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BOOK REVIEW

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Caroline E. Foster, Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard, and Due Diligence

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With 'The Rise of the Regulatory State'[1] at the beginning of the twentieth century, regulation replaced litigation as the main method of social control in the United States. Over the past few decades, more and more countries around the world started to follow the example of the United States, which led to the global expansion of the regulatory state. This in turn spurred more international disputes due to divergences in the respective regulatory standards. Theoretically speaking, global regulation might be the best solution. However, so far this not happened, partly due to the paralysis of the law-making functions of most international organizations, and partly due to the tradition of 'constructive ambiguity' in treaty negotiations. Thus, more and more resorts were made to the second-best option: international courts and tribunals.

This is not an easy task as it requires a delicate balance to be struck. On the one hand, it goes without saying that all states, big or small, have the sovereign right to decide regulatory issues on their own. On the other hand, their regulatory powers must stay within the boundaries set by their international obligations, which are often couched in highly abstract, broad, and ambiguous language. How should the international tribunals settle these disputes? Which principles should they adopt in delineating the boundaries for regulatory powers? In her new book, Caroline E. Foster answers these difficult questions with an in-depth examination of the efforts to resolve international health and environment disputes by some of the leading international tribunals, ranging from ones with broad jurisdictions such as the International Court of Justice, to those with narrower mandates such as the dispute settlement panel and Appellate Body of the World Trade Organization (WTO) and investor–state arbitration panels. Her extensive analyses reveal three key regulatory standards emerging from these disputes: regulatory coherence, due regard for the rights of others, and due diligence in the prevention of harm.

Despite the emergence of these regulatory standards, international adjudication of regulatory issues still remains a rather difficult task. This is not surprising for three reasons, which I shall illustrate with a hypothetical WTO dispute concerning the health regulations of a WTO Member:

First, the health regulations are most likely made by a Ministry of Health, which often pays little or even no attention to the country's international trade obligations. As health regulations, such measures are likely to achieve 'regulatory coherence', i.e., be 'capable of achieving their ends … necessary to achieve their purposes … reasonable in light of their objectives … bear a rational relationship to the purposes at hand, [and] … strictly proportionate to these objectives'.[2] However, the same might not necessarily be true if the same measures are judged as trade

[1]E.L. Glaeser and A. Shleifer (2003) 'The Rise of the Regulatory State', *Journal of Economic Literature* 41(2), 401–425.
[2]Foster, at 24.

regulations, as the very same regulation would be judged by different ends, purposes, and objectives from a trade rather than health regulation perspective.

Second, the principles of due regard and due diligence are much easier to follow in a domestic context, mainly due to the existence of feedback and accountability mechanisms embedded in the domestic legislative process of most countries. At the international level, however, there are no such mechanisms and thus it becomes harder to follow such principles. On the contrary, political pressures to score economic benefits for domestic constituencies in the short-term would actually make many countries view their international relations through the lens of a zero-sum competition, making win-win cooperation very difficult if not impossible.

Third, even if regulatory disputes could be resolved at the international level, international tribunals might not necessarily provide the best venue. As noted by Foster her book, 'the cases … have cast a varied light on the question of how appropriate it may be to rely on international courts and tribunals as fora in which regulatory standards are elaborated'.[3] According to Foster, this is partly due to the many constraints on the international adjudicatory process, including the 'social constraints'[4] inherent in 'an adversarial, dispute-specific process', the 'formal constraints'[5] on the types of interpretive tools that they might use, etc. More broadly, the inherent weakness of litigation as an *ex post facto* means of law enforcement has led to the rise of the regulatory state at the turn of the twentieth century.[6] It is ironic that, while litigation was rejected in favour of regulation at the domestic level, countries would somehow still choose litigation over regulation at the global level.

The problem, however, is that international regulation-making is easier said than done. Again, the WTO provides a good example here. For the past two decades, the 'most-favoured nations' in Geneva have tried, and failed, to make inroads in their efforts to craft new multilateral agreements covering behind-the-border regulatory issues at the WTO. There are a myriad of reasons for the stalemate, but one could argue that one of the major reasons is, paradoxically, the fact that the WTO is unique among global institutions to be equipped with a binding, functional dispute settlement mechanism. This is confirmed by the notorious 174-page long Report on the Appellate Body[7] by the Office of the United States Trade Representative (USTR), which recounted the various 'sins' of the Appellate Body, including allegedly 'undermin[ing] WTO Members' legitimate regulatory space by essentially converting non-discrimination obligations into a "detrimental impact" test' in a series of disputes concerning the Agreement on Technical Barriers to Trade,[8] which were also discussed by Foster (pp. 191–211) of her book. This reveals an inherent weakness of international adjudication as a mechanism for the development of international regulatory standards, as Foster put eloquently in her book:

> The work of international courts and tribunals may provide valuable and necessary mechanisms for the elaboration of candidate global regulatory standards, but discussion and deliberation alone or predominantly in these arbitral and judicial fora will be insufficient. A standards-enriched international law produced only through international courts and tribunals would remain lacking in legitimate authority due to the absence of procedural justification in this respect.[9]

To put it simply, the question is not whether international tribunals make the right decision, but whether they are the right fora to make such decisions. Despite the great work done by

[3]Ibid., at 87.
[4]Ibid., 288–290.
[5]Ibid., 290–293.
[6]Glaeser and Shleifer, supra note 1.
[7]United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization', February 2020, https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (accessed 4 August 2021)
[8]Ibid, at 90–95.
[9]Foster, at 285.

various international tribunals over the past few decades, as summarized in Foster's book, the answer has to be no, and we will have to look elsewhere for solutions. In the realm of trade agreements, this means looking beyond the traditional multilateral trade agreements, with the free trade agreements (FTAs) and open plurilateral agreements as the most likely candidates.

FTAs were originally crafted to reduce tariffs, but in recent years they have been upgraded from being simply tools of market access to tackling behind-the-border regulatory barriers. This is most evident in the new generation of mega-regional FTAs such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which expands its scope into issues such as competition law and the regulation of electronic commerce and state-owned enterprises. The problem, however, is that FTAs are both too narrow and too broad. They are too narrow in terms of membership, as most FTAs only have a couple members, or at most, a dozen, such as the CPTPP and the Regional Comprehensive Economic Partnership (RCEP). To make matters worse, many FTAs close their doors once they are signed, as they do not often offer paths to membership for new countries, or include provisions for periodic review. They are too broad in terms of the scope of coverage, as they often cover everything from trade in goods to services, to trade remedies, technical barriers, and various regulatory issues. Such broad coverage makes it easier to negotiate as members can link up concessions across different issue areas but, at the same time, the constraint of narrow membership makes it much harder to spread the new disciplines on regulatory issues to a wider group of countries.

This is where open plurilateral agreements (OPAs) can be helpful. These are 'agreements authorizing regulatory authorities in various domains to cooperate to reduce the costs of exporting goods and services produced in their jurisdiction to other member countries, subject to critical, continuing determination by the regulators themselves and their national political oversight bodies, that products and production processes meet evolving national standards'.[10] OPAs combine the best features of both multilateral trade agreements and FTAs by having both broad membership and deep regulatory cooperation. At the same time, OPAs also avoid the shortcomings of the two as they are structured as open, voluntary, and domain-specific agreements.

For a long time, negotiating plurilateral agreements was regarded as taboo in the WTO due to the fear that it would sabotage the 'single-undertaking' approach enshrined in the Doha Development Agenda. Fortunately, this changed at the 11th Ministerial Conference held in December 2017, when groups of WTO Members started to explore the possibility of plurilateral negotiation with various Joint Statement Initiatives (JSIs). Currently, the JSIs cover regulatory issues such as e-commerce, investment facilitation for development, and services domestic regulation, as well as issues facing micro, small and medium-sized enterprises (MSMEs).[11] By WTO standards, negotiations under the JSIs proceeded at lightning speed, with the successful conclusion of negotiations on services domestic regulation announced on 2 December 2021,[12] while the draft text for investment facilitation for development was agreed in December 2022.[13]

However, even if all of the JSIs come to successful conclusion, their utility would be greatly undermined unless they can be enforced through the dispute settlement system of the WTO. This is not possible for now, as the continued blockage on the appointment of new members to the WTO Appellate Body by the United States has paralysed the dispute settlement system.[14]

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[10]B. Hoekman and C. Sabel (2019) 'Open Plurilateral Agreements, International Regulatory Cooperation and the WTO', *Global Policy*, https://doi.org/10.1111/1758-5899.12694.

[11]'WTO, Joint Initiatives', www.wto.org/english/tratop_e/jsi_e/jsi_e.htm (accessed 3 January 2023).

[12]'WTO, Joint Initiative on Services Domestic Regulation', www.wto.org/english/tratop_e/serv_e/jsdomreg_e.htm (accessed 3 January 2023).

[13]'Circulation of Draft Agreement Marks Major Milestone in Investment Facilitation Talks', www.wto.org/english/news_e/news22_e/infac_16dec22_e.htm (accessed 3 January 2023).

[14]For background on the US blockage, see H. Gao (2018) 'Dictum on Dicta: Obiter Dicta in WTO Disputes', *World Trade Review* 17, 509, 509–533; Z. Weihuan and H. Gao (2019) '"Overreaching" or "Overreacting"? Reflections on the Judicial Function and Approaches of WTO Appellate Body', *Journal of World Trade* 53, 951, 951–978; H. Gao (2021) 'Finding a

Moreover, the United States has openly challenged the legitimacy of the WTO dispute settlement system by calling it 'flawed', and stating that the United States 'does not intend to remove' its illegal trade measures as a result of a WTO Panel report, and 'will not cede our judgment or decision-making over essential security matters to the WTO'.[15] Unless the United States, the birthplace of the regulatory state, starts to take the power of international tribunals to adjudicate regulatory issues seriously, we will not be able to achieve 'regulatory coherence' of 'global regulatory standards'. As part of the 'due diligence' work, regulators and negotiators from around the world should pay 'due regard' to the lessons and challenges arising from the quest for regulatory standards by international courts and tribunals, and this excellent book provides a good starting point.

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Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement', *Journal of International Economic Law* 24(3), 534–550, https://doi.org/10.1093/jiel/jgab031.

[15]See 'Statement from USTR Spokesperson Adam Hodge' (United States Trade Representative), http://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge (accessed 3 January 2023). See also 'Statement from USTR Spokesperson Adam Hodge' (United States Trade Representative), http://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge-0 (accessed 3 January 2023).