

# SUBSIDIARITY IN THE WORLD TRADE ORGANIZATION: THE PROMISE OF WAIVERS

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## I

### A CHANGE IN PERSPECTIVE: SUBSIDIARITY THROUGH DECISIONMAKING BY THE POLITICAL ORGANS OF THE WTO

Most inquiries into subsidiarity in the World Trade Organization (WTO) so far have concentrated on dispute settlement. The reason for this focus is the extensive jurisdiction of WTO panels and the WTO Appellate Body to assess the legality of governmental measures aiming at human and animal health, food safety, or environmental protection, and their power to engage in lawmaking through interpretation.<sup>2</sup> By contrast, the political organs of the WTO have remained somewhat neglected even though they, too, enjoy significant decision-making power because of the waiver power in Article IX Paragraph 3 of the WTO Agreement.<sup>3</sup> This article redirects attention to the WTO's political organs and examines how they can further the principle of subsidiarity in the WTO through the exercise of this power. The waiver power is of particular relevance for an examination of subsidiarity within the bounded context of the WTO.<sup>4</sup> The significance of the waiver power is that it allows the main political organs—the Ministerial Conference and the General Council—to suspend upon request of a WTO member any obligation of WTO law, thus limiting the reach of WTO law. The legality of measures for which a waiver is in effect cannot be assessed against the suspended WTO norm. And, in case of a dispute between WTO

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1. This article builds on ISABEL FEICHTNER, *THE LAW AND POLITICS OF WTO WAIVERS: STABILITY AND FLEXIBILITY IN PUBLIC INTERNATIONAL LAW* (2012).

2. See Tomer Broude, *Selective Subsidiarity and Dialectic Deference in the World Trade Organization*, 79 *LAW & CONTEMP. PROBS.*, no. 2, 2016, at 53; see also Matthew Windsor, *A Fine Balance? Delegation, Standards of Review, and Subsidiarity in WTO Dispute Settlement*, 14 *AUCKLAND U.L. REV.* 41 (2008) (arguing for subsidiarity as a standard-of-review principle in WTO dispute settlement).

3. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 art. IX, para. 3 [hereinafter WTO Agreement].

4. For the distinction between subsidiarity in bounded and unbounded settings, see Markus Jachtenfuchs & Nico Krisch, *Subsidiarity in Global Governance*, 79 *LAW & CONTEMP. PROBS.*, no. 2, 2016, at 1, 8–9. For the application of subsidiarity in the “unbounded” setting of international economic governance to guide the choice between bilateral, regional or multilateral economic cooperation, see generally Arie Reich, *Bilateralism Versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity*, 60 *U. TORONTO L.J.* 263 (2010).

members concerning the respective measure, the WTO dispute-settlement organs will not apply the waived norm. A waiver thus enables members to lawfully take measures that, without the waiver, might be found by the dispute-settlement organs (or other law interpreters and adjudicators) to violate WTO law.

This article exposes the potential of the waiver to further subsidiarity within the WTO. It first clarifies how the waiver can promote subsidiarity by reconciling the effective realization of international trade law's objectives with the pursuit of domestic policy preferences. Second, it argues that general rules and exceptions are not sufficient to accommodate WTO members' policy preferences and that the waiver constitutes an important complement. Third, it presents the results of an empirical inquiry into the WTO's waiver practice, which reveals that, to date, the waiver power falls short of its subsidiarity potential. Fourth, it therefore proposes a number of changes to the waiver process—not requiring any treaty amendments—to increase the likelihood that the political organs realize subsidiarity by use of the waiver power.

## II

### SUBSIDIARITY IN THE WTO AND THE POTENTIAL OF THE WAIVER

Assessing WTO law and practice from a subsidiarity perspective raises the question of the objectives of WTO law. According to the understanding of subsidiarity on which this article is based, subsidiarity relates questions of collective autonomy and self-government, on the one hand, to the effective pursuit of certain governance objectives, on the other hand. Applied to an international organization like the WTO, subsidiarity entails a presumption for the exercise of authority at the member-state level, for it is the member states that are most likely to provide procedures for the meaningful exercise of collective autonomy and self-government. Yet this presumption can be overcome if the realization of common objectives demands the allocation of authority to—or the exercise of such authority by—the international organization.<sup>5</sup>

The following clarifies the conception of the objectives of international economic governance; it does not attempt to answer whether subsidiarity is a binding norm of WTO law. Rather, subsidiarity is referred to as an external normative standard to evaluate the law and practice of waivers in the WTO; that is, to assess whether the waiver power may be and is being used to further subsidiarity and how certain changes in the waiver process could enhance the likelihood that subsidiarity concerns are being promoted in the WTO. More concretely, the article examines whether the political organs do and may promote subsidiarity by restricting WTO authority (through a suspension of WTO norms) in order to allow WTO members to pursue policy preferences

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5. Cf. Jachtenfuchs & Krisch, *supra* note 4, at 6–7.

that enjoy broad public support<sup>6</sup> where this does not endanger the realization of WTO objectives. The conception of the objectives of international economic governance set forth in the following, and which forms the backdrop of this subsidiarity assessment, is not uncontentious. Yet it is supported by a number of institutional features, including the waiver power itself. It is informed by the desire to maintain the legitimacy of the WTO and to reconcile multilateral trade discipline with meaningful self-government. It thus follows from the same concerns that underlie the principle of subsidiarity.<sup>7</sup>

#### A. Objectives of International Economic Governance

Neither scholars nor governments agree on what the objectives of international economic governance are or should be.<sup>8</sup> This article sides with those who propose a “modest” conception of international economic law and governance. This modest conception views international economic governance as aiming to prevent potentially destructive protectionism while leaving sufficient policy space for states to implement measures that may impede trade but are regarded as necessary to realize societal preferences. Legal rules and principles in this conception have the function—in combination with procedures for adjudication—to ensure predictability by distinguishing acceptable (legal) from unacceptable (illegal) trade barriers. Thus, with respect to the WTO, this conception stresses the need for WTO law to be flexible enough to account for different societal preferences within the member states and at the same time to provide for binding and enforceable legal norms in order to secure peaceful trade relations and predictability for economic actors.

This understanding is situated in the tradition of embedded liberalism.<sup>9</sup> It emphasizes not only that international economic governance has to account for the fact that societal preferences differ from member state to member state,<sup>10</sup> but also that it has to acknowledge that the economic cannot be neatly separated from the political, that markets operate in particular societal settings,

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6. I understand subsidiarity as protecting collective autonomy and self-government. I focus therefore on deference to policy preferences that enjoy broad public support, variously denoted as collective or societal preferences.

7. For a subsidiarity-inspired conception of the WTO, see Robert Howse & Kalypso Nicolaïdis, *Toward a Global Ethics of Trade Governance: Subsidiarity Writ Large*, LAW & CONTEMP. PROBS., no. 2, 2016. I am much indebted to and draw heavily on Robert Howse's writings for my own understanding of international economic governance. See, e.g., Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM J. INT'L L. 94 (2002); Robert Howse, *The Legitimacy of the World Trade Organization*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 355 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

8. For an in-depth discussion, see FEICHTNER, *supra* note 1, at 20–45.

9. See John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 405 (1982); see also Howse & Nicolaïdis, *supra* note 7, at 259.

10. Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 YALE J. INT'L L. 367, 368–69 (2012).

and that there are no blueprints for economic development.<sup>11</sup> It follows that international economic law, while securing a number of ground rules (such as nondiscrimination), should leave states the freedom to experiment with economic policies and institutions.<sup>12</sup> From this stance, a number of outcomes of the Uruguay Round—which led to the creation of the WTO—can be criticized as going too far in promoting a particular ideal of economic governance and foreclosing states' policy space to experiment.<sup>13</sup>

Despite its contestability, this interpretation of international economic governance serves as the basis for the following assessment of the waiver. The normative concerns that underlie it are the same as those that motivate the subsidiarity discourse in international law. Just like the proposed interpretation of WTO law, subsidiarity demands that international governance be no more intrusive than necessary and that it espouse some flexibility to take account of collective preferences as formulated at the regional or national levels. This article is indeed aspirational, as pointed out by Tomer Broude,<sup>14</sup> in that it assesses to what extent the waiver power is or may be used in order to promote this normative conception of the WTO and subsidiarity. As Robert Howse and Kalypso Nicolaidis explain in detail, this conception can be developed from and linked back to actual features of international economic law, while at the same time it cannot be ignored that other aspects of the current international economic governance regime stand in stark contrast to its normative trajectory.<sup>15</sup>

## B. The Waiver: Flexibility, Deference, and Maintenance of WTO Objectives

The particular features of the WTO waiver that constitute its subsidiarity potential can be clarified against the background of the conception of international economic governance objectives outlined above.

### 1. The Waiver Power of the GATT of 1947 and the WTO

The waiver power in Article IX Paragraph 3 of the WTO Agreement is one of few competences of the WTO's political organs to make binding decisions. It allows the Ministerial Conference “[i]n exceptional circumstances . . . to waive an obligation imposed on a Member by this Agreement or any of the

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11. See generally DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH (2007).

12. *Id.*; see also ROBERTO MANGABEIRA UNGER, FREE TRADE REIMAGINED: THE WORLD DIVISION OF LABOR AND THE METHOD OF ECONOMICS 2 (2007); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999) (discussing the intimate relationship between self-determination and economic development).

13. RODRIK, *supra* note 11, at 195–212; YONG-SHIK LEE, RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM 12 (2006).

14. Broude, *supra* note 2, at 57 & n.24.

15. Howse & Nicolaidis, *supra* note 7, at 260–61, 282–83.

Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members . . . .”<sup>16</sup>

The waiver power in Article IX Paragraph 3 of the WTO Agreement succeeded the General Agreement on Tariffs and Trade’s (GATT) waiver power in Article XXV Paragraph 5 of the GATT of 1947.<sup>17</sup> Article XXV Paragraph 5 of the GATT of 1947 had authorized the CONTRACTING PARTIES<sup>18</sup> “in exceptional circumstances not elsewhere provided for” to waive any obligation under the GATT of 1947. A waiver decision could be taken by a two-thirds majority of votes cast, which had to comprise more than half of the contracting parties.<sup>19</sup> From the wording, as well as the *travaux préparatoires* of the London Conference that negotiated the Havana Charter, it appears that the waiver power was intended as an emergency exception to allow for a temporary suspension of obligations if none of the other escape clauses applied.<sup>20</sup> Yet the GATT waiver power was in no way used only in emergency situations. As a consequence it was called “[p]erhaps the most important single power of the CONTRACTING PARTIES.”<sup>21</sup> Indeed, a few waivers had been granted without time limits and with far-reaching scope. The most prominent and contentious of these was the U.S. Agricultural Waiver adopted in 1955.<sup>22</sup> This waiver, which allowed the United States to maintain import restrictions on agricultural products in deviation from GATT disciplines, is interpreted by

16. Apart from this general waiver competence there are a number of specific waiver competences in the WTO Agreements, including in: General Agreement on Tariffs and Trade art. VI, para. 6(b), art. XVII para. 18, art. XXIV para. 10, Oct. 7, 1957, 278 U.N.T.S. 170 [hereinafter GATT]; Agreement on Technical Barriers to Trade art. 12.8, Apr. 15, 1994, 1868 U.N.T.S. 120 [hereinafter TBT Agreement]; Agreement on the Application of Sanitary and Phytosanitary Measures art. 10.3, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement]; Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 63.2, 66.1, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; Agreement on Subsidies and Countervailing Measures arts. 27.4, 29.4 Apr. 15, 1994, 1869 U.N.T.S. 14 [hereinafter SCM Agreement]; Agreement on Trade-Related Investment Measures art. 5.3, Apr. 15, 1994, 1868 U.N.T.S. 186 [hereinafter TRIMS Agreement].

17. General Agreement on Tariffs and Trade, Jan. 1, 1948, 55 U.N.T.S. at 272 [hereinafter GATT of 1947].

18. Under the GATT of 1947, the contracting parties acting jointly were designated as the CONTRACTING PARTIES. Art. XXV, para. 1 GATT of 1947.

19. Art. XXV, para. 5, cl. 2 GATT of 1947.

20. The delegate from the United States, Mr. Kellogg, stated that the proposed waiver power was meant to “cover cases which were exceptional and caused particular hardship to any particular member.” U.N. Econ. & Soc. Council of the Int’l Conference on Trade & Emp’t, *Verbatim Report of the Ninth Meeting of Committee V*, E/PC/T/C.V/PV/9, at 8 (Nov. 7, 1946) [hereinafter U.N. Econ. & Soc. Council Report]; see also Preparatory Comm. of the Int’l Conference on Trade & Emp’t, *Report of Ad Hoc Sub-Committee on Articles 52, 54, 55, 59, 60 and 62*, E/PC/T/C.V/25, at 3 (Nov. 11, 1946). The French delegate at the same meeting stated that the waiver power should allow the suspension of obligations if they “would impose some economic hardships on some countries, those hardships . . . being of a temporary character,” U.N. Econ. & Soc. Council Report, *supra* note 20, at 9.

21. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 541 (1969).

22. Waiver to the United States Regarding the Restrictions under the Agricultural Adjustment Act, GATT BISD (3d Supp.), at 32 (1955).

some to have led to a general deterioration of the GATT obligations in the agricultural sector.<sup>23</sup>

During the Uruguay Round the waiver power was reviewed. The European Economic Community had suggested a reconsideration and reform of Article XXV Paragraph 5 of the GATT of 1947<sup>24</sup> in order “to prevent the perpetuation of, or to forestall, virtually permanent privileged situations.”<sup>25</sup> The new waiver power in Article IX Paragraph 3 of the WTO Agreement still provides for its use in “exceptional circumstances.” A more effective limitation on the waiver power was introduced with the new voting rules.<sup>26</sup> Article IX Paragraph 3 of the WTO Agreement requires a majority vote that comprises three-fourths of WTO members. In practice (apart from the first eight waiver decisions)<sup>27</sup> all waivers in the WTO are adopted by consensus—mostly by the General Council acting on behalf of the Ministerial Conference.<sup>28</sup> This practice is in line with the General Council’s decision-making procedures according to which the General Council shall seek consensus. The procedures provide for voting when consensus cannot be achieved.<sup>29</sup>

Article IX Paragraph 4 of the WTO Agreement adds further requirements. It demands that waiver decisions state the exceptional circumstances justifying the waiver, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate, and it also requires that waivers be reviewed on an annual basis.<sup>30</sup>

## 2. The Subsidiarity Potential of the WTO Waiver

Three features in particular make the waiver a suitable instrument to operationalize subsidiarity in the WTO. It is due to these features that the waiver may further international economic governance that reconciles

23. ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 42 (2002); JACKSON, *supra* note 21, at 718; KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 260–63 (1970).

24. 2 *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* (1986–1992) 1845 (Terence P. Stewart ed., 1993).

25. Negotiating Group on GATT Articles, *Communication from the European Economic Community*, MTN.GNG/NG7/W/4, at 2 (May 18, 1987).

26. Obligations that are subject to a transitional period or a period for staged implementation may be waived only by consensus decisions. WTO Agreement, art. IX, para. 3 n.4.

27. General Council, *Minutes of Meeting*, July 31, 1995, Doc. WT/GC/M/6, at 5 (Sept. 20, 1995).

28. All WTO members are represented in the General Council, which exercises the functions of the Ministerial Conference when the latter is not in session. WTO Agreement, art. IV para. 2.

29. Statement by the Chairman, *Decision-Making Procedures Under Articles IX and XII of the WTO Agreement*, Nov. 15, 1995, WTO Doc. WT/L/93 (Nov. 24, 1995).

30. The Understanding in Respect of Waivers of Obligations Under the General Agreement on Tariffs and Trade 1994 includes additional requirements for requests of waivers of GATT obligations.

A request for a waiver or for an extension of an existing waiver shall 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 policy objectives by measures consistent with its obligations under GATT 1994.

Understanding in Respect of Waivers of Obligations Under the General Agreement on Tariffs and Trade 1994 para. 1, Apr. 15, 1994, [https://www.wto.org/english/docs\\_e/legal\\_e/11-25\\_e.htm](https://www.wto.org/english/docs_e/legal_e/11-25_e.htm).

responsiveness to societal preferences with a commitment to multilateral trade discipline. First, the waiver can make WTO law more flexible without compromising the formal and binary distinction between binding and nonbinding and between legal and illegal that is characteristic of the legal form. The waiver neither calls into question that the waived norm forms part of WTO law, nor does it relativize its binding nature.<sup>31</sup> Rather, it suspends individual norms, often with respect to particular measures, for a specified time. As a consequence, the suspended norm for the duration of the waiver period is not applicable when the legality of a measure covered by the waiver is being assessed.

Second, the waiver can be used to accommodate measures adopted by individual member states to realize policy preferences that, without a waiver, might violate WTO law. The waiver power thus allows the political organs of the WTO to pay deference to member states' preferences by restricting the WTO's own authority. The interpretation of the exercise of the waiver power as a restriction of WTO authority becomes plausible if one focuses on the WTO's internal institutional balance. The political organs, by exercising a power allocated to them in the WTO Agreement, are restricting the authority of the dispute-settlement organs by preventing them from applying the suspended norm if a dispute arises.<sup>32</sup>

Third, the waiver is a decision by the main political organs of the WTO (usually the General Council acting on behalf of the Ministerial Conference) in which all members are represented. Therefore it can be interpreted as an assessment by the WTO membership that the suspension of law which is effected by the waiver does not endanger the realization of WTO objectives. The waiver procedure not only provides the opportunity for the membership to continuously debate and revisit the correct conception of WTO objectives, but it can also be used to incrementally adjust the law as members' views on the appropriate balance between multilateral trade discipline and domestic policy space change. The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Waiver, which relaxes the limitations imposed by the TRIPS Agreement on compulsory licensing for the production of essential medicines,<sup>33</sup> may be interpreted in this vein. It can be understood as aligning WTO law with the membership's views as to the proper balance between the international protection of intellectual property and members' capacity to ensure that their populations have access to essential medicines.

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31. For a proposal to accord different degrees of bindingness to WTO norms depending on their welfare-enhancing effects, see Joel P. Trachtman, *The WTO Cathedral*, 43 STAN. J. INT'L L. 127 (2007); Joel P. Trachtman, *Bananas, Direct Effect and Compliance*, 10 EUR. J. INT'L L. 655 (1999).

32. For a discussion why waivers should be considered secondary law of the WTO, see FEICHTNER, *supra* note 1, at 163–69.

33. *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc. WT/L/540 (Sept. 2, 2003).

## III

## THE WAIVER AS A NECESSARY COMPLEMENT TO GENERAL RULES AND EXCEPTIONS

One objection that may be raised against conceptualizing the waiver as a subsidiarity device is that the legal rules and exceptions of the WTO Agreements already provide for sufficient flexibility to reconcile responsiveness to domestic preferences with effective international trade discipline.<sup>34</sup> Norms that make WTO law more flexible include Article XX of the GATT and Article XIV of the General Agreement on Trade in Services (GATS),<sup>35</sup> which allow members to take measures in the pursuit of public interests and the rules of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade Agreements (TBT Agreement) that take into account differences in societies' acceptance and management of risk. The exceptions to allow for regional integration, Article XXIV of the GATT and Article V of the GATS, may also be considered here, as well as those in the TRIPS Agreement according to which members may exclude certain products from patentability or grant compulsory licenses.<sup>36</sup>

Given the flexibility built into WTO law by these norms, it must be asked whether the waiver is needed to provide for additional deference to individual members' policy preferences. In response the following sets out the limits to providing flexibility through the formulation of general rules and exceptions. Against this background the waiver power appears as an important and complementary exit option to accommodate policy preferences of WTO members.

## A. The Limits of General Rules and Exceptions to Accommodate Collective Preferences

The policy preferences of individual WTO members may be highly context dependent and might not lend themselves well to generalization; thus, they cannot be fully accommodated by the formulation of general rules or exceptions if such norms are not to result in blanket authorizations. The controversy on genetically modified organisms (GMOs), which some European states strongly oppose, serves as an illustration. The SPS Agreement requires that measures to protect against health risks be based on either international standards or a scientific risk assessment.<sup>37</sup> Where there is no scientific evidence to support the existence of a risk, members may "provisionally" adopt measures, but "shall

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34. For an assessment of such WTO norms from a subsidiarity perspective, see Broude, *supra* note 2; Howse & Nicolaidis, *supra* note 7.

35. General Agreement on Trade in Services art. XIV, Apr. 15, 1994, 1869 U.N.T.S. 183 [hereinafter GATS].

36. TRIPS Agreement, *supra* note 16, arts. 27, 30, 31. Further flexibility is provided by the safeguard provision in Article XIX GATT and the Agreement on Safeguards, Apr. 15, 1994, 1869 U.N.T.S. 154, as well as provisions providing for special and differential treatment of developing countries.

37. SPS Agreement, *supra* note 16, at art. 3, paras. 2-3.

seek to obtain the additional information necessary for a more objective assessment of risk and review the . . . measure accordingly within a reasonable period of time.”<sup>38</sup> Arguably, this variation of the precautionary principle is insufficient to protect against anticipated dangers that may only materialize in the distant future.<sup>39</sup> The potential dangers, which in several European states motivate strong opposition to GMOs, are largely of such a nature. Still, the desire to impose a ban on GMOs need not be interpreted as calling into doubt the general principles of the SPS Agreement. It does not necessarily implicate the claim that the SPS Agreement should include a broader precautionary principle. A society that decides to take a broad precautionary approach in one specific instance, such as the ban on GMOs, may nonetheless be opposed to the inclusion into the SPS Agreement of a general authorization for precautionary measures absent scientific evidence for the reason that such a rule does not lend itself to a rational application.<sup>40</sup> Yet even if strongly held preferences do not result in demands for a general change in the legal rules, WTO law’s acceptance (and possibly also its legitimacy) will be mitigated if it cannot accommodate such preferences.<sup>41</sup>

Robert Howse, Joanna Langille, and Katie Sykes have recently argued that a number of such societal preferences that are highly context dependent and do not lend themselves to instrumental rationalization may be accommodated by the public-morals exception in Article XX(a) of the GATT.<sup>42</sup> Yet this exception, even in the suggested broad interpretation, which the Appellate Body to some extent confirmed in the *Seal Products* case,<sup>43</sup> has its limitations. Most importantly, it can only be invoked to justify *prima facie* violations of trade norms that result from measures taken to protect public morals, that is, “standards of right and wrong conduct maintained by or on behalf of a community or nation.”<sup>44</sup> It would be straining the concept of morality if one were to interpret, for example, experimental measures of economic policy as answering to standards of right and wrong. And a GMO ban, while it might be

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38. SPS Agreement, *supra* note 16, at art. 5, para. 7.

39. Nicholas Perdikis, William A. Kerr & Jill E. Hobbs, *Reforming the WTO to Defuse Potential Trade Conflicts in Genetically Modified Goods*, 24 *WORLD ECON.* 379, 384 (2002).

40. JAGDISH BHAGWATI, IN *DEFENSE OF GLOBALIZATION* 152 (2004); *see also* CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* 2 (2005) (criticizing the precautionary principle as incoherent). Rationality of international law may be all the more important given its democratic deficit.

41. Obviously, a state always has the option of defecting, which may be more or less costly given the defecting state’s power and the extent to which other state parties are affected.

42. Robert Howse & Joanna Langille, *supra* note 10; Robert Howse, Joanna Langille & Katie Sykes, *Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products*, 48 *GEO. WASH. INT’L L. R.* 81 (2015).

43. Reports of the Appellate Body, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R; WT/DS401/AB/R (May 22, 2014).

44. Report of the Panel, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, para. 6.465, WTO Doc. WT/DS285/R (Nov. 10, 2004).

reformulated as based on moral concerns,<sup>45</sup> is better understood as answering to a strong collective preference against a practice perceived to be potentially harmful to health and the environment.

## B. The WTO Waiver as an Exit Option to Realize Collective Preferences

Various scholarly reform proposals address the potential tension between matters of general principle and societal preference in specific situations and contexts. Whereas some argue for a solution at the level of adjudication and law enforcement,<sup>46</sup> others propose including further exception clauses into the WTO Agreements in order to justify measures based on strong societal preferences.<sup>47</sup> The following presents a number of the latter proposals in order to make the case that it may be better to use the waiver power to accommodate strongly held societal preferences than to add largely indeterminate exception clauses to WTO law.

The proposals discussed here agree that additional exit options shall not permit measures that serve special interests but shall legalize measures that enjoy broad public support. In terms of subsidiarity, one may say that the proposed exceptions are meant to allow for deference to members' authority in situations where there is a strong reason for the exercise of authority at the lower level, namely, wide public support. More specifically, Dani Rodrik proposes that deviations from the general rules are justified for policy measures that were the subject of an investigative process in which all relevant parties—including consumer and public interest groups, importers, exporters, and civil society organizations—were heard and which revealed broad support for these measures.<sup>48</sup> Pascal Lamy, by comparison, remains relatively vague and merely states that the measures to be justified by his proposed exception clause must be

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45. For an argument that a ban on GMOs could be justified by the public-morals exception in Article XX(a) GATT, see Gareth Davies, *Morality Clauses and Decision-Making in Situations of Scientific Uncertainty: The Case of GMOs* 11–13 (Hebrew Univ. Int'l Law, Research Paper No. 10-06, 2006).

46. See BHAGWATI, *supra* note 40, at 152 (suggesting that WTO members who adopt measures dictated by public opinion but inconsistent with WTO law should not be retaliated against but should instead make a tort payment to the injured industry); Jeffery Atik, *Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice, and International Trade*, 19 U. PA. J. INT'L ECON. L. 229, 234, 261 (1998) (proposing a specific standard-of-review test for when a measure reflects a deeply embedded value that enjoys clear support of the population and if the member imposing the measure bears the greater part of the cost of the trade distortion caused by the measure).

47. RODRIK, *supra* note 11, at 230–33. (proposing an Agreement on Developmental and Social Safeguards to allow for temporary deviation from the rules to pursue developmental policies or to protect social values); Nicholas Perdakis, William A. Kerr & Jill E. Hobbs, *supra* note 39, at 397 (proposing a new WTO Agreement that would allow for trade barriers responding to consumer preferences); Pascal Lamy, *The Emergence of Collective Preferences in International Trade: Implications for Regulating Globalisation*, Speech at Conference on “Collective Preferences and Global Governance: What Future for the Multilateral Trading System”, (Sept. 15, 2004), [http://trade.ec.europa.eu/doclib/docs/2004/september/tradoc\\_118929.pdf](http://trade.ec.europa.eu/doclib/docs/2004/september/tradoc_118929.pdf) (arguing that WTO law should allow for temporary nonprotectionist least-trade-restrictive measures that give effect to collective preferences).

48. RODRICK, *supra* note 11, at 231.

based on collective preferences, which he defines as “the end result of choices made by human communities that apply to the community as a whole.”<sup>49</sup> Further, he states that collective preferences require “institutions capable of forging collective preferences.”<sup>50</sup> Whereas both Dani Rodrik and Pascal Lamy explicitly<sup>51</sup> or implicitly<sup>52</sup> refer to democratic structures, Nicholas Perdikis, William Kerr, and Jill Hobbs merely require the demonstration of a sufficient level (in quantity and quality) of consumer concern in their proposal on exceptions for trade barriers based on consumer concern.<sup>53</sup> It can be argued, however, that they, too, implicitly rely on democratic structures because outside such structures it will be difficult to determine whether a sufficient level of consumer concern is reached.<sup>54</sup>

Because the proposals aim to ensure responsiveness of the WTO to strong domestic preferences without predetermining the content of such preferences, they mainly establish formal procedural requirements. They require that the respective preference is a collective preference<sup>55</sup> tested in an inclusive investigation<sup>56</sup> and broadly shared by consumers.<sup>57</sup> With respect to the substantive content of the measures that can be justified by the proposed exceptions, the authors only state negative requirements. These include requirements that the respective measure shall not be more trade restrictive than necessary, shall not be protectionist, and shall not aim at the imposition of preferences on other societies.<sup>58</sup>

The lack of positive substantive requirements coupled with an emphasis on inclusive procedures raises doubts as to whether the inclusion of such exceptions into an international legal regime is feasible or even desirable. It is true that international law increasingly takes an interest in democratic

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49. Lamy, *supra* note 47, at 2.

50. *Id.*

51. RODRIK, *supra* note 11, at 229 (“Nondemocratic countries cannot count on the same trade privileges as democratic ones.”). Rodrik also points out that the inclusive investigations he proposes as a requirement for his safeguards clause to apply rarely happen in practice, even in industrialized countries. *Id.* at 232.

52. Pascal Lamy argues that “democratic societies are organised in such a way as to allow the emergence of ‘collective’ preferences, which synthesise the preferences of individuals through political debate and institutions. These preferences then become standards which apply to everyone and provide a framework for relations between individuals.” Lamy, *supra* note 47, at 2. He does not address whether collective preferences may be forged also in nondemocratic societies. *See id.*

53. Perdikis, Kerr & Hobbs, *supra* note 39, at 395–97.

54. Perdikis, Kerr, and Hobbs propose the establishment of a “professional, social science-based institution . . . to develop harmonized international procedures for evaluating the existence and intensity of consumer concerns.” *Id.* at 397.

55. Lamy, *supra* note 47, at 2.

56. RODRIK, *supra* note 11, at 232.

57. Perdikis, Kerr & Hobbs, *supra* note 39, at 395–97.

58. According to Rodrik’s proposal, if there is a strong preference within a WTO member for import restrictions to protect domestic food safety, labor, or environmental standards, such restrictions may be justified. They should not, however, be justified if they aim to impose these standards on other members. RODRIK, *supra* note 11, at 232.

structures at the national level.<sup>59</sup> Nonetheless, it seems unlikely that WTO members, including nondemocratic members, would agree to an exception clause that makes deliberative and inclusive policy-making processes a precondition for the clause to apply. Furthermore, the dispute-settlement organs appear ill suited to apply such standards.<sup>60</sup> Against this background the exercise of the waiver power appears preferable to the creation of an additional exception clause. It already provides for a procedure that can be used to respond to domestic collective preferences and on its face is indifferent to domestic policy-making processes.

#### IV

#### THE WTO'S WAIVER PRACTICE: FALLING SHORT OF THE WAIVER'S SUBSIDIARITY POTENTIAL

Before this article turns to the operationalization of the waiver power as an exit option to accommodate collective preferences, this part takes account of the waiver practice. An assessment of this practice reveals that the WTO's political organs have made creative use of the waiver power and have exercised it for a number of purposes. Despite the consensus practice a good number of waiver decisions have been adopted. From the entry into force of the WTO Agreement in 1995 until the end of 2010, 202 waiver decisions (including extension decisions) were granted.<sup>61</sup> Moreover, the requirement in Article IX Paragraph 3 of the WTO Agreement of the existence of "exceptional circumstances" does not appear to limit the exercise of the waiver power. Yet an examination of the waiver practice also reveals that it falls short of the waiver power's subsidiarity potential. The following gives a brief overview of the different types of waivers that have been adopted and then focuses on the use of the waiver as an exception granted to individual members to realize collective preferences.

The different types of waivers that can be distilled from practice fall into two groups—individual and collective waivers. Individual waivers encompass two types of waivers: (1) individual waivers granted to account for capacity problems<sup>62</sup> and (2) individual waivers that allow members to pursue policy

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59. JEAN D'ASPREMONT, *L'ÉTAT NON DÉMOCRATIQUE EN DROIT INTERNATIONAL. ETUDE CRITIQUE DU DROIT INTERNATIONAL POSITIF ET DE LA PRATIQUE CONTEMPORAINE* (2008); NIELS PETERSEN, *DEMOKRATIE ALS TELEOLOGISCHES PRINZIP. ZUR LEGITIMITÄT VON STAATSGEWALT IM VÖLKERRECHT* (2009); Thomas Franck, *The Emerging Right to Democratic Governance*, 86 *AJIL* 46, 46 (1992).

60. For such criticism directed at Pascal Lamy's proposal for a collective-preferences exception, see Steve Charnovitz, *An Analysis of Pascal Lamy's Proposal on Collective Preferences*, 8 *J. INT'L ECON. L.* 449, 455–59 (2005).

61. This number is derived from a note by the WTO Secretariat, *Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Information on Waivers*, WTO Doc. IP/C/W/387 (Oct. 24, 2002) (including in its Annex I a list of all waiver decisions granted in the WTO until October 15, 2002) and from WTO Annual Reports, [http://www.wto.org/english/res\\_e/reser\\_e/annual\\_report\\_e.htm](http://www.wto.org/english/res_e/reser_e/annual_report_e.htm).

62. Individual waivers that take account of capacity problems include waivers that grant individual

preferences (potentially) inconsistent with WTO law.<sup>63</sup> Collective waivers waive obligations for groups of members or all members. Three types of collective waivers exist: (1) collective waivers that defer the obligation to comply with certain norms for the benefit of developing countries to take account of their capacity problems;<sup>64</sup> (2) collective waivers that modify legal rules and can be considered as legislative instruments, a prominent example being the TRIPS Waiver;<sup>65</sup> and (3) collective waivers that provide exceptions from WTO law for measures mandated by another international legal regime, such as the Kimberley Waiver, which suspends WTO norms with respect to trade bans for rough diamonds that are taken in accordance with the Kimberley Process Certification Scheme.<sup>66</sup>

From a subsidiarity perspective, the individual waiver that allows members to pursue domestic policy preferences (potentially) inconsistent with WTO law is most relevant.<sup>67</sup> An examination of the waiver practice reveals that the

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members additional time to implement changes to the Harmonized System in their national customs nomenclature and to revise their tariff schedules accordingly. See Isabel Feichtner, *The Administration of the Vocabulary of International Trade: The Adaptation of WTO Schedules to Changes in the Harmonized System*, 9 GERMAN L.J. 1481, (2008). Further waivers in this group allow members to defer compliance with principles of customs valuation as laid out in Article VII GATT and the Agreement on Customs Valuation. They include, for example, *Cape Verde—Implementation of Article VII of GATT 1994 of the Agreement on Customs Valuation*, WTO Doc. WT/L/812 (May 4, 2011) (waiver granted to Cape Verde on May 3, 2011 and waiving Article VII GATT and the obligations of the Agreement on Customs Valuation for one year). Finally, individual waivers to address capacity problems are the waivers granted periodically to Cuba to waive its obligation under Article XV, para. 6 GATT to become a member of the International Monetary Fund, *Cuba—Article XV:6*, WTO Doc. WT/L/678 (Dec. 19, 2006).

63. On these waivers see *infra*, text accompanying notes 67–83.

64. See *Least-Developed Country Members—Obligations Under Article 70.9 of the TRIPS Agreement With Respect to Pharmaceutical Products*, WTO Doc. WT/L/478 (July 12, 2002) (suspending the obligations of least-developed countries under Article 70.9 TRIPS Agreement with respect to pharmaceutical products until 2016).

65. *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc. WT/L/540 (Sept. 2, 2003). Other waivers of this type are *Preferential Tariff Treatment for Least-Developed Countries*, WTO Doc. WT/L/759 (May 29, 2009) (creating an exception to Article I, para. 1 GATT to allow developing-country members to provide preferential tariff treatment to products from least-developed countries) and *Preferential Treatment to Services and Service Suppliers of Least-Developed Countries*, WTO Doc. WT/L/847 (Dec. 19, 2011) (creating an exception to Article II, para. 1 GATS for preferential treatment granted to services and service suppliers of least-developed countries).

66. *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, WTO Doc. WT/L/518 (May 27, 2003). Such collective waivers are adopted also to allow WTO members to implement changes to the Harmonized System made within the World Customs Organization. See, e.g., *Introduction of Harmonized System 2007 Changes into WTO Schedules of Tariff Concessions*, WTO Doc. WT/L/809 (Dec. 16, 2010).

67. Collective waivers that address the allocation of authority between the WTO and other international legal regimes, such as the Kimberley Waiver, have also been assessed from a subsidiarity perspective. They have been interpreted as promoting a principle of horizontal subsidiarity (which however is not the focus of this contribution). See Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests*, 20 EUR. J. INT'L L. 615, 642–43 (2009) (building on the concept of horizontal subsidiarity proposed by Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, 16 GOVERNANCE 73 (2003)).

political organs of the WTO are reluctant to use the waiver power in order to open up policy space for members to realize collective preferences, to promote noneconomic interests, or to experiment with development policies. The bulk of individual waiver decisions currently adopted by the WTO for the realization of policy preferences are waivers that legalize trade preferences granted by developed WTO members to selected developing country members. These include, for example, waivers granted to the United States for its trade preference schemes under the African Growth and Opportunities Act<sup>68</sup> or the Andean Trade Preferences Act.<sup>69</sup> It is difficult to interpret these waivers as permitting the realization of domestic collective preferences, as they mainly allow governments to further certain foreign policy objectives.

By contrast, waivers that could more easily be subsumed under a subsidiarity rationale because they legalize measures that pursue internal policy objectives have seldom been adopted. Exceptions are a number of waivers granted to WTO members to allow them to adopt or maintain measures for their internal economic development. Thus, a few individual waivers have permitted WTO members to maintain trade-related investment measures for a limited period of time beyond the end of the transitional period provided for in Article 5.2 of the Trade-Related Investment Measures (TRIMs) Agreement.<sup>70</sup> Another handful of waivers permitted WTO members to defer the implementation of commitments that were included in their accession protocols.<sup>71</sup> Of the latter, a waiver granted to Mongolia is particularly

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68. *United States—African Growth and Opportunity Act*, WTO Doc. WT/L/754 (May 29, 2009).

69. *United States—Andean Trade Preference Act*, WTO Doc. WT/L/755 (May 29, 2009). Further waivers to legalize trade preferences are: *United States—Caribbean Basin Economic Recovery Act*, WTO Doc. WT/L/753 (May 29, 2009) (legalizing U.S. preferences under the Caribbean Basin Economic Recovery Act); *Caribbean*, WTO Doc. WT/L/677 (Dec. 19, 2009) (legalizing Canadian preferences under CARIBCAN); *European Communities—Application of Autonomous Preferential Treatment to Moldova*, WTO Doc. WT/L/722 (May 15, 2008) (legalizing EU preferences for Moldova); *European Communities’ Preferences for Albania, Bosnia And Herzegovina, Croatia, Serbia and Montenegro, and the Former Yugoslav Republic of Macedonia*, WTO Doc. WT/L/654 (Aug. 2, 2006) (legalizing EU preferences for Western Balkans); *European Communities—The ACP–EC Partnership Agreement*, WTO Doc. WT/L/436 (Dec. 7, 2001) (legalizing EU preferences under the Cotonou Agreement).

70. *Thailand—Extension of the Transition Period for the Elimination of Trade-Related Investment Measures Notified Under Article 5.1 of the Agreement on Trade-Related Investment Measures*, WTO Doc. WT/L/410 (Aug. 7, 2001) (waiver granted to Thailand in 2001). Also see the seven extension decisions adopted by the Council for Trade in Goods in July 2001 on the basis of the TRIMs Agreement, not the waiver power in Article IX, para. 3 WTO Agreement. *Extension of the Transition Period for the Elimination of Trade-Related Investment Measures Notified Under Article 5.1 of the Agreement on Trade-Related Investment Measures*, WTO Docs G/L/460-466 (Aug. 7, 2001). Further extensions were granted by the Council for Trade in Goods beginning in November 2001 until December 31, 2003. See *Extension of the Transition Period for the Elimination of Trade-Related Investment Measures Notified Under Article 5.1 of the Agreement on Trade-Related Investment Measures*, WTO Docs G/L/497-504 (Nov. 9, 2001). A further waiver was granted to Colombia. See *Colombia—Extension of the Application of Article 5.2 of the Agreement on Trade-Related Investment Measures*, WTO Doc. WT/L/441 (Jan. 10, 2002).

71. *Cape Verde—Implementation of the Schedule of Concessions*, WTO Doc. WT/L/768 (July 31, 2009) (allowing Cape Verde to defer implementation of tariff concessions); *Mongolia—Export Duties on Raw Cashmere*, WTO Doc. WT/L/695 (Aug. 1, 2007) [hereinafter *Mongolia*, WT/L/695] (allowing

noteworthy from an economic-development perspective. It allowed Mongolia, which had committed in its accession protocol to dismantle export duties on raw cashmere within ten years of accession, to maintain such duties for an additional five-year period.<sup>72</sup> The maintenance of export duties enabled the country, according to its own assessment, to contain price fluctuations for cashmere and to develop and expand its cashmere-processing industry.<sup>73</sup>

A recent waiver process concerning a request by the Philippines demonstrates the obstacles to a more extensive use of the WTO waiver power to accommodate domestic development policies and other policy preferences of individual WTO members. The Philippines requested a waiver of its obligations under Article 4.2 of the Agreement on Agriculture<sup>74</sup> to allow it to maintain quantitative restrictions on rice imports.<sup>75</sup> It justified its request both with the need to continue protecting domestic rice farmers from foreign competition until the farmers become more competitive and also with the desire to promote food security through self-sufficiency with respect to rice.<sup>76</sup> The waiver was formally requested in March 2012.<sup>77</sup> It then took until July 2014—more than two years—before the General Council adopted a waiver.<sup>78</sup> From the minutes of the meetings of the Council for Trade in Goods,<sup>79</sup> it appears that the obstacles to the formation of consensus were not objections to the usefulness of quantitative restrictions from the standpoint of economic development<sup>80</sup> nor objections related to matters of principle (such as irreconcilability of the restrictions with WTO objectives), but rather countervailing economic interests of a number of rice-exporting WTO members.<sup>81</sup>

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Mongolia to maintain export duties on raw cashmere until January 29, 2012); *Albania—Implementation of Specific Concessions*, WTO Doc. WT/L/610 (May 30, 2005) (allowing Albania to defer privatization of the telephone sector and implementation of certain tariff concessions); *Albania—Implementation of Specific Commitments in Telecommunications Services*, WTO Doc. WT/L/567 (June 7, 2004); *Hungary—Agreement on Agriculture*, WTO Doc. WT/L/238 (Oct. 29, 1997) (allowing Hungary to maintain certain export subsidies for agricultural products until December 31, 2001).

72. *Mongolia*, WT/L/695, at 1.

73. Communication from Mongolia, *Mongolia—Export Duties on Raw Cashmere*, WTO Doc. WT/GC/W/638, at 2 (Sept. 27, 2011) [hereinafter *Mongolia*, WT/GC/W/638].

74. Agreement on Agriculture art. 4.2, Apr. 15, 1994, 1867 U.N.T.S. 410.

75. Council for Trade in Goods, *Request for Waiver Relating to Special Treatment for Rice of the Philippines*, WTO Doc. G/C/W/665/Rev.4 (Mar. 27, 2014) [hereinafter *Waiver Request Rev. 4*].

76. *Id.* at 1.

77. Council for Trade in Goods, *Request for Waiver on Special Treatment for Rice of the Philippines*, WTO Doc. G/C/W/665 (Mar. 20, 2012). The Philippines requested a waiver to avoid a protracted debate on whether an extension of its special treatment of rice could be based on Annex 5 of the Agreement on Agriculture. See Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods*, para. 97, WTO Doc. G/C/M/110 (June 15, 2012).

78. See General Council, *Minutes of the Meeting*, WTO Doc. WT/GC/M/152 at 45 (Oct. 9, 2014). The waiver decision, which expires on June 30, 2017, is included in General Council, *Decision on Waiver Relating to Special Treatment for Rice of the Philippines*, WTO Doc. WT/L/932 (July 25, 2014).

79. According to WTO Agreement, the Council for Trade in Goods considers requests for waivers of GATT obligations.

80. For such objections, see, for example, Philippine Institute for Development Studies, *Putting Rice on the Table: Rice Policy, the WTO, and Food Security* 3 (Policy Notes No. 2011-11, May 2011).

81. See Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods*,

No open multilateral debate was conducted on the questions of whether the WTO's authority should be restricted in order to allow the Philippines to protect its rice farmers from foreign competition or whether such protection could be considered a collective preference enjoying broad public support in the Philippines. Rather, the request triggered an intransparent bargaining process between the Philippines and a number of WTO members that argued a waiver would negatively affect their export interests. To accommodate these concerns, the Philippines had requested that any member with a substantial interest in rice communicate this interest to the Philippines.<sup>82</sup> Consequently, a process of bilateral negotiations between the Philippines and interested members ensued, leading to several revisions by the Philippines of its waiver request, in particular the envisaged country-specific quotas for rice imports.<sup>83</sup>

This kind of process in response to individual waiver requests is not uncommon in the WTO. Waiver decisions are mostly prepared in informal meetings, and the process is strongly influenced by particular trade interests.

## V

### THE WAIVER PROCESS: HOW TO IMPROVE IT TO ENHANCE DEFERENCE TO COLLECTIVE PREFERENCES

If the waiver is to be operationalized as an instrument to further subsidiarity in international economic governance, the waiver process should do two things: first, it should assess whether the measures for which waivers are requested are expressions of collective preferences (that is, policy preferences that enjoy broad public support); and second, it should increase the likelihood that the political organs deciding on waiver requests grant waivers to accommodate collective preferences, as long as this does not endanger the objectives of the WTO. An inquiry whether measures are based on collective preferences and responsiveness to collective preferences depend on the inclusiveness and transparency of the waiver process. Today's waiver processes do not correspond to this ideal; rather, they are characterized by intransparency, informality, and bilateral negotiations. In the following, the current features of the waiver process are explored with reference to the ideals of inclusiveness and transparency. The article suggests that coupling the existing reason-giving requirements<sup>84</sup> with an assessment of waiver requests by working parties, as was

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paras. 5.4, 5.7–5.8, WTO Doc. G/C/M/116 (Mar. 11, 2014) (stating the objections to the adoption of the waiver by the United States, Thailand, and Canada for reasons of ongoing bilateral negotiations).

82. Committee on Agriculture, *Notification of Initiation of Negotiations on Continuation of Special Treatment for Rice, Communication from the Philippines*, WTO Doc. G/AG/W/91 (Nov. 22, 2011).

83. Waiver Request Rev. 4, *supra* note 75; Council for Trade in Goods, *Request for Waiver Relating to Special Treatment for Rice of the Philippines*, WTO Doc. G/C/W/665/Rev.3 (Oct. 17, 2013); Council for Trade in Goods, *Request for Waiver Relating to Special Treatment for Rice of the Philippines*, WTO Doc. G/C/W/665/Rev.2 (Oct. 8, 2013); Council for Trade in Goods, *Request for Waiver Relating to Special Treatment for Rice of the Philippines*, WTO Doc. G/C/W/665/Rev.1 (Nov. 16, 2012).

84. Giving reasons is required by the Waiver Understanding for the waiver request and by Article IX, para. 4 WTO Agreement for the waiver decision.

common practice under the GATT of 1947, would greatly improve the waiver process. Further, the article proposes a departure from the consensus practice and a return to voting on waivers.

These suggestions do not include any substantive principles to assess waiver requests. As discussed above, the particular potential of the waiver procedure lies in the fact that it does not establish any generalized substantive criteria as to which measures merit legalization by a waiver and which do not.

#### A. Inclusiveness of the Waiver Process

Inclusiveness of the waiver process is important in two dimensions. First, the waiver process must not be biased in favor of more powerful members, so that all WTO members can benefit from the waiver power. Access of developing countries is particularly important if the waiver is to play a larger role in the realization of development preferences. Second, the waiver process should include the views of nongovernmental actors and other international institutions that represent societal interests currently not as well represented by governments as organized industry or labor interests.<sup>85</sup> Such inclusiveness will facilitate the assessment whether a measure for which a waiver is being requested enjoys wide public support.

With respect to the accessibility of the waiver process for developing countries, it is important to note that Article IX Paragraph 3 of the WTO Agreement formally affords each WTO member the right to submit a waiver request. This right enables WTO members, developed and developing members alike, to put any matter on the agenda of the competent WTO organ as long as it is phrased as a request for the suspension of an obligation and indicates the reasons why a waiver is requested. This agenda-setting opportunity provided for by the waiver power is of particular importance to developing country members as these members often experience difficulties having their concerns heard and discussed in formal meetings.<sup>86</sup>

Nonetheless, looking at the past, the GATT and the WTO may be accused of double standards in their waiver practice. With respect to the GATT of 1947, Robert Hudec pointed out how developing countries were still required to request waivers if they wanted to deviate from the rules after legal discipline had largely broken down in the 1960s and 1970s, while developed country members openly violated the law.<sup>87</sup> Double standards are also apparent when

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85. On the strong impact of these interests on trade law, see Dani Rodrik, *The Global Governance of Trade as if Development Really Mattered* (Report Submitted to the United Nations Development Programme, 2001), <http://www.giszpenc.com/globalciv/rodrik1.pdf>. On the strong impact of special interests on international lawmaking by governments, see Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 170–71 (1999).

86. See Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 598, 612 (2007) (discussing the difficulties of weak states in convening negotiations on treaty amendments).

87. ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 227 (1975).

comparing the waivers that have been granted to developed country members with those granted to developing country members. Whereas there is a rather large practice in the WTO to grant waivers for the realization of foreign policy preferences to developed country members (namely to legalize special trade preferences extended to selected developing countries),<sup>88</sup> the practice to grant waivers for the realization of policy preferences to developing country members is very limited and only encompasses a few waivers to extend transition periods and to defer compliance with specific accession commitments.<sup>89</sup>

Inclusiveness of the waiver process with respect to nongovernmental views can be enhanced through the participation of actors other than government representatives. Apart from WTO members, international organizations admitted as observers<sup>90</sup> can express their opinions on a waiver request within the WTO organs dealing with the request.<sup>91</sup> The process that led to the adoption of the TRIPS Waiver demonstrates that a waiver process can prompt a debate that includes not only government representatives, but also other international institutions and NGOs.<sup>92</sup> Thus, when the TRIPS Waiver was debated in the TRIPS Council, representatives from the World Health Organization, the Joint United Nations Programme on HIV–AIDS, and the Holy See actively participated by making legislative proposals and by providing information and moral guidance.<sup>93</sup> NGOs, which may not be directly admitted as observers, can participate indirectly by informing, scrutinizing, and potentially scandalizing the process.<sup>94</sup> The opportunity for such indirect participation depends on the transparency of the waiver process.

## B. Transparency of the Waiver Process

Currently waiver processes are quite intransparent. This is mainly due to the restricted publication of minutes of meetings in which waiver requests are being discussed and because many waiver requests are the subject of bilateral negotiations rather than multilateral debate.

Prior to the formal adoption of waivers by the General Council (and seldom, by the Ministerial Conference), requests are usually considered by the

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88. See *supra* note 69.

89. See *supra* notes 70–71.

90. The guidelines on observer status in the WTO are, however, relatively restrictive and subject to criticism also among the WTO membership. *Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council*, WTO Doc. WT/L/161, Annex 3 (July 25, 1996).

91. *Id.* at para. 8.

92. Feichtner, *supra* note 67, at 625–27.

93. See Council for Trade-Related Aspects of Intellectual Prop. Rights, *Minutes of Meeting*, para. 47, WTO Doc. IP/C/M/38 (Feb. 5, 2003); Council for Trade-Related Aspects of Intellectual Prop. Rights, *Minutes of Meeting*, para. 5, WTO Doc. IP/C/M/37 (Oct. 11, 2002); Council for Trade-Related Aspects of Intellectual Prop. Rights, *Minutes of Meeting*, paras. 124–27, WTO Doc. IP/C/M/36 (July 18, 2002).

94. See OREN PEREZ, ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM. RETHINKING THE TRADE AND ENVIRONMENT CONFLICT 100–05 (2004) (discussing the role of NGOs in providing nonpoliticized information to the WTO).

lower organs; in the case of the Philippines' request of a waiver to legalize quantitative restrictions on rice imports, these organs were the Council for Trade in Goods and the Committee on Agriculture. While the meeting minutes of the General Council and the Council for Trade in Goods are published (as are the minutes of the Council for Trade in Services and the TRIPS Council), the Committee on Agriculture's minutes are not. Yet even where minutes are published, they are not always informative with respect to members' positions on waiver requests, as most debates take place in informal meetings and bilateral negotiations. It is those negotiations that are frequently (as in the Philippines' case) decisive for the eventual success of waiver requests. The resulting intransparency of the waiver process makes it very difficult for external observers to assess objections to a waiver request or to indirectly participate in the debate, for example, by publicly rebutting objections.

There exist, however, two important procedural requirements that may ensure some transparency. One is found in Article IX Paragraph 3(b) of the WTO Agreement. This provision sets out a time limit for the consideration of waiver requests, which is not to exceed ninety days.<sup>95</sup> The rules of procedure of the specialized councils for the GATT, the GATS, and the TRIPS Agreement provide that matters lacking consensus shall be transferred to the General Council.<sup>96</sup> As a consequence, if no consensus is achieved within ninety days in the council initially addressing the waiver request, the issue moves up to the General Council. Referral to the General Council gives waiver requests more visibility. Thus, when no consensus had formed in the Council for Trade in Goods within ninety days of the submission of the initial waiver request by the Philippines, the chairman of the Council for Trade in Goods reported to the General Council on the status of the waiver process.<sup>97</sup> The placing of the waiver request on the agenda of the General Council afforded the Philippines the opportunity to present to the General Council the reasons why it requested the waiver.<sup>98</sup>

The other avenue to enhance the transparency of waiver processes is the annual review of waivers. Article IX Paragraph 4 of the WTO Agreement provides that “[a]ny waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates.” In practice, these

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95. In practice, this requirement does not always lead to a timely consideration. For example, the consideration of the European Community's request for a waiver for trade preferences granted under the Cotonou Agreement was substantially delayed because members opposing the waiver argued that the request did not meet the procedural requirements. See Council for Trade in Goods, *Minutes of the Meeting*, WTO Doc. G/C/M/44 at 18 (Oct. 30, 2000).

96. See, e.g., General Council, *Rules of Procedure for Meetings of the Council for Trade in Goods*, WTO Doc. WT/L/79, Rule 33 (Aug. 7, 1995).

97. General Council, *Minutes of the Meeting*, para. 167, WTO Doc. WT/GC/M/137 (Sept. 13, 2012).

98. In this case, the General Council agreed to allow the Council for Trade in Goods to continue consideration of the Philippines's request and to report back once it had concluded the matter. *Id.* at para. 170.

reviews are conducted by the General Council. For a member that wishes to request an extension of a waiver, these reviews offer an opportunity to report on the implementation and effects of the measure for which the waiver was granted. Moreover, such reports may have an impact on the assessment of future waiver requests. For example, the positive account of Mongolia's experience with export duties on cashmere, which were legalized by a waiver,<sup>99</sup> may provide arguments in favor of the adoption of further waivers to legalize export restrictions in order to promote the establishment of processing industries for natural resources in developing countries.<sup>100</sup>

### C. Reinstatement of the GATT Working Party Procedure

The transparency of waiver processes and the likelihood that waiver requests are addressed in a multilateral debate could be significantly increased if the WTO returned to the working party procedure of the GATT. Under the GATT of 1947, it was common practice that, upon the submission of a waiver request, a working party was established. Participation in the working party was open to all interested contracting parties.<sup>101</sup> Usually, the working party, after a question-and-answer process and consideration of the request, issued a report that was drafted by the Secretariat. This working party report listed all relevant documents, including the request and relevant domestic legislation. It summarized the position of the requesting contracting party as well as the opinions formed in the working party, giving a detailed picture of diverging views on factual, policy, and legal questions. Annexes to the working party report included relevant documents and—unless the working party was of the view that the requested waiver should not be adopted—a draft waiver decision. When the working party was of the view that a request should be granted, it recommended adoption of a waiver to the CONTRACTING PARTIES.<sup>102</sup>

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99. *Mongolia*, WT/GC/W/638.

100. Although WTO law prohibits export quotas, it generally does not prohibit export duties. Yet prohibitions of duties on raw materials exports have been included in a number of accession protocols, such as the one for Mongolia.

101. The Working Party that examined the U.S. request for a waiver of Article I GATT of 1947 with respect to CBERA preferences was open also to CBERA-eligible beneficiary countries who were not GATT contracting parties. Report, *Working Party on United States Caribbean Basin Economic Recovery Act (CBERA)*, para. 2, GATT Doc. L/5708 (Oct. 26, 1984). Generally excepted from this practice to examine waiver requests in working parties were requests concerning the adaptation of GATT schedules to the Harmonized System. Because these waiver decisions were routinely and frequently granted, they were considered by the GATT Committee on Tariff Concessions but not by specially established working parties. When the European Community requested a waiver for trade preferences to be granted to trading partners of the former German Democratic Republic after German unification, it opposed the establishment of a working party for time reasons. This prompted critique by the United States, which asked other contracting parties to support its request for the establishment of a working party as a precondition to any decision on a waiver. See Council, *Minutes of Meeting*, GATT Doc. C/M/246, 6 (Nov. 23, 1990). When the European Community nonetheless requested a vote on the waiver decision, the United States voted against it. After the adoption of the waiver decision, a working party was established to examine the preferences legalized by the waiver decision.

102. In a few instances, working parties did not recommend the adoption of a waiver. In two cases

The working party reports were formally adopted by the CONTRACTING PARTIES and published.<sup>103</sup> They constitute an important documentation of the reasons and objectives justifying the waiver request, the views of individual contracting parties with respect to the waiver in question, the interpretation by the working party of the legal requirements of the waiver competence, and general waiver practice. Yet with the establishment of the WTO and the adoption of the consensus practice with respect to waiver decisions, the GATT's working party practice was largely abandoned. Only once was a working party constituted in the WTO to consider a waiver request, namely the request by the European Community and African, Caribbean, and Pacific states in 2001 for a waiver for trade preferences granted under the Cotonou Agreement.<sup>104</sup>

Reinstating the working party procedure would enhance the likelihood that the reasons that support a waiver request, as well as the objections against granting a waiver, are tested in a multilateral debate. Article IX Paragraph 4 of the WTO Agreement demands that a waiver decision "state the exceptional circumstances justifying the decision." Currently waiver decisions are not very elaborate in this respect. Yet if waiver requests were debated in a working party, the reason-giving requirement would gain importance as the working party would need to document in its concluding report the reasons for waiver requests and how it discussed and evaluated them.

In case a waiver request concerns measures based on development policy or particular poverty-alleviation programs, the requesting member could include in its request the opinions of experts from NGOs or other international institutions. On this basis, an inclusive, transparent, and reasoned debate could test whether the waiver request is indeed broadly supported within the requesting WTO member state or, rather, is backed by narrow special interests. A similar argument was made by Kenneth Dam with respect to the U.S. request for a waiver of Article I Paragraph 1 of the GATT of 1947 to allow the economic integration of the Canadian and U.S. car industries.<sup>105</sup> A principled examination of the waiver request would have revealed, according to Dam, that

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the requesting member withdrew the request. The European Community withdrew its request for a waiver to legalize preferences for citrus fruit, *Report of the Working Party on Citrus Fruit*, GATT Doc. L/3281 (Dec. 5, 1969), and Greece withdrew its request to legalize preferences for steel from the Soviet Union, *Report of the Working Party on Greek Tariff Quotas*, GATT Doc. L/3447 (Oct. 14, 1970). In the other two instances, the United States proceeded to put its requests for the Automotive and CBERA Waivers to a vote by the CONTRACTING PARTIES who adopted waiver decisions. *Caribbean Basin Economic Recovery Act*, GATT Doc. L/5779 (Feb. 20, 1985). *United States Imports of Automotive Products*, GATT Doc. L/2528 (Dec. 28, 1965).

103. Working party reports were published in the Basic Instruments and Selected Documents Supplements.

104. Council for Trade in Goods, *Minutes of the Meeting*, para. 3.1, WTO Doc. G/C/M/53 (Nov. 14, 2001).

105. CONTRACTING PARTIES, *United States Imports of Automotive Products*, GATT Doc. L/2528 (Dec. 28, 1965).

the measures in question benefited the car industry, but that they did not reduce prices for the benefit of consumers. He goes on to state,

One may . . . suspect that if the GATT waiver exercise had been more serious and more penetrating, and if, to take the suggestion one step further, there had been an independent international body to examine from an overall point of view the implications of the agreement, there might have been more vocal and effective criticism of the preferential arrangement within the United States and Canada.<sup>106</sup>

It might, thus, be argued that the examination of a waiver request by a working party may even have a democracy-enhancing effect domestically.

Assessment of waiver requests by working parties would also impose some discipline on members objecting to a waiver. They no longer would have the option to just veto a waiver, but would instead be forced to verbalize their objections. Through publication in the report, these objections would be exposed to scrutiny and critique beyond the working party. Arguably, objections merely based on particularistic concerns of individual members would be less likely to stand scrutiny than objections that address the implications of a waiver for the realization of WTO objectives.

Finally, the documentation of the debates on waiver requests in working party reports would provide guidance for future waiver examinations. It would strengthen the precedential effects of waiver processes by creating a justificatory burden for future processes. Even though there is no legal obligation to treat like waiver requests alike, documented waiver practice might give rise to an expectation among the membership that the WTO does not deviate from its practice without good reasons.

#### D. Return to Voting on Waivers

A final reform proposal concerns the adoption of waiver decisions by vote. The WTO Agreement does not prohibit voting on waivers—an exception being waivers of obligations that are subject to a transitional period or a period for staged implementation which require consensus.<sup>107</sup> The General Council decision of 1995 on decisionmaking on accessions and waivers, which states that waiver decisions shall be adopted by consensus, clarifies that a WTO member may request a vote at the time the decision is taken.<sup>108</sup> Therefore, the General Council could return to the GATT practice of voting on waivers. A return to voting could make the waiver process more responsive to members' collective preferences as decisionmaking by majority vote would prevent individual members from obstructing the adoption of waivers with their veto.<sup>109</sup>

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106. DAM, *supra* note 23, at 50.

107. WTO Agreement, *supra* note 3, at art. IX, para. 3 n.4.

108. Statement by the Chairman, *Decision-Making Procedures Under Articles IX and XII of the WTO Agreement*, WTO Doc. WT/L/93 (Nov. 4, 1995).

109. As the waiver does not foreclose the admissibility of nonviolation complaints, outvoted members that incur actual damages due to a measure legalized by a waiver could seek redress under the nonviolation procedure. See Feichtner, *supra* note 1 at 259–70.

## VI CONCLUSION

This article lays out the subsidiarity potential of the WTO's waiver power in Article IX Paragraph 3 of the WTO Agreement, namely its potential to enhance the responsiveness of the WTO to societal preferences without endangering the objective of multilateral trade discipline. The features of the waiver power—that any WTO member can request a waiver, that the measures or situations for which waivers can be granted are not prescribed, and that waiver requests are considered by the political organs of the WTO—make the waiver a particularly attractive instrument from a subsidiarity perspective. Whenever there exists a strong collective preference within a WTO member for a particular measure that might violate WTO law, this member can request a waiver. Thus, the waiver power provides an exit option from WTO law to accommodate societal preferences and highly context-specific democratic experimentation to further economic development. At the same time, the requirement for approval of waiver requests via political procedure ensures that WTO members do not deviate from WTO norms as they wish, but that their requests are instead subject to scrutiny. The waiver process provides an opportunity for WTO members to debate how the borders between the WTO's authority and its members' authority should be drawn. This is a question that, in an organization like the WTO that aims at managing the interface between different national and regional economic systems and between trade and nontrade issues, can be settled only temporarily and should remain open to contestation and political deliberation.

Yet to realize the potential of the waiver power to implement subsidiarity in the WTO, the waiver process must be reformed. Only if it becomes more inclusive and transparent, and subjects waiver requests to multilateral debate, can it effectively test both whether individual waiver requests are justified by collective preferences and whether granting a waiver would be compatible with WTO objectives. It would be an important step toward a process more likely to realize subsidiarity were the WTO to revert to the practice under the GATT of 1947 to assess waiver requests in working parties and to adopt waiver decisions by vote.