important function in legitimate international governance, and that to perform this function its validity needs to be based on formal requirements. Validity and flexibility need to be reconciled through law-making procedures that may take account of the identified flexibility challenges.

After this general exposition of the study's analytical framework, I turn to the WTO. The perception of the flexibility challenges posed by an international legal regime depends on how one interprets its objectives. Chapter 3 first sets out an understanding of the WTO as an organization which is aimed at coordinating potentially conflicting societal interests. It then conceptualizes WTO law as a body of public law that, on the one hand, contributes to the creation of a public good, namely the global market and, on the other hand, places restrictions on domestic public authority. The chapter concludes by setting out the main flexibility challenges posed by WTO law.

1 Throughout this study I use the terms 'domestic law' and 'domestic self-government', not only to refer to state law and self-government within states, but also to European Union law and government in the European Union.

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The stability/flexibility challenge in public international law

A. INTERNATIONAL LAW AS PUBLIC LAW

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 states. It increasingly seeks to promote and protect societal interests which are shared across borders – transnational interests, or, to use Wolfgang Friedmann's term, 'common human interests'.[1] Such international law aims at the protection of common goods, as for example the marine environment, the protection of shared values and interests, such as human rights or certainty for transnational business transactions, and the internationalization of common spaces, such as the deep seabed or the moon.[2]

International legal regimes[3] that pursue such aims influence domestic government. They do so in prohibiting certain government measures or by requiring governmental action. Sometimes international institutions themselves exercise governmental functions, by adopting legislative acts, or by engaging in administration or adjudication.[4]

This type of international law which to varying degrees affects and constrains the ability of polities to self-govern can no longer be seen

1 Friedmann, *Changing Structure of International Law*, 62 *et seq.*; cf. Weiler and Motoc, 'Taking Democracy Seriously', 47, 63 *et seq.*

2 Feichtner, 'Community Interest'; Weiler, 'The Geology of International Law', 547, 556.

3 The term 'international legal regime' as used throughout this study encompasses international treaties, international organizations and other international institutions, but also instruments giving rise to non-binding norms; the term is thus used to describe a narrower set of institutions than Stephen Krasner's definition of international regime which encompasses 'principles, norms, rules, and decision making procedures around which actor expectations converge in a given issue-area': Krasner, 'Structural Causes and Regime Consequences', 185.

4 Cf. Alvarez, *International Organizations as Law-Makers*; see also the contributions in Bogdandy *et al.* (eds.), *The Exercise of Public Authority by International Institutions.*

as a pure *inter*-national law of co-existence akin to a private law that regulates the interaction between states as equal and unitary subjects of law. Rather, it constitutes an international *public* law.[5] More illustratively, it may be termed a 'world internal law' (*Weltinnenrecht*).[6] Attached to the characterization as public law are certain normative demands: on the one hand regarding the content of the legal norms and, on the other hand, regarding processes of norm creation.[7] These demands are partly reflected in legal doctrine. The concept of *jus cogens*, for example, may be seen to protect the conformity of international law with certain fundamental values.[8] Demands concerning processes of norm creation, such as demands for transparency and participation of actors other than government actors, are as of yet only insufficiently reflected in international legal doctrine. Doctrine still predominately perceives the state as a unitary entity represented by individual government officials.

The impact of international law on domestic government is further accentuated by the increasing legalization and judicialization of international regimes. Legal norms are more and more precise, leaving states less freedom of implementation. Increasingly autonomous bodies, in particular courts and tribunals, are empowered to interpret and apply these norms as well as to make new law.[9]

5 Frowein, 'Konstitutionalisierung des Völkerrechts', 427, 428; on the public law approach to international law and institutions see also Bogdandy, Dann and Goldmann, 'Developing the Publicness of Public International Law', 1375.

6 Sir Gerald Fitzmaurice observed that a convention such as the Universal Postal Convention 'although a treaty, was in a way a municipal law of the whole international community': Fitzmaurice, Report on the Law of Treaties, 368th meeting, 218. See also Delbrück, 'Prospects for a "World (Internal) Law?"', 401. According to Joost Delbrück 'World Law may be defined as a body of law that transcends the notion of strictly inter-state law . . . World Law encompasses in its scope and application state and non-state actors, transactions and situations of most different kinds beyond the state or national level' (*ibid.*, 403).

7 Kingsbury, 'The Concept of "Law" in Global Administrative Law', 23.

8 Generally on the doctrinal concepts of *jus cogens* and *erga omnes* norms, see Simma, 'From Bilateralism to Community Interest in International Law', 217; Tomuschat, 'International Law. Ensuring the Survival of Mankind', 9; Kadelbach, *Zwingendes Völkerrecht*.

9 Cf. Abbott *et al.* 'Concept of Legalization', 401. Apart from precision and delegation Kenneth Abbott *et al.* identify a third dimension to measure legalization, namely bindingness. However, from an internal perspective bindingness does not seem to be a useful criterion. The legal system distinguishes itself from other social systems by its operative code legal/illegal and thus cannot accommodate different degrees of bindingness without giving up this binary code: cf. Fischer-Lescano and Liste, 'Völkerrechtspolitik', 209, 222; see also section C.III below. On law-making as an exercise of public authority by international courts and tribunals, see Bogdandy and Venzke, *In Whose Name?*

B. THE FLEXIBILITY CHALLENGE

The fact that international legal regimes increasingly restrict and complement domestic government raises several concerns and consequently demands for flexibility. These can be formulated taking three different perspectives: a domestic perspective, an intra-regime perspective and an inter-regime perspective. From each perspective one can distinguish between flexibility demands related to the legitimacy of international governance as well as flexibility demands related to its effectiveness.

I The domestic perspective

International legal rules that promote or protect societal interests are manifestations of political choice. They further certain socio-economic interests to the detriment of others.[10] Thus they are contestable, not only among states as sovereigns, but also within states.[11] However, while legislation in liberal democracies is legitimated through a democratic process and certain constitutional guarantees, law-making at the international level is largely a prerogative of states' executives. The democratic deficit which arises from the empowerment of the executive and the limited influence of domestic parliaments and public opinion on international law-making is exacerbated by the inflexibility of treaty law. While changes in the balance of interests and preferences in the polity domestically can lead to the adoption of new legislation, international law is highly irresponsive to such changes. It continues to bind states and determine their policies even when it is not supported by a parliamentary majority.[12] The legal option to withdraw from an international legal regime often does not represent a practical option due to the dependency of states on international cooperation.[13] Consequently, from the perspective of domestic self-government, it may be claimed that public international law illegitimately restricts the realization of domestic preferences determined in a democratic process or that certain activities of international

10 Kennedy, 'Laws and Developments', 17.
11 Weiler, 'The Geology of International Law', 547, 555–6.
12 For a detailed analysis of legitimacy deficits resulting from international law-making with further references, see Friedrich, 'Nonbinding Instruments' (manuscript on file with the author).
13 Weiler, 'Alternatives to Withdrawal from an International Organization', 282.

institutions violate fundamental principles or values embodied in domestic constitutions.[14]

The rigidity of international law, which is sometimes even greater than that of national constitutions, might not be perceived as a legitimacy deficit if one attributes to international law a constitutional function. The rigidity of international law as constitution is then perceived as a necessary safeguard to protect certain values from intrusion by domestic government or to protect democratic processes from disproportionate influences of special interests.[15] Human rights treaties are frequently conceived as constitutional in this sense.[16] With an increasing judicialization of international human rights regimes the constitutional function is, however, often called into question. Where international courts are called upon to interpret human rights norms, the interpretative choices of domestic polities are reduced. This raises concerns, in particular where such interpretations conflict with interpretations of domestic (constitutional) courts. Arguably, the judicialization of human rights regimes poses the danger of ignoring the contextuality of the concrete application and realization of human rights.[17]

As long as the state constitutes the primary form of political organization that makes democratic self-government possible and as long as there is no consensus as to the concrete realization of 'constitutional' values recognized by international law, international legal regimes need to be responsive to collective choices and cultural context in order to remain legitimate.

The rigidity of international legal instruments not only poses a challenge for the legitimacy of international governance, but also for its effectiveness. From the domestic perspective the rigidity of international legal instruments that restrict domestic governmental freedom may endanger the acceptability by governments of these norms. States may be particularly unwilling to bind themselves in light of the uncertainty as to how norms will be applied in the future by autonomous international organs.

14 Cf. the decision by the ECJ in Cases C-402/05P and C-415/05P, *Kadi and Al Barakaat*, judgment of the Court (Grand Chamber) of 3 September 2008; see also McGinnis and Somin, 'Should International Law Be Part of our Law?', 1175.

15 Tomuschat, 'Der Verfassungsstaat im Geflecht der internationalen Beziehungen', 7; Peters, 'Compensatory Constitutionalism', 579; Keohane, Macedo and Moravcsik, 'Democracy-Enhancing Multilateralism', 1.

16 For a functional comparison of domestic bills of rights and international human rights treaties, see Gardbaum, 'Human Rights as International Constitutional Rights', 749.

17 Lord Hoffmann, 'The Universality of Human Rights'; cf. Helfer, 'Overlegalizing Human Rights', 1832.

It is consequently argued that effectiveness depends on the ability of states to defect within certain limits without incurring excessive costs. Opt-out options, like escape clauses or reservations, are seen as necessary to induce consent to becoming a member of an international institution as well as to maintain acceptance and high levels of overall compliance.[18]

II The intra-regime perspective

The preceding section referred to flexibility demands that may be raised from the perspective of domestic constituencies and governments – demands that international law should yield to domestic preferences. From an intra-regime perspective, the rigidity of international legal instruments – in particular treaties – also poses a flexibility challenge. Since societal needs and preferences, as well as reality, change over time, international legal norms must be adaptable to such changes in order to remain legitimate and effective. In the words of Roscoe Pound: 'Law must be stable and yet cannot stand still.'[19]

Representation of the various societal interests affected by international law is still deficient at the international level and consequently international law often is imbalanced and more representative of certain interests than others – often those which are best able to influence executive officials partaking in international negotiations.[20] Moreover, international legal regimes which are based on the principle of sovereign equality frequently do not take sufficient account of the different stages of development of state parties. To foster acceptance international legal regimes need to be able to address such imbalances through law-making which is more transparent and representative than most of today's international negotiations. The more international law mandates transformations of domestic government and administration, the more the differences in capacity as well as differences in the prioritization of policies resulting from different stages of development must be reflected by the legal norms.[21]

18 Bilder, *Managing the Risks of International Agreement*; Downs and Rocke, *Optimal Imperfection?*; Helfer, 'Constitutional Analogies in the International Legal System', 193, 231; Pauwelyn, 'Transformation of World Trade', 1; Pauwelyn, *Optimal Protection of International Law*. Obviously, demands for flexibility to enhance the effectiveness of international agreements presuppose that international law does indeed influence government actions and is not merely epiphenomenal as claimed by Goldsmith and Posner, *Limits of International Law*, and Posner, *Perils of Global Legalism*.

19 Pound, *Interpretations of Legal History*, 1.

20 Benvenisti, 'Exit and Voice in the Age of Globalization', 167.

21 Cullet, *Differential Treatment in International Environmental Law*.