

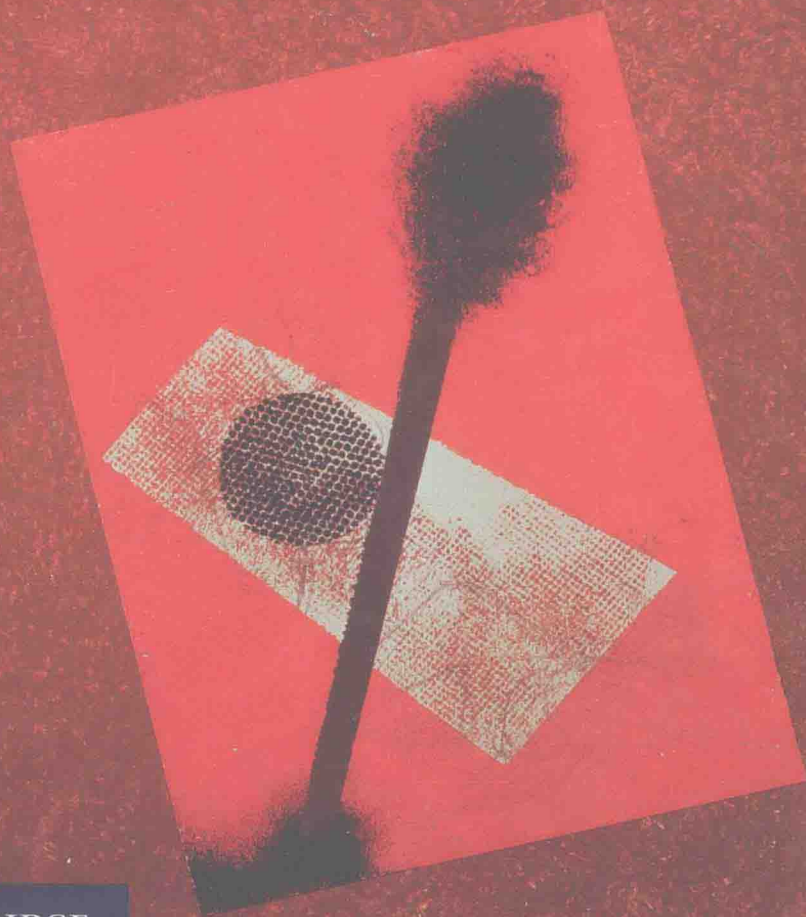
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THE LAW AND POLITICS OF WTO WAIVERS

Stability and Flexibility in
Public International Law

Isabel Feichtner



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ISABEL FEICHTNER



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THE LAW AND POLITICS OF WTO WAIVERS

Despite being an important legal instrument in the law of the WTO, the waiver has hitherto been the subject of little scholarly analysis. Isabel Feichtner fills this gap by challenging the conventional view that the WTO's political bodies do not engage in significant law-making. She systematizes the GATT and WTO waiver practice and suggests a typology of waivers as individual exceptions, general exceptions and rule-making instruments. She also presents the procedural and substantive legal requirements for the granting of waivers, deals with questions of judicial review and interpretation of waiver decisions, and clarifies the waiver's potential and limits for addressing the need for flexibility and adaptability in public international law and WTO law in particular. By connecting the analysis of waiver competence and waiver practice to the general stability/flexibility challenge in public international law, the book sheds new light on the WTO, international institutions and international law.

ISABEL FEICHTNER is Assistant Professor of Law and Economics at Goethe University Frankfurt am Main, Germany.

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The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law

Isabel Feichtner

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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 validity. 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.

