Book Review

Isabel Feichtner


The World Trade Organization (‘WTO’) often prides itself on being a ‘member-driven’ international organization: decisions are taken by the member states together; in contrast to the situation within other international organizations, there is no big unwieldy secretariat to initiate and prepare (and therewith influence) decisions; and, in the absence of specific powers, there is no such thing as ‘mission creep’ either. If these are advantages of the WTO’s institutional design, they are also often seen to come with a drawback: in a member-driven organization, politics is almost paralyzed. The requirement of consensus provides every member state effectively with a veto; and as a result, not much gets done. Changes to the law proceed at a snail’s pace, if they proceed at all, rendering the WTO an inflexible entity.

That the reality of the WTO is considerably more complex and nuanced is shown in this excellent study by Isabel Feichtner, an assistant professor of law and economics at the Goethe University in Frankfurt. To her mind, things actually do happen in the WTO, and they do so predominantly through the use of the waiver technique: a member state (or a group of member states) can temporarily be given permission to depart from regular WTO obligations if the WTO’s plenary body (the Ministerial Conference — or sometimes, acting in its place, the General Council) so decides. Waivers have been used to exempt individual member states from temporarily onerous obligations, but have also been employed to create exceptions on behalf of developing nations, and have even been used to sensitize the WTO to non-WTO-law. Thus, the waiver regarding the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (‘TRIPS Agreement’)1 softens the rigidity of the TRIPS Agreement when it comes to the licensing of patented medication; whereas

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the ‘Kimberley Process’ waiver makes it possible for member states to suspend the trade in so-called ‘blood diamonds’ without being accused of impeding international trade.

Feichtner’s book is a veritable encyclopedia of WTO waivers. She discusses how the waiver option came about and was a part of the 1947 General Agreement on Tariffs and Trade (‘GATT’); she discusses the decision-making process concerning waivers; she discusses the various types of waiver decisions that can be taken; she discusses the contents of waivers, both in concrete terms and in more normative terms (emphasizing, for example, how useful it is if waivers contain a provision regarding their duration), as well as the politics of waivers. What is more, she manages to do all this while simultaneously keeping things interesting: she has adopted a somewhat business-like but highly effective writing style, characterized by great clarity and accuracy.

For Feichtner, tapping into the current constitutionalization debate, international law is best seen as a public legal order. This order is, however, characterized by a relatively great measure of inflexibility, and thus in need of devices that help facilitate flexibility. In this context, she discusses such phenomena as reservations or the géométrie variable, and it is clear that to her mind, the waiver power is also a method of introducing flexibility into the global legal order — a way to ‘manage the risks of international agreement’, to evoke the title of Bilder’s classic study. Waivers can help persuade states to join regimes they might otherwise be tempted not to join; waivers allow WTO law to subordinate itself to other, competing regimes (as the Kimberley Process waiver does); and waivers might even help to change the law, short of formal amendment, as the TRIPS Agreement waiver suggests.

Conceiving of international law as public law also entails that the law emanating from international organizations is not conceptualized as the sole and somewhat random product of inter-state bargaining, but as coming closer to a conception of global administrative law. Consequently, Feichtner cannot but lament the sometimes very underdeveloped nature of ‘secondary law’ (to borrow the term from European Union law). Waiver decisions are not always taken transparently; they do not always contain a justificatory statement of reasons, let alone a reference to the proper legal basis on which they are taken; and they

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4 This is not to say she is blind to power-political realities. Instead, Feichtner’s point is that while individual decisions may be the result of bargaining, together they can still be conceptualized as forming a body of secondary law.