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WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds"

Joost Pauwelyn
Duke University School of Law

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WTO COMPASSION OR SUPERIORITY COMPLEX?: WHAT TO MAKE OF THE WTO WAIVER FOR “CONFLICT DIAMONDS”

Joost Pauwelyn*

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ABSTRACT

In May 2003, the WTO granted a waiver for trade restrictions imposed on WTO members not participating in the Kimberley Certification Scheme combating so-called “conflict diamonds.” This Article examines the implications of this waiver decision. It argues that GATT/TBT provisions may already excuse the trade restrictions at issue, especially now that the UN Security Council has explicitly supported them. The waiver, therefore, risks sending out the wrong signals, confirming a WTO “superiority complex.” At the same time, by excluding restrictions between Kimberley participants from its scope, the waiver implies that WTO members considered the Kimberley scheme to be a non-WTO instrument.

* Associate Professor, Duke University School of Law, formerly with the Legal Affairs Division and Appellate Body Secretariat of the WTO. Many thanks to Lorand Bartels, Steve Charnovitz, Lothar Ehring, Sandy Levinson, Gabrielle Marceau and Joel Trachtman for discussions and comments.
that could play a role before a WTO panel. This convergence of the WTO treaty with other instruments of international law must be applauded. Yet, the same result could have been achieved by other, more conciliatory means, such as an interpretative decision. Referring to other recent examples, the Article concludes that WTO law should not take other international negotiations hostage. The WTO treaty is of equal value as other treaties. “Contracting out” of WTO rules by some WTO members ought to be accepted as long as it does not affect the rights of third parties.

I. INTRODUCTION

Have you seen the latest James Bond movie? Then you probably remember the tragic story of “conflict diamonds.” In Die Another Day, diamonds were smuggled out of conflict-ridden Sierra Leone, in violation of a UN embargo, to be “reprocessed” into Icelandic diamonds and exchanged, finally, for high-tech weapons in North Korea. James Bond, of course, had his way of dealing with it on-screen. In early 2003, the World Trade Organization (WTO) entered the picture in a less dramatic way, yet, for the international lawyer, just as interesting. On May 15, 2003, WTO members granted a waiver for certain import and export restrictions on conflict diamonds. WTO members listed in an annex to the waiver decision (or who subsequently notify the WTO Council for Trade in Goods) are excused for violations of certain articles of the GATT with respect to measures “necessary to prohibit the export [and import] of rough diamonds to [and from] non-Participants in the Kimberley Process Certification Scheme consistent with the Kimberley Process Certification Scheme.” Thus, the waiver thereby explicitly allows countries to enact prohibitions that seem, at first glance, to be

2. Revised Waiver Request, supra note 1, Annex at 3. WTO members listed in the Annex to date are: Australia, Brazil, Canada, Israel, Japan, Korea, Philippines, Sierra Leone, Thailand, United Arab Emirates, United States.
4. Revised Waiver Request, supra note 1.
inconsistent with general WTO rules. The waiver runs for 4 years starting on January 1, 2003.³

The Kimberley Process sets up an international scheme of certification to break the link between the trade in rough diamonds and armed conflict, especially in African countries such as Angola, Sierra Leone, and Liberia.⁶ The scheme sets out a certification requirement for rough diamond exports to, and imports from, participants. Certification requires certain minimum standards and aims to eliminate the presence of conflict diamonds from all shipments to and from participants. Conflict diamonds are:

rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognized in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future.⁷

With respect to trade with countries that do not participate in the Kimberley scheme, participants should “ensure that no shipment of rough diamonds is imported from or exported to a non-Participant.”⁸ Put simply, under the Kimberley scheme, trade between Kimberley participants is restricted to certified non-conflict diamonds only; trade between Kimberley participants and non-participants is prohibited altogether.

The Kimberley scheme was formally adopted on November 5, 2002 in the Interlaken Declaration and became effective on January 1, 2003.⁹ The thirty-nine Kimberley participants reportedly account for 98% of

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5. Pursuant to Article IX:4 of the Agreement Establishing the WTO, however, the waiver needs to be reviewed on an annual basis so as to check “whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met”. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENT—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement]. The latter test may provide interesting debates in the years to come.

6. The Kimberley Process Certification Scheme (Nov. 5, 2002), reprinted in Waiver Request, supra note 1 at 4 [hereinafter Kimberley Scheme].

7. Id. § 1.

8. Id. § III(c).

9. Interlaken Declaration on 5 November 2002 on the Kimberley Process Certification Scheme for Rough Diamonds, reprinted in Waiver Request, supra note 1, at 4 [hereinafter Interlaken Declaration].
production and global trade in rough diamonds. Thirty-seven of the thirty-nine Kimberley participants are also WTO members.

This Article examines what to make of this rather exceptional waiver decision. Was it necessary in the first place? Why is the waiver limited to trade with countries not participating in the Kimberley process? What does this mean for trade restrictions imposed between Kimberley participants? What does it say about the WTO consistency of other trade restrictions taken for humanitarian purposes? Moreover, more generally, what does this episode tell us about how WTO members perceive the relationship between the WTO treaty and other instruments of international law?

The remainder of this Article is structured as follows. Section II details the common sense implications of enacting a waiver. Section III examines why it was decided that the waiver should not apply to trade restrictions between Kimberley participants. Section IV, building on the earlier discussion, asks whether the waiver is to be construed as an act of "compassion" on behalf of the WTO membership or rather proof of what will be described as a WTO "superiority complex." Finally, Section V offers a two-track alternative to the waiver process for WTO members to deal with the relationship between the WTO treaty and other instruments of international law, be it the Kimberley scheme or other legal instruments such as multilateral environmental agreements. The recurring message in this Article is that the WTO treaty should not consistently be used as an excuse to stalemate or water-down negotiations in other fora, be it the Kimberley Process, the International Labor Organization, the WHO Framework Convention on Tobacco Control or the Cartagena Protocol on Biosafety.

II. COMMON SENSE IMPLICATIONS OF ENACTING A WAIVER

Technically speaking, the act of granting a waiver is, of course, not conclusive evidence that a measure benefiting from the waiver otherwise

violates the WTO treaty. Although a waiver was granted, the measure in and of itself could either be: (a) WTO consistent, and then there was no need for a waiver in the first place; or (b) WTO inconsistent, in which case the waiver effectively alters the character of the measure from "illegal" to "legal."

Along these lines, the preamble to the waiver decision notes as follows: "this Decision does not prejudge the consistency of domestic measures taken consistent with the Kimberley Process Certification Scheme with provisions of the WTO Agreement, including any relevant WTO exceptions . . . the waiver is granted for reasons of legal certainty."\(^{13}\)

Nonetheless, once all WTO members decide by consensus to waive WTO obligations for certain measures, it is difficult to resist the following two common sense implications:

1) (Some) WTO members at least feared that the measures for which the waiver was granted are inconsistent with WTO rules; and

2) Closely related measures excluded from the waiver were thought to be consistent with WTO rules (hence, there was no need to include them in the waiver).

In this sense, what the diamond waiver does cover is as important as what it does not cover.

Now, the May 2003 waiver only applies to measures “necessary to prohibit the export [and the import] of rough diamonds to non-Participants in the Kimberley Process Certification Scheme.”\(^{14}\) As a result, common sense would seem to imply that:

1) WTO members feared that restrictions on diamonds from (and to) non-participants in the Kimberley Process could violate WTO rules (hence the need for a waiver), whereas

2) Restrictions between Kimberley participants were thought to be safe for WTO purposes (hence their exclusion from the waiver).

\(^{13}\) Waiver Request, supra note 1, at 2. The request for the waiver confirms that a waiver “will lend legal certainty to the relationship between those measures [outlined in the Kimberley scheme] and the GATT 1994.” \(^{14}\) Id. It is questionable, therefore, whether the waiver request meets the requirement in paragraph 1 of the Understanding in Respect of Waivers of Obligations under GATT 1994 that waiver requests must describe "reasons which prevent the Member [in casu, Kimberley participants] from achieving its policy objectives by measures consistent with its obligations under GATT 1994." Understanding In Respect of Waivers of Obligations, Apr. 14, 1994, GATT, supra note 3, ¶ 1.

\(^{14}\) Waiver Request, supra note 1, ¶ 1–2 (emphasis added).
Especially in this case where the waiver was granted "for reasons of legal certainty,"\textsuperscript{15} restrictions between participants were thus considered not to implicate questions of legal certainty: those restrictions (as opposed to restrictions on non-participants) would survive a challenge before a WTO panel; even a waiver to clear all doubts was thought unnecessary.

III. Why is There No Waiver for Trade Restrictions Between Kimberley Participants?

There can be little doubt that Kimberley certification requirements, once enacted by a WTO member for trade between Kimberley participants, will violate the restriction on quotas as stated in GATT Art. XI. Art. XI outlaws all "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures" on the trade between WTO members.\textsuperscript{16} Now, the very objective of the Kimberley requirements is to ban all trade in a certain type of diamonds, namely conflict diamonds. Rough diamonds that are not certified cannot be traded.\textsuperscript{17} Hence, the presence of a quantitative restriction—an import ban—that is, prohibited under GATT Art. XI.\textsuperscript{18} Regardless of whether the Kimberley scheme is binding law or

\textsuperscript{15} But see id. pmbl. Recall that the preamble to the waiver decision leaves all possibilities open when it "does not prejudge the consistency of domestic measures taken consistent with the Kimberley Process Certification Scheme with provisions of the WTO Agreement." "Domestic measures" are not explicitly limited to those imposed as against non-participants only.

\textsuperscript{16} GATT, supra note 3, art. XI.

\textsuperscript{17} See Kimberley Scheme, supra note 6, § IV(d) (stating that participants "should" (1) "as required, amend or enact appropriate laws or regulations to implement and enforce the Certification scheme", as well as (2) "maintain dissuasive and proportional penalties for transgressions"). The notice from the Kimberly Process Chairman makes this clear when stating that "[d]uring the month of January 2003, Participants are requested not to take punitive action against non-compliance . . . Punitive action shall be exercised as from 1 February 2003." Abbe Chikane, Kimberley Process Chairman, Notice 1/4 to All Kimberley Participants and Observers (Dec. 12, 2002), available at http://www.kimberleyprocess.com (last visited Aug. 28, 2003).

\textsuperscript{18} One commentator expressed the view that the Kimberley scheme would not violate GATT Art. XI since "the applicability of the Article XI is arguably limited to actions of one or another Member, not to a multilateral initiative endorsed by the U.N. The use of the phrase 'any member' in Article XI and throughout the WTO Agreements indicates that the WTO Agreements contemplate that trade measures that violate GATT occur when a certain Member acts unilaterally, or even plurilaterally, but not multilaterally." Tracey Michelle Price, The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate, 12 MINN. J. GLOBAL TRADE 1, 53 (2003).

Of course, the Kimberley scheme as such, independent of the acts taken by WTO Members, does not violate GATT Art. XI. But the scheme does call for the imposition of certain trade restrictions by WTO members and those trade restrictions, once enacted, will violate Art.
merely of a hortatory nature (an issue we address below\textsuperscript{19}), the fact remains that if, and when, a participant enacts restrictions consistent with the Kimberley scheme, such restrictions will violate GATT Art. XI\textsuperscript{20}.

So why was it thought that restrictions as between participants in the Kimberley process would be safe when challenged before a WTO panel (and hence, \textit{not} need a waiver)? Two explanations can be found:

1) The WTO treaty itself justifies restrictions as between participants pursuant to GATT Art. XX and/or XXI and/or the Agreement on Technical Barriers to Trade (TBT);

2) Even if restrictions as between participants would not be justified under the WTO treaty itself, a WTO panel would still excuse them based on the Interlaken Declaration in which all participants adopted the Kimberley scheme.\textsuperscript{21}

A. Are Trade Restrictions Between Kimberley Participants Justified Under GATT Arts. XX/XXI and/or the TBT Agreement?

That trade measures taken pursuant to the Kimberley scheme are justified under GATT exceptions—the first reason that could explain why the waiver does \textit{not} cover trade between participants—was the position taken by a number of WTO members, in particular, the EC.\textsuperscript{22} It was also the view expressed in the first Clean Diamond Act submitted to the US Senate in 2002.\textsuperscript{23}

\textsuperscript{19} See infra text accompanying note 68.

\textsuperscript{20} See GATT, supra note 3, art. XI. In addition to GATT Art. XI, restrictions on conflict diamonds—that is, diamonds originating in a particular country—would also constitute a violation of the most-favored-nation principle in GATT Art. I, as it constitutes discrimination between WTO members.

\textsuperscript{21} A third explanation for the limited scope of the waiver, of a political rather than a legal nature (but for that reason not less plausible), could well be that Kimberley participants did not fear or even envisage that other Kimberley participants would challenge Kimberley restrictions before the WTO. For all practical purposes, it was felt that there was no need for a waiver between participants. Be this as it may, the legal implications of, and other signals sent out by, the limited scope of the waiver described below remain.

\textsuperscript{22} See WTO Goods Council Approves Kimberley Process Waiver, supra note 10 ("The main disagreement stemmed from the fact that some countries did not see the need for a waiver, as they considered GATT Article XXI (Security Exemptions) to cover issues such as the Kimberley Process"); Press Release, European Union, EU welcomes WTO green light for Kimberley System to block blood diamonds (May 15, 2003), at http://europa.eu.int/comm/trade/issues/bilateral/regions/ACP/pr160503_en.htm ("[T]here is no reason to believe that a conflict between WTO rules and UN activities would have occurred").

In particular, GATT Art. XXI(c) seems to justify Kimberley restrictions. Art. XXI(c) reads as follows: “Nothing in this Agreement shall be construed . . . (c) to prevent any WTO member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”

The question of conflict diamonds has been in the hands of the UN Security Council for almost five years now. Each time, acting under Chapter VII of the UN Charter (on “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”), the UN Security Council has imposed embargoes on conflict diamonds from Angola, Sierra Leone, and Liberia. All UN members must comply with such embargoes. Unlike the Kimberley scheme—which, as will be discussed later, includes hortatory language—UN embargoes are legally binding. Moreover, as UN Charter obligations, trade restrictions imposed by the Security Council prevail over any other international agreement, including the WTO treaty. Pursuant to Art. 103 of the UN Charter, UN Charter obligations preempt all other international agreements.

Trade Organization to take measures to deal with situations such as that presented by the current trade in conflict diamonds without violating their World Trade Organization obligations’). But see The Clean Diamond Act, supra note 11. Subsequently, the United States was one of eleven WTO members requesting the waiver. The Clean Diamond Act that Congress passed in April 2003, which the President signed in July 2003, no longer refers to the GATT consistency of measures to combat conflict diamonds. Rather, it explicitly refers to the waiver that is pending at the WTO and even makes the effective date of the Act dependent on the date that the WTO waiver enters into force.

24. GATT, supra note 3, art. XXI(c).
26. UN CHARTER ch. VII.
28. See infra text accompanying note 68.
29. See U.N. CHARTER art. 103 (stating “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall
Article XXI(c) merely confirms this preeminence of UN Security Council obligations. Since the Kimberley scheme trade restrictions are limited to conflict diamonds "as described" by the UN Security Council and "as understood and recognized by" the UN General Assembly, it would, indeed, be more than likely that a WTO panel excuses those restrictions as "action in pursuance of . . . obligations under the United Nations Charter for the maintenance of international peace and security" in the sense of GATT Art. XXI(c). After all, the Kimberley process was initiated by the United Nations and both the UN General Assembly and the Security Council have explicitly supported the Kimberley scheme. Most recently, in a January 28, 2003 resolution, the Security Council noted "the decision made at the 5 November 2002 Interlaken Declaration on the Kimberley Process Certification Scheme for Rough Diamonds" and decided that it "[s]trongly supports the Kimberley Process Certification Scheme, as well as the ongoing process to refine and implement the regime, adopted at the Interlaken Conference as a valuable contribution against trafficking in conflict diamonds and looks forward to its implementation . . .".

Understanding this hierarchical relationship between UN Charter obligations and the WTO, could one really expect a WTO panel to second-guess a plethora of UN resolutions and decide for itself that trade restrictions called for in the Kimberley scheme are not "action in pursuance of . . . obligations under the United Nations Charter for the maintenance of international peace and security"?

In addition, arguments can be made that Kimberley trade restrictions are justified also under GATT Art. XXI(b)(ii) and (iii). Art. XXI(b)(ii), for example, justifies measures "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of prevail"). This priority clause was confirmed by the ICJ with respect to Security Council resolutions in Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Accident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), 1992 I.C.J. 1,114 (Apr. 14) (Request for Provisional Measures).


32. Id. ¶ 1.

33. That WTO rules must, in this sense, give way to certain U.N. Security Council resolutions, is confirmed also in the recent Clean Diamond Act, the U.S. implementing legislation for the Kimberley scheme. See The Clean Diamond Act, supra note 11. Section 15 of the Act links the "effective date" of the Act to the date that either the WTO waiver enters into effect or "an applicable decision in a resolution adopted by the United Nations Security Council pursuant to Chapter VII of the Charter of the United Nations is in effect". Id. ¶ 15. Given the word "or", the Act could, therefore, enter into force even without the WTO waiver.
supplying a military establishment.” The Kimberley Process would seem exactly this type of measure. The UN, in a long series of resolutions, has explicitly recognized that “conflict diamonds . . . are used by rebel governments to finance their military activities including attempts to undermine or overthrow legitimate governments.” As the Interlaken Declaration points out, trade in conflict diamonds “can be directly linked to the fuelling of armed conflicts . . . and the illicit traffic in, and proliferation of, armaments especially small arms and light weapons” (remember the Bond movie!). As a result, blocking the trade in conflict diamonds could be seen as a measure “relating to the . . . traffic in other goods and materials [diamonds] as is carried on directly or indirectly for the purpose of supplying a military establishment.” To meet GATT Art. XXI(b) conditions, Kimberley restrictions would then also have to fulfill the chapeau of Art. XXI(b). That is, the regulating member must “consider[] [the restriction] necessary for the protection of its essential security interests.” However, the language of this chapeau gives considerable discretion to a particular member to define “its essential security interests.” In this case, where the UN Security Council has already acted under Chapter VII, one could even argue that the security interests of most, if not all, WTO members are at stake: conflict diamonds fuel armed conflict, especially in Africa; hence, banning their trade should help maintain international peace and security. Moreover, recent reports have linked the trade in conflict diamonds to Al Qaeda, thereby extending the security threat of conflict diamonds well beyond Africa. This connection with international terrorism can only embolden the argument that a ban on conflict diamonds is, indeed, action “necessary for the protection of essential security interests” of many WTO members.

In addition to security concerns expressed in GATT Art. XXI, the general exceptions in GATT Arts. XX(a) and (b) may also apply. These provisions excuse measures “necessary to protect public morals” and “human . . . life or health.” Although it may be more difficult to justify

34. GATT, supra note 3, art. XXI(b)(ii).
36. Interlaken Declaration, supra note 9, pmbl.
the Kimberley restrictions under Art. XX than it is to excuse them under Art. XXI (discussed earlier), the argument could be made that since conflict diamonds sponsor violent wars and systematic and gross human rights violations, a WTO member should be permitted to keep those diamonds out of its market, be it to protect the health and life of people in Africa or to protect “public morals” in the importing country itself, that is, by means of a trade restriction targeted at a practice that is shocking to, for example, US (as well as, arguably, global) public morality. The Art. XX(b) defense, in particular, could be more difficult to sustain since the human life and health that would then be “protected” is located outside the territory of the regulating country (that is, the life and health of victims of armed conflicts in Africa). This would raise intricate questions of whether Art. XX has such extra-territorial reach and covers trade restrictions based on so-called “process and production methods” (PPMs)\textsuperscript{39}, as opposed to restrictions based purely on the physical features of the products kept out (for instance, a technical regulation on the size, color or weight of the diamonds).\textsuperscript{40} An additional complexity is that trade restrictions on conflict that diamonds are not even traditionally understood PPMs, but relate to features even further removed from the physical characteristics of the traded product itself (here, the diamonds). Indeed, conflict diamonds are banned not based on how they were produced (the way traditional PPMs operate), but on who mined or sold them and how the profits procured by the diamonds were used. After all, the distinguishing feature of conflict diamonds is that they are “used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments.”\textsuperscript{41} Note, in this respect, the EC is currently defending a type of PPM restriction in a WTO dispute brought by India against drug, environment and labor rights-related conditions built into the EC's generalized system of preferences (GSP), that is, the EC system set up to grant trade preferences, in particular tariff reductions, to developing countries.\textsuperscript{42} India’s view is that such conditioning of trade, based on non-trade policies in the exporting country (for instance, does the exporting country sufficiently respect the environment or labor rights and does it cooperate in the battle against illegal drugs?), is unjustified.

\textsuperscript{39} For example, how and in what circumstances were the diamonds mined?
\textsuperscript{41} Kimberley Scheme, supra note 6, § 1.
\textsuperscript{42} WTO Secretariat, European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, Constitution of the Panel Established at the Request of India, WT/DS246/5 (Mar. 6, 2003).
discrimination between developing countries. This ongoing procedure may explain why the EC was one of the WTO members most vehemently defending the GATT legality of the Kimberley scheme since if one takes the view that Kimberley restrictions need a waiver, one may imply that also more traditional PPMs or GSP conditionalities are inconsistent with WTO rules absent an explicit waiver.

Finally, in the event trade restrictions implementing the Kimberley scheme were found to be “technical regulations” in the sense of the TBT Agreement, WTO members enacting trade restrictions “in accordance with” this scheme may benefit from a presumption of TBT consistency. This would, however, raise the controversial question of whether Kimberley certification requirements and other trade restrictions lay down “product characteristics or their related process and production methods” as required in the definition of “technical regulation” in Annex 1.1 of the TBT Agreement. If so, Article 2.5 of the TBT Agreement provides that “[w]henever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2 [which includes “national security requirements” and “protection of human health or safety”], and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.”

For purposes of Article 2.5, Kimberley requirements could, indeed, be regarded as “relevant international standards.” As the panel on EC—Sardines found, for TBT purposes, “[i]nternational standards are standards that are developed by international bodies.” Does the Kimberley scheme set out “standards” and is the Kimberley process an “international body”? First, the word “standard” is defined in Annex 1.2 as: “Document approved by a recognized body, that provides, for common and repeated use, rules,
guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.\textsuperscript{48} Hence, the fact that the Kimberley requirements are not mandatory could make them “standards” in the TBT sense and, ironically, somewhat more important for TBT purposes since only compliance with international “standards” offers a presumption of TBT conformity. Second, the word “international body” is defined in Annex 1.4 as: “Body or system whose membership is open to the relevant bodies of at least all Members.”\textsuperscript{49} Section VI.8 of the Kimberley scheme explicitly states, “[p]articipation in the Certification Scheme is open on a global, non-discriminatory basis to all Applicants willing and able to fulfill the requirements of that scheme.”\textsuperscript{50} As a result, membership in the Kimberley Process “is open to the relevant bodies of at least all [WTO] Members.” Consequently, Kimberley requirements could well qualify as “international standards” triggering a presumption of TBT conformity.

The above reasons could explain why WTO members, when enacting the waiver, excluded restrictions on trade between Kimberley participants: those restrictions were already justified under WTO rules. Then—comes the obvious question—would these same GATT/TBT justifications not also justify restrictions against non-participants? Put differently, if one is of the view that Kimberley restrictions between participants are GATT consistent, what makes the same restrictions against non-participants so different that they need a waiver?

B. If Restrictions Against Participants Are GATT Consistent, Why Are Not Restrictions Against Non-Participants Consistent as Well?

Compliance of diamond restrictions with GATT Arts. XX and/or XXI should, in principle, not depend on whether the WTO member subjected to the restriction is also a participant in the Kimberley process. Rather, in those cases, compliance is determined through the very words in Arts. XX and XXI,—by more or less objectively verifiable factors of health protection, the involvement of national security interests, arms trafficking, requirements in UN Security Council resolutions, etc. Applied to the conflict diamonds situation, all of these factors have to do

\textsuperscript{48} TBT Agreement, supra note 45, Annex 1, § 2 (emphasis added).
\textsuperscript{49} Id. Annex 1, § 4.
\textsuperscript{50} Note also that in the event the TBT Agreement justifies a measure prohibited under GATT, a “conflict” arises which must be resolved in favor of the TBT Agreement pursuant to the General Interpretative Note to Annex 1A. Multilateral Agreements on Trade in Goods, WTO Agreement, supra note 5, Annex 1A. See Joost Pauwelyn, Cross-agreement Complaints Before the Appellate Body: A Case Study of the EC—Asbestos Dispute, 1 WORLD TRADE REV. 63 (2002).
with the importing country and the nature or origin of the diamonds in question, not with whether the exporting country is part of the Kimberley scheme. Neither GATT Art. XX nor Art. XXI depend on the existence of a bilateral or multilateral agreement with the specific country one is trading with to determine the GATT consistency of a trade restriction. GATT Arts. XX and XXI also permit trade restrictions when no international agreement exists between two trade partners. That is, after all, the very reason why these provisions are there, namely to allow countries to restrict trade under certain conditions, such as national security, health, etc., even if other countries do not perceive these risks in the same way.

Most importantly, for purposes of GATT Art. XXI(c) discussed earlier, the Kimberley scheme itself includes both restrictions on participants and the ban on all trade with non-participants. This scheme was initiated and explicitly supported by both the UN Security Council and the UN General Assembly. As a result, even if there remains a difference between the trade restrictions imposed on participants and non-participants (in effect certified trade is permitted between the former and no trade at all is allowed with the latter), this difference could, through the Kimberley scheme, be said to be included in the “action” that is required “in pursuance of [WTO members’] obligations under the UN Charter for the maintenance of international peace and security” in the sense of GATT Art. XXI(c). Hence, it could be argued, Art. XXI(c) justifies restrictions on non-participants as much as it justifies restrictions on participants.

Turning to the alternative defense under GATT Art. XX and the question of whether this defense may also justify restrictions on non-participants, the only instance in which the existence of bilateral or multilateral negotiations with the exporting country (here, the non-participants) could come into play is the chapeau of Art. XX. This introductory phrase in Art. XX—a phrase that is, crucially, not included in Art. XXI (which is, after all, the best defense for conflict diamond restrictions)—prohibits “arbitrary or unjustifiable discrimination between countries where the same conditions prevail.” The Appellate Body in _US—Shrimp_ considered that the failure to engage countries “in serious across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection” of the objective that one is concerned about (in _US—Shrimp_, sea turtles; here, breaking

52. GATT, _supra_ note 3, art. XXI(c).
53. GATT, _supra_ note 3, _Id._ art. XX, introductory paragraph.
the link between conflict diamonds and brutal violence), could constitute discrimination against particular WTO members thus left out of negotiations. When it comes to the elaboration of the Kimberley scheme, however,—a process initiated by the United Nations and open to all countries—it would be difficult to conclude that any WTO member was left out. As the second Appellate Body in US—Shrimp found, the regulating country has to “provide all exporting countries ‘similar opportunities to negotiate’ an international agreement” and is “expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other.” The universal scope and repeated appeal by both the UN Security Council and General Assembly for all countries to participate in the Kimberley Process make it difficult to conclude that any WTO member was discriminated in terms of good faith efforts to reach agreement on an international certification scheme for conflict diamonds. After all, as the Appellate Body noted, the good faith effort to reach an agreement is what counts; there is no requirement that a multilateral agreement actually be concluded before one can validly impose Art. XX measures. If one were to impose such a requirement, the Appellate Body added, this “would mean that any country party to the negotiations with the [regulating country], whether a WTO Member or not, would have, in effect, a veto over whether the [regulating country] could fulfill its WTO obligations.”

Hence, under GATT Art. XX as well, it could be argued that the fact that a WTO member is not a Kimberley participant should not stop WTO members from banning conflict diamonds imported from, or exported to, such non-participant. In that sense, a conflict diamond is a conflict diamond, no matter where it comes from or goes to.

57. Id.
58. Section VI, paragraph 8 of the Kimberley scheme, as adopted in Interlaken, states as follows: “Participation in the Certification Scheme is open on a global, non-discriminatory basis to all Applicants willing and able to fulfill the requirements of that scheme.” Kimberley Scheme, supra note 6, ¶ VI, ¶ 8.
59. The preamble to the Interlaken Declaration states: “Emphasising that the widest possible participation in the Certification Scheme is essential and should be encouraged and facilitated. To that end, we invite all those involved in the trade in rough diamonds to join the Process without delay and if possible before 1 January 2003.” Interlaken Declaration, supra note 9, pmbl. Similar language is set out in paragraph 3 of U.N. S.C. Res. 1459, supra note 31.
60. U.S.—Shrimp—Recourse, supra note 56, ¶ 123.
61. Since non-participants do not certify their diamonds, no diamonds from non-participants can be conclusively proven to be conflict-free; hence, all trade with
The same could be true for the TBT defense outlined earlier: trade restrictions “in accordance with” Kimberley requirements—which could be characterized as “relevant international standards”—offers WTO members a presumption of consistency with the TBT Agreement. However, this presumption is triggered regardless of the Kimberley requirement that a WTO member imposes, be it one against participants or against non-participants. Both of these requirements are spelled out clearly in the Kimberley scheme. Hence, both could be “international standards” and equally justified for TBT purposes.6

Consequently, the case could be made that Kimberley restrictions both between participants and against non-participants are WTO-consistent, irrespective of a waiver, in particular, because GATT Art. XXI(c) permits “action” that is required “in pursuance of [WTO members’] obligations under the UN Charter for the maintenance of international peace and security.”63 As a result, the first reason that may explain why the waiver only covers trade with non-participants—namely, restrictions as between participants were considered as WTO consistent, while those against non-participants were not—seems to be in doubt. In terms of WTO consistency, there seems to be little difference between restrictions on participants and those on non-participants. Hence, if WTO members really wanted to offer legal certainty with the waiver, why did they not apply it equally to both types of restrictions? This indicates that there may have been other reasons to distinguish restrictions on participants from those on non-participants. This leads us to the second reason that could explain why the waiver only covers trade with non-participants: the Interlaken Declaration as an independent defense to be invoked before a WTO panel.

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non-participants must be banned. If not, the entire scheme would collapse, since anyone could simply import, export or even re-export conflict diamonds from, or to, any non-participant and thereby circumvent the entire certification scheme. In order to re-enter the diamond trade, non-participants would have to abide by international certification requirements. As a result, all WTO members can continue to trade in diamonds without discriminating against anyone.

62. An additional question that may then arise is whether a complete ban on diamonds from non-participants still qualifies as a “technical regulation.” The Appellate Body in EC-Asbestos, overturning the Panel, found that an import ban on asbestos fibers cannot be examined in isolation of exceptions to this ban, but must be assessed rather as an “integrated whole” under the TBT Agreement. See EC—Asbestos, supra note 45, ¶ 64. At the same time, the Appellate Body also seemed to imply that a pure ban, without any further regulation, may not be a “technical regulation” falling under the TBT Agreement, stating: “This prohibition on these [asbestos] fibres does not, in itself, prescribe or impose any ‘characteristics’ on asbestos fibres, but simply bans them in their natural state. Accordingly, if this measure consisted only of a prohibition on asbestos fibres, it might not constitute a ‘technical regulation.’” Id. at ¶ 71 (emphasis in original).

63. GATT, supra note 3, art. XXI(c).
C. Does the Waiver Exclude Trade Between Participants
Because it Was Thought that as Between Participants
the Interlaken Declaration Itself Would
Justify Any WTO Violation?

Could the exclusion from the waiver of restrictions between participants be explained by another reason: a growing acceptance that a WTO panel would accept trade restrictions between participants based on the Interlaken Declaration itself (and this even if those restrictions would not be justified under WTO rules as such)? In other words, did WTO members worry about the WTO conformity of both Kimberley restrictions on participants and non-participants? And did they only stop worrying about restrictions on participants, not because of some distinction under WTO rules themselves (as we pointed out, for purposes of WTO consistency, the two types of restrictions seem little different), but because those restrictions had already been explicitly accepted by WTO members that are also Kimberley participants in the Interlaken Declaration. As a result, there was no further need to confirm this acceptance in the WTO waiver.

This raises the question of whether WTO panels could refer to a non-WTO treaty or declaration as an excuse not to abide by WTO rules. Put differently, if a WTO panel were to find that Kimberley restrictions between participants violate WTO rules and cannot be excused under any GATT/TBT exception (contrary to our earlier analysis), could that panel still find that the WTO violation is justified based on another, non-WTO instrument agreed upon by both disputing parties, in this case, the Kimberley scheme as it applies between participants? Elsewhere, I have argued that WTO panels should be permitted to do so, as long as three criteria are met: 1) the non-WTO instrument was agreed upon by both disputing parties; 2) the restriction does not affect the rights and obligations of third parties; and 3) the subsequent international agreement can be said to prevail over the WTO treaty either as the later in time or the more specific norm dealing with the particular facts.64 In the present case, the outcome would be that after agreeing to trade restrictions in the Kimberley scheme, one Kimberley participant couldn’t revert to the WTO to sue another Kimberley participant who implemented that scheme, only to seek the withdrawal of a restriction both parties just agreed to.

However, under this line of thinking, there is a crucial distinction between Kimberley restrictions on participants and non-participants: the Interlaken Declaration can only be invoked as a defense against WTO

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members that agreed to the declaration in the first place; it cannot be relied upon against a WTO member that did not accept it. Hence, the Interlaken Declaration offers an excuse for restrictions on participants, not for restrictions on non-participants. This may, in turn, have convinced WTO members to enact the waiver only for trade restrictions on non-participants.\(^6\) If this is indeed what WTO members had in mind, or what must be logically inferred from the waiver, then the waiver constitutes an important recognition of the role of non-WTO instruments before a WTO panel.

Still, two problems arise in construing the Interlaken Declaration as a non-WTO instrument that could override the WTO treaty as between its participants.

First, although the Interlaken Declaration was formally adopted and this declaration, in turn, “adopted” the Kimberley scheme, the “undertakings in respect of the international trade in rough diamonds” use hortatory language, more particularly, the word “should,” instead of “shall.”\(^6\)\(^7\) As a result, it may be difficult to read the Interlaken Declaration as an instrument “contracting out” of certain WTO obligations, in particular GATT Art. XI not to impose quantitative restrictions. How, one could argue, can a prohibition to impose a trade ban (in Art. XI) be “contracted out,” or overruled, by hortatory language (in the Interlaken Declaration) calling upon countries that they “should” ban the trade in non-certified diamonds?

Here is a possible answer: the language in the Interlaken Declaration may not impose legally binding obligations that can be enforced as between participants. In this sense, one participant could trade diamonds with another participant without requiring certification and, strictly speaking, not breach international law. The fact that the “obligations” in the Kimberley scheme are, thereby, not legally enforceable is one thing. An altogether different question is, however, whether the Kimberley scheme may nonetheless confer certain rights (even if it does not impose obligations).

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65. Note that also WTO members who are not participating in the Kimberley process can be added to the list of WTO members that can rely on the waiver. Revised Waiver Request, supra note 1, ¶ 3.

66. Interlaken Declaration, supra note 9, ¶ 1.

67. Kimberley Scheme, supra note 6, ¶ 3.

68. This leads most participants to the conclusion that the Kimberley scheme is “voluntary.” See, e.g., U.S. General Accounting Office, International Trade: Critical Issues Remain in Deterring Conflict Diamond Trade 56 (2002) (including the State Department’s observation of “the voluntary nature of the system . . . Launching the scheme early on a voluntary basis would not preclude future legally binding actions. However, legally binding agreements take significantly longer time to develop and bring into effect.”).
Could it, indeed, not be said that although a participant cannot be “forced” to require certification (since the scheme refers to “should,” not “shall”), a participant who is doing exactly what is called for under the scheme is exercising a right that was explicitly conferred to it? This right under the scheme could then be said to prevail over an earlier, and more general, obligation in the WTO treaty. In sum, although a non-WTO instrument does not impose legally binding obligations, the fact that it calls upon participants to impose certain restrictions could still be construed as the grant of an explicit right that may, pursuant to conflict rules of public international law,69 prevail over an obligation in the WTO treaty. Put differently, should a Kimberley participant, who is involved in a WTO dispute with another participant, not be permitted to insist that although its trade restrictions may violate WTO rules, the other party itself agreed to those trade restrictions when it adopted the Kimberley scheme and cannot now revert to something agreed upon earlier in the WTO? A panel would then give priority to the Kimberley scheme not because it considers that this scheme is, for example, necessary to achieve the objective of national security or protection of human health and life (as it would do under GATT Arts. XXI/XX) but because the complainant, now challenging the restrictions, itself agreed to this scheme in the first place.

A second problem with reading the Interlaken Declaration as a form of “contracting out” of the WTO treaty as between participants, is paragraph 3 of the Interlaken Declaration, which reads as follows: “We will ensure that the measures taken to implement the Kimberley Process Certification Scheme for rough diamonds will be consistent with international trade rules.”70

If participants were engaging in a “contracting out” of the WTO treaty, why would they state that implementation measures must be “consistent with international trade rules”?71

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70. In addition, the Kimberley Process Certification Scheme recognized that “the international certification scheme for rough diamonds must be consistent with international law governing international trade.” Kimberley Scheme, supra note 6, pmbl. See also G.A. Res. 56/263, U.N. GAOR, 56th Sess., 96th plen. mtg., ¶ 5, U.N. Doc. A/RES/56/263 (2002) (emphasizing “the importance of ensuring that the measures taken to implement the international certification scheme for rough diamonds are consistent with international law governing international trade”).

71. Interlaken Declaration, supra note 9, ¶ 3.
One way to explain this apparent contradiction could be to say that paragraph 3 was meant to refer only to trade restrictions against non-participants; that Kimberley participants were worried only about the WTO consistency of those restrictions since they would not be agreed upon by both parties in a WTO dispute (as opposed to the trade restrictions between participants agreed upon under the scheme and hence safely overruling any prior WTO obligation as between participants). After all, paragraph 3 of the Interlaken Declaration does not state that the Kimberley scheme leaves the WTO treaty untouched or must give way to the WTO treaty.\textsuperscript{72} On the contrary, it seems to imply that a problem of WTO consistency may arise in the implementation of the scheme.\textsuperscript{73} Hence, the participants “will ensure that” implementing measures “will be consistent with international trade rules.”\textsuperscript{74} Asking for a WTO waiver, as they did, would seem to be part of the fulfillment of this promise. Hence, the reference in the Interlaken Declaration and other related instruments to rules on international trade, as well as the perceived need for the waiver, confirm that the Kimberley scheme was seen as problematic under WTO rules. However, this, one could argue, is how they resolved the problem: between participants, the Interlaken Declaration itself settles the question; against non-participants, the waiver clears all doubts.

D. Conclusion on the Validity before a WTO Panel of Trade Restrictions Related to Conflict Diamonds

Above, we discussed two possible reasons why the waiver excludes restrictions as between Kimberley participants: (1) WTO rules, in and of themselves, justify those restrictions; (2) if any WTO violation remains,
the Interlaken Declaration excuses them between its participants. We saw that the first reason, on its own, is not very convincing since, given the circumstances, little difference exists in terms of WTO conformity between restrictions on participants and those on non-participants, leaving more or less equal amounts of certainty/uncertainty for both. Hence, if WTO members really wanted to provide legal certainty with the waiver, why did the waiver single out restrictions against non-participants? This led to a potential second reason for the waiver's limited scope: the Interlaken Declaration as an independent defense before a WTO panel. Although there are some problems with this second explanation, given the shaky nature of the first, this second explanation may have carried more weight. If this assessment were correct, then surely the waiver is an important step in the gradual process of WTO members recognizing the independent value of non-WTO instruments before a WTO panel.

In any event, irrespective of why WTO members thought that Kimberley restrictions between participants would survive scrutiny before a WTO panel (and thus left them out of the waiver), it seems unavoidable that this should be the case, notwithstanding their exclusion from the waiver. If not, one would end up with the rather absurd result that restrictions against non-participants are WTO consistent (since falling under an explicit waiver), whereas restrictions between participants are not. In this sense, the waiver does not achieve its stated objective of legal certainty: although, in my view, restrictions between participants ought to survive panel scrutiny, this is not guaranteed. Even with respect to trade with non-participants (the only type covered by the waiver) there is no legal certainty since the waiver does not apply to restrictions imposed by all participants, but only to those that put their name in the Annex to the waiver. So far, only 11 of the 37 participants that are also WTO members have done so.75

Does this mean that all trade restrictions imposed to deal with conflict diamonds are now safe under WTO rules? Surely not. Regarding non-participants, the waiver only covers restrictions “consistent with the Kimberley Process Certification Scheme” imposed by WTO members listed in the annex to the waiver. On the other hand, with respect to participants, the independent defense offered by the Interlaken Declaration itself can only cover restrictions explicitly called for in the Kimberley scheme itself. All other restrictions—not explicitly covered in the waiver or not explicitly called for in the Kimberley scheme—will need to be

75. See supra text accompanying note 2. Recall also that for a WTO member to be listed in the Annex there is no need for it to be a Kimberley participant, see supra text accompanying note 65.
carefully scrutinized especially under GATT Arts. XXI and XX. The waiver decision itself makes it clear that dispute settlement procedures continue to apply. Paragraph 7 states: "This waiver shall not preclude the right of affected Members to have recourse to Articles XXII and XXIII of the GATT 1994." Kimberley participants "can identify and decide on additional verification measures to be undertaken," that is, restrictions not explicitly called for in the scheme. However, according to the scheme, "such measures are to be implemented in accordance with applicable national and international law."

IV. COMPASSION OR SUPERIORITY COMPLEX?

There can be no doubt that WTO members enacted the conflict diamonds waiver for the noblest of intentions. The trade in conflict diamonds is a scourge that must be stopped, both to prevent brutal wars and humanitarian disasters in Africa and to protect the world against terrorism. In this sense, for the WTO to explicitly recognize the importance of putting an end to this trade is surely a humanitarian act of "compassion." It shows the human face of the much-maligned WTO. Systemically, the waiver also demonstrates the widening horizon of WTO negotiators, a horizon that stretches increasingly beyond purely trade and economic matters to include also human values and priorities as they are expressed in instruments negotiated outside the WTO. In this sense, as well, the waiver could be seen as proof that the WTO is "com-passionate" for things happening outside the four corners of the WTO building in Geneva. Moreover, the waiver confirms that the legislative function of the WTO is not completely deadlocked and can actually provide solutions without having to go to dispute settlement. All of this must be applauded.

At the same time, however, it is questionable whether the WTO had to enter into this debate in the first place, especially by way of granting a waiver. It risks sending two wrong signals. First, it seems to imply that without the waiver, trade restrictions on conflict diamonds would be in-

76. Waiver Decision, supra note 1, ¶ 7.
77. Id.
78. Kimberley Scheme, supra note 6, § 6, ¶ 13 (emphasis added).
79. For example, Pascal Lamy, EU trade commissioner, made the following statement in response to the diamond waiver: "The WTO green light should be welcomed as a clear demonstration of coherence among international rules. It shows that WTO rules are sufficiently flexible to accommodate the implementation of a UN mandated activity. Carefully drafted trade measures can and do support development." EU press release, supra note 22.
80. For a recent discussion, see Claus-Dieter Ehlermann, Tensions between the dispute settlement process and the diplomatic and treaty-making activities of the WTO, 1 World Trade Rev. 301 (2002).
consistent with WTO rules. This paper has contested this implication, arguing that WTO provisions may justify restrictions both between Kimberley participants and against non-participants. Beyond the question of conflict diamonds, the presumption of illegality thus raised by the waiver may, more generally, hamper the further development of GATT exceptions, especially to the extent that these exceptions may cover trade restrictions for humanitarian purposes or restrictions based on so-called process or production methods (PPMs).

A second misguided signal implied in the waiver is the presumption that whatever is agreed upon outside the WTO—be it in the United Nations or the Kimberley Process—must still be reconfirmed in the precinct of the WTO itself for it to have any value before WTO organs, as if other instruments of international law can never add to or override the WTO treaty. This relates to what I called in the title of this Article the WTO’s “superiority complex.” I term it a superiority “complex” because I do not honestly believe that either the staff of the WTO secretariat or the government delegates running WTO business are in any way arrogant or feel openly superior. After all, it is the same countries, and sometimes (though not often) even the same delegates, who negotiate both WTO instruments and other instruments outside the WTO. It is, rather, a superiority “complex” in that it is hidden, yet difficult to suppress, causing a constant fear that whatever is agreed upon outside the WTO must be double-checked for consistency with WTO rules, as if WTO rules are somehow of a superior order or norms that cannot be deviated from except by means of a waiver. The conflict diamonds example offers an extreme case of this superiority complex in that it relates to action called for by the UN Security Council, an organ that is recognized as superior not only in Article 103 of the UN Charter but also in Art. XXI(c) of the GATT itself.

However, this WTO superiority complex seems to be reoccurring. It was omnipresent in all recent international negotiations with a trade component, be it the Cartagena Protocol on Biosafety (regarding the international transport of living modified organisms produced through modern biotechnology81), the Kimberley Process, or the WHO Framework Convention on Tobacco Control (imposing, among other things, restrictions on the sale and advertising of tobacco products).82 It is reflected also in the debates concerning the International Labour Organization (ILO) resolution of June 2000 recommending action

82. See FCTC, supra note 12.
against Myanmar/Burma for its persistent violation of core labour standards. In that debate, the question is often raised whether a trade embargo on Myanmar would not be prohibited by WTO rules, as if WTO rules are completely de-linked from, and a fortiori superior to, an explicit and quite unique ILO recommendation to take action (the first since the ILO's inception in 1919!). In the Biosafety Protocol, for example, this superiority complex, viewing WTO rules as almost "constitutional" in nature, combined with an obvious desire to give effect to the new protocol, led to the following much belaboured preambular clauses which effectively cancel each other out: "Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements; Understanding that the above recital is not intended to subordinate this Protocol to other international agreements."  

As I have argued elsewhere, it is wrong to regard WTO provisions as commandments that are written in stone and can only be overcome by a consensus of all WTO members. WTO members must be allowed to "contract out" of WTO provisions or give preference to other instruments that they consider as more important, as long as they do not thereby affect the rights and obligations of third parties. Given the essentially "bilateral" nature of WTO obligations, such "contracting out" without affecting third parties should even be easier and more acceptable under the WTO treaty than it is under other treaties, such as those on human rights or the environment, which are often of an erga omnes partes nature. As a result, WTO members negotiating treaties outside the WTO should not worry about contradicting WTO provisions as long as such contradictions affect only the rights and obligations of WTO members that are party to the new treaty. In this sense, negotiators should stop using the WTO as a scapegoat that allegedly forces them to stalemate or water-down commitments entered into elsewhere.

Fortunately, however (at least for the purpose of bringing together WTO and other instruments of international law), the waiver on conflict diamonds does not cover restrictions between Kimberley participants. This exclusion constitutes an important qualification and may actually neutralize much of the second "wrong signal" described above. Indeed,

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84. Biosafety Protocol, supra note 12, pmbl.

by excluding trade restrictions that had already been agreed upon by some WTO members in the Kimberley Process, the WTO seems to recognize that such agreement—albeit one reached outside the WTO—is sufficient, in and of itself, to overcome any problems of WTO consistency before a WTO panel. If this is the case, the waiver—although generally inspired by the superiority complex described earlier—may, in its details, actually be an important departure from WTO tradition and a crucial first step in healing this WTO malaise.

Another indication that the WTO's superiority complex is under attack can be found in the WHO Framework Convention on Tobacco Control (FCTC), adopted on 21 May 2003.86 The June 2002 draft of this convention included two provisions relevant to its relationship with the WTO treaty (and, following the superiority complex described earlier, giving clear deference to WTO rules).87 First, Article 2.3 provided: "Nothing in this Convention and its related protocols shall be interpreted as implying in any way a change in rights and obligations of a Party under any existing international treaty."88 Second, Article 4.5 stated as follows, "[w]hile recognizing that tobacco control and trade measures can be implemented in a mutually supportive manner, Parties agree that tobacco control measures shall be transparent, implemented in accordance with their existing international obligations, and shall not constitute a means of arbitrary or unjustifiable discrimination in international trade."89

These draft provisions would, therefore, have subjected the new tobacco convention to any pre-existing WTO rules. Once again, the perceived superiority of the WTO treaty seemed poised for triumph. Still, both provisions were deleted from the text in the next draft as well as in the final FCTC convention. In what is, effectively, a complete U-turn, the chair of the intergovernmental negotiating body explained this change as follows:

Although these paragraphs [Articles 2.3 and 4.5] highlight an important issue, there is no need to include them as specific provisions in the framework convention since these matters are adequately addressed by the Vienna Convention on the Law of Treaties. Additionally, the preamble reiterates the paramount importance of health . . . In international law, there is no in-built

86. See FCTC, supra note 12.
88. Id. art. 2.3.
89. Id. art. 4.5.
hierarchy between different types of treaties. This means that in principle, the framework convention on tobacco control, once entered into force will have the same standing as any other international treaty. The relationship between successive treaties dealing with the same subject matter is addressed by customary international law and is in part codified in Article 30 of the Vienna Convention on the Law of Treaties. In the event of a conflict between two treaties that do not contain provisions as to their respective priority, there are two fundamental rules:

1) the more recent treaty will be applied in precedence over the older one; and

2) the more specific treaty will be applied in precedence over the more general one.90

Consequently, instead of explicitly stating the superiority of the WTO treaty over the new tobacco convention (as the June 2002 draft did), the final text of the FCTC confirms the inherent equality between the WTO treaty and the new FCTC. The final text refers to general rules of international law—in particular, the *lex posterior* and *lex specialis* principles—to resolve any conflicts. In essence, in the event a conflict were to arise (an eventuality that is far from certain), the FCTC, being both later in time and more specific (at least to the extent it deals with trade in a specific product, tobacco), will normally *prevail* over the WTO treaty; albeit, of course, only between countries that are party to both treaties.

Though hijacked for quite some time over concerns of its conformity with WTO rules, the FCTC thus offers another crucial indication that the days of perceived WTO superiority may be waning. A more general cure for this complex may be in sight, in the form of a firm recognition that the WTO treaty is just like any other treaty and that a WTO panel, when examining a claim of violation of WTO rules, ought to take cognizance also of norms that the disputing parties agreed upon elsewhere, outside of the WTO, as long as those outside rules do not affect third party rights.

V. A Two-Track Alternative to the Waiver Process

What alternatives did WTO members have in dealing with the conflict diamonds issue? If WTO members really insisted on providing legal certainty that Kimberley restrictions would survive a WTO panel (as noted earlier, an objective they did not fully achieve with the current waiver), they could have chosen the following two-step alternative. This option may also be useful to regulate the interaction between WTO rules and multilateral environmental agreements, a topic currently part of the Doha Round of Negotiations.

First, in the Kimberley scheme itself, participants (all but two of which are WTO members) could have stated explicitly that, in the event of conflict, the Kimberley scheme (as both the later in time and the more specific treaty) prevails over WTO rules. This simply reconfirms the existing rule in case a later treaty remains silent on the issue as did, for example, the WHO tobacco convention discussed in the previous section. The lex posterior rule in Art. 30 of the Vienna Convention, states that the later treaty (in casu, the Kimberley scheme) prevails. Obviously, such a clause would have worked only between participants in the scheme. As noted before, the rights of third parties, in casu the WTO rights of non-participants in the scheme, cannot be affected. Second, in the WTO, instead of granting a waiver, WTO members could have adopted an authoritative interpretation of GATT Art. XXI (or, less likely, of GATT Art. XX). This is, in effect, what WTO members did (in all but form) with respect to certain TRIPS provisions as they relate to the problem of access to essential medicines. In the Doha Declaration on the TRIPS Agreement and Public Health, the WTO membership stated, “the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health . . . in particular, to promote access to medicines for all.” It was agreed, more specifically, that “public health crises, including those relating to HIV/AIDS, tuberculosis,
malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency for which the TRIPS Agreement itself provides exceptions to patent rights. A similar decision could have been made for conflict diamonds. WTO members could have stated simply “measures regulating or prohibiting the export and import of rough diamonds necessary to implement the Kimberley Process Certification Scheme will be presumed to fall under the exception in GATT Art. XXI.”

Importantly, such interpretative decision would cover restrictions, both among participants and against non-participants. Like a waiver decision, it could have been enacted by a three-fourths majority decision pursuant to paragraph 2 (not paragraph 3) of Article IX of the Marrakesh Agreement Establishing the WTO. However, unlike the waiver which implied the existence of WTO violations but for the waiver (thereby confirming the WTO’s superiority complex), an interpretative decision would have sent the unmistakable signal that exceptions in WTO rules already permit trade restrictions to deal with outrageous activities such as extracting money from diamonds to pursue brutal wars and sponsor terrorism. In addition, an interpretation would have offered 100% legal certainty, where (in theory) the waiver, which only covers non-participants, still leaves some doubt (hopefully dispelled in this paper) as to whether the restrictions between participants would survive scrutiny before a WTO panel.

Finally, however, the waiver was, in a sense, the easy way out: by stating that the waiver “does not prejudice the [WTO] consistency of domestic measures taken consistent with” the Kimberley scheme, WTO members avoided taking any explicit position on the WTO consistency of Kimberley restrictions absent the waiver. An authoritative interpretation, in contrast, would have required positive resolve to agree that Kimberley restrictions do fall under GATT exceptions. Yet with more convincing by those countries adamant about the capacity of existing WTO rules to embrace and justify such restrictions, an interpretative decision on conflict diamonds could have contributed to the much needed refinement and development of GATT exceptions (which were, after all,

95. Id., ¶ 5(c).
96. Instead of an interpretative decision to the effect that Kimberley restrictions would fall under GATT exceptions, WTO members could also agree on a conflict clause giving priority to the Kimberley scheme in the event of conflict with WTO rules, along the lines of Article 104 of NAFTA in respect of the relationship between NAFTA and certain multilateral environmental agreements. See North American Free Trade Agreement (NAFTA), Dec. 17, 1992, art. 104, 32 I.L.M. 296, 297–98 (1993). However, such a clause would not seem to cover the problem of possible WTO violation by restrictions on non-participants.
97. WTO Agreement, supra note 5.
written in 1947), this time, not by the WTO judiciary, but by the WTO membership itself. This was a rare opportunity that was missed.

VI. CONCLUSION

The WTO decision to explicitly permit trade restrictions on diamonds from countries not participating in the Kimberley scheme set up to stop the traffic in conflict diamonds is, at first glance, a welcome sign that the WTO cares not only about free trade. Upon reflection, however, the WTO waiver may do more harm than good.

Firstly, there are strong arguments indicating that WTO rules as they stood already justified the restrictions at issue. Hence, granting a waiver has the potential of undermining future trade restrictions imposed for humanitarian purposes if such is done in the absence of a waiver.

Secondly, the Kimberley scheme itself and, in particular, the UN Security Council resolutions that support it are, like the WTO, part of international law. Hence, why was there a need to reconfirm in the WTO what was already decided in other fora? This hints at a certain superiority complex currently in vogue at the WTO. At the same time, however, the diamond waiver only relates to trade with non-participants in the Kimberley scheme. It could, therefore, be argued that between Kimberley participants it was thought that any WTO violation would anyhow be justified with reference to the Kimberley scheme itself. Hence, between participants no waiver was needed. If this interpretation is correct, the limited scope of the waiver constitutes an important recognition that the WTO—including its dispute settlement mechanism—will take account also of non-WTO instruments, in casu the Kimberley scheme and related UN resolutions, even in the absence of an applicable waiver.

EPILOGUE

From April 28–30, 2003, the by then extended group of 52 Participants in the Kimberley scheme held a plenary session in Johannesburg, South Africa. Crucially for the implementation of the scheme, a Participation Committee was established with the task of determining which of the countries that adopted the scheme effectively complied with its minimum requirements, i.e., enacted the laws and regulations required under the scheme to ensure proper certification.1205 On July 31, 2003, a list of 40

countries was released. As of August 31, 2003, only these countries are regarded as Participants in the scheme. All trade in rough diamonds with countries not on this list is considered as trade with non-Participants and must be banned. Importantly, 24 countries that had adopted the scheme did not make the list.

This peculiar implementation mechanism has an important consequence for the thesis in this Article. So far, we assumed that all countries that adopted the Kimberley scheme would be seen as Participants in it. However, with the new list of 40 countries, even countries that adopted the scheme have now been classified as non-Participants—subject to a complete embargo on rough diamonds—on the ground that they failed to meet the minimum requirements in the scheme. This means that there are now two classes of non-Participants: (1) countries that never adopted the scheme in the first place (that is, the class of non-Participants envisaged in this Article); and (2) countries that adopted the scheme but did not make the short-list of 40 countries.

When it comes to the trade embargo to be imposed on the latter class of non-Participants, the arguments made in Section III:B in support of WTO consistency based on explicit WTO exceptions themselves continue to apply. In addition, however, for this second class of non-Participants also the arguments in Section III:C apply, that is, even if the embargo were not justified under WTO rules as such, the Kimberley scheme—as a system of international law that was explicitly adopted by these non-Participants—must offer an independent defense against any claim of WTO violation. As a result, as much as there was no need to adopt a WTO waiver for trade restrictions as between Kimberley Participants, no WTO waiver was needed either for restrictions imposed on the non-Participants that adopted the Kimberley scheme but were subsequently found not to meet minimum requirements. This new development adds to the argument made in the Article that the WTO waiver was not necessary and may undermine the WTO consistency of similar trade restrictions where no waiver was granted. At the same time, it may also weaken the other argument made in the Article, namely that WTO members considered that trade restrictions as between countries that adopted the Kimberley scheme would be covered and justified by relevant legislation and makes its recommendation to the Chair of the Kimberley scheme who, in the end, is left with the final decision to accept or decline an application for Participant status.

99. See Press Release, Global Witness Ltd., Kimberley Process Finally Agrees Membership List But Lack Of Monitoring Undermines Credibility (July 31, 2003), at http://www.globalwitness.org/press_releases/display2.php?id=214 (last visited Sept. 16, 2003). This list is under continuous review and is likely to be expanded as soon as other countries have adopted the required legislation.
the Kimberley scheme itself (even if they otherwise violate WTO rules) so that, for these restrictions, there was no need for a waiver. To that extent, the WTO superiority complex may not be overcome after all.