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International Adjudication and the Development of Regulatory Standards

Review of Caroline E Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard and Due Diligence* (OUP 2021).

Joshua Paine*

One of the consequences of the judicialization of international law prevailing over the last 30 years is that international courts and tribunals have assumed a greater role as 'producers of legal knowledge'.[1] In *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard and Due Diligence*, Caroline Foster offers deeply researched and considered reflections on the implications of the increased law-making role of international tribunals, focusing on environmental and health disputes, and specifically, on standards developed by tribunals that discipline States' exercise of regulatory authority.[2] In a nutshell, and as outlined further below, Foster's book focuses on standards or requirements that States' regulatory measures must meet, which typically have a basis in applicable international legal provisions, but are, to a significant degree, developed by international tribunals through interpretation. Additionally, the book examines the appropriate role of international tribunals in developing such regulatory standards and the wider implications of these developments for the international legal system.[3] Foster interrogates questions that have obvious relevance for international economic law, particularly in the trade and investment contexts, where increasingly demanding requirements for domestic regulation have emerged in recent decades, including through the increased output of international tribunals in these fields. The specific 'regulatory standards' that Foster focuses on are 'requirement[s] for "regulatory coherence" between States' domestic measures and their legitimate objectives', requirements for States to give due regard to the interests of other affected States in their regulatory decision-making, and requirements that States exercise due diligence over activities under their jurisdiction to prevent harm to others.[4] The breadth of bodies whose case law is reviewed is appropriately broad – the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and arbitral tribunals operating under the UN Convention on the Law of the Sea (UNCLOS), inter–State arbitration, World Trade Organization (WTO) dispute settlement, and investment treaty arbitration, are all considered in detail.[5]

Based on Foster's review of jurisprudence, she argues that 'three emerging "global regulatory standards" are prominent' and represent 'golden threads [which] appear to run through the practice'.[6] First, there is 'the requirement for "regulatory coherence" between States' domestic measures and their legitimate objectives', which takes a variety of forms, e.g. requirements that a measure bears a rational or reasonable relationship to a permissible objective, or is necessary to achieve that objective. Second, there are 'growing requirements for domestic administrative processes to take into account the interests of those in other States who will be affected by regulatory decision-making, in the form of "due regard" formulae'. 'Third, States are

*Senior Lecturer in Law, University of Bristol, joshua.paine@bristol.ac.uk. By way of disclosure, I have known Caroline Foster as a colleague for a decade, and in 2020 I commented on a draft of the book under review at her invitation.

[1] Benedict Kingsbury, 'International Courts: Uneven Judicialisation in Global Order' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 219, 213.

[2] Caroline E Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard, and Due Diligence* (OUP 2021) 3.

[3] ibid 3–5, 8, 12–13, 33–35.

[4] ibid 4.

[5] ibid 9.

[6] ibid 4, 22.

increasingly expected to exercise "due diligence" in the prevention of harm to others, including through a certain level of control over private actors in areas beyond national jurisdiction.'[7]

Foster's book 'enquires into the legitimacy of the resulting standards-enriched international law, the appropriateness of the part played by international courts and tribunals in its articulation, and systemic challenges arising'.[8] Specifically:

> [T]he book poses and responds to three questions about the change in international law that may be brought about through the regulatory standards emerging from international dispute settlement … Firstly, how effective are the regulatory standards elaborated by international courts and tribunals in preserving or enhancing international law's claim to legitimate authority? Secondly, how appropriate is it to rely on international adjudicatory processes as one of the main avenues through which to create a 'standards-enriched' international law? Thirdly, what are the opportunities, challenges and dilemmas arising in the course of this process of transition to a standards-enriched international law?[9]

Following an introduction, Foster establishes key concepts and regulatory standards in Chapter 2 and divides the book as follows. Chapter 3 turns to the ICJ, UNCLOS dispute settlement, and inter-State arbitration, addressing how these bodies have developed various 'regulatory coherence' standards, while Chapter 4 analyses how these bodies have developed due regard and due diligence standards. Chapter 5 turns to WTO dispute settlement, addressing necessity testing, and Chapter 6 addresses 'rational relationship' requirements, as developed under several covered agreements. Chapter 7 shifts to investment treaty arbitration, addressing various regulatory coherence standards developed in the jurisprudence, while Chapter 8 focuses specifically on proportionality balancing *stricto sensu* in investment treaty arbitration, offering several original suggestions for how such a test might be reframed, if it is to be used at all.[10] In the remainder of the book, Foster zooms out to return to the key research questions and themes arising from the survey of jurisprudence. Chapter 9 addresses the research questions about whether the regulatory standards being developed are effective in strengthening international law's claim to legitimate authority, and about the role of the international adjudicatory process in developing such standards. Chapter 10 addresses the final research question, focusing on various 'systemic challenges and opportunities', e.g. regarding the potential re-conceptualization of sovereign freedom as conferred power, and developments in the status of private entities in international law. Foster also proposes several 'opportunities for reconsideration', including a case for employing due regard rather than proportionality *stricto sensu* tests. Chapter 11 provides a brief conclusion.

The most original findings of the book include the following. First, Foster argues that the standards being developed by international courts and tribunals 'tend to indulge domestic authority, making considerable allowance for decision-making through domestic legal systems'.[11] 'However, the standards' indulgence of domestic authority limits their contribution to the development of international law's capacity to achieve the balancing of international interests in ways better calibrated to global substantive needs.'[12] Foster attributes this to the social constraints under which international tribunals operate, which lead tribunals to favour reasoning that will be considered acceptable by relevant audiences, in the interest of preserving

[7] ibid 4.
[8] ibid 3, 8.
[9] ibid 8.
[10] ibid 263–273.
[11] ibid 281–82. See also 39–40, 346.
[12] ibid 12, 280.

their own institutional legitimacy.[13] Examples of regulatory standards that Foster argues leave 'central place to domestic decision-making' include requirements for regulatory coherence, '[m]ultifactorial necessity tests', as developed in the WTO, and 'due diligence tests'.[14] Regarding due diligence tests, Foster highlights how ITLOS' Seabed Disputes Chamber interpreted sponsoring States' obligation 'to ensure' compliance by contractors with obligations under UNCLOS and related instruments as an obligation of conduct, which required States' exercise due diligence, whereas a stricter, more literal interpretation of this obligation may not have been acceptable to States.[15]

Second, within the case law reviewed, Foster identifies significant reliance by adjudicators on the abuse of rights doctrine, drawing on 'the idea of the misuse of power' or '*détournement de pouvoir* [which] is understood to take place where a right is exercised for an end that is different to the purpose for which the right has been created'.[16] This 'adds to the inference that sovereign regulatory capacity is a matter of conferred power', 'similar to the constitutionally conferred powers that the state is often considered to possess under domestic law', thus signalling a potential shift in our conception of sovereignty under international law.[17] A good example of this point, which Foster considers, is the ICJ's reasoning in *Whaling in the Antarctic*, where the Court found that Japan's granting of permits for whaling was not covered by a treaty exception that permitted whaling 'for purposes of scientific research' and had regard to the object and purpose of the treaty in construing the scope of the exception and determining whether Japan's purported scientific whaling program fell within it.[18]

Third, Foster highlights deficiencies in the international adjudicatory process as a means for developing such wide-ranging 'regulatory standards', e.g. that there is lack of deliberative input from political processes, the disputing parties' pleadings have too much influence over the standards being developed, and '[t]he audiences that are most directly and obviously served by international courts and tribunals may be too small'.[19] For example, Foster demonstrates how in *Whaling in the Antarctic* and in *Dispute regarding Navigational and Related Rights* before the ICJ,[20] and in *Arctic Sunrise* before an UNCLOS Annex VII tribunal,[21] the standards which these tribunals developed for the permissible exercise of State regulatory power in the relevant contexts were heavily influenced by the parties' pleadings.[22]

Fourth, Foster develops an original argument that due regard tests are preferable to proportionality balancing *stricto sensu* and should be further developed to coordinate State regulatory autonomy with other competing interests (e.g. the interests of other States or of the

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[13] ibid 286–90.
[14] ibid 282.
[15] ibid 282, 108–109, 130. *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, [109]–[116].
[16] Foster (n 2) 31–32, 294–95.
[17] ibid 32, 295, 307.
[18] See *Whaling in the Antarctic (Australia v Japan, New Zealand intervening)*, Judgment, ICJ Rep [2014] 226, esp. [55], [58], [67], [88], [94], [97], [223]–[227]. Foster (n 2) 296 ('In light of the Whaling Convention's object and purpose the discretion afforded by Article VII was necessarily limited in its scope'). Many of the individual opinions rendered in the case also engaged with this issue. See eg Diss. Op. Yusuf, [21]–[26]; Sep. Op. Xue [7]–[12].
[19] Foster (n 2) 285–90, see also 47, 87, 280.
[20] *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, ICJ Rep [2009] 213, [86]–[87].
[21] *The Arctic Sunrise (Netherlands v Russia)*, Award on the Merits (2015) 171 ILR 1, esp. [221]–[222], [324]–[328].
[22] Foster (n 2) 76–78, 83–84, 65–67, 87.

international community).[23] Foster bases her argument on the view that proportionality balancing *stricto sensu* 'elevates judgements about the value of regulatory action to the international level' and asks 'an international court or tribunal … to weigh the relative value of the legal interests at issue'.[24]

Fifth, Foster argues that 'it is the balance between the legal interests of those subject to the relevant rules that is defined through such [regulatory] standards, rather than a balance between the various interests of the disputing parties in a given case'.[25] In short, this means that adjudicators must refrain from focusing exclusively on the disputing parties before them and keep in mind the balance of interests between those subject to the relevant obligation. For example, Foster views investment treaties as ultimately remaining inter-State bargains, despite the standing conferred on investors, and thus argues that, if they apply a (dis)proportionality test, investor–State tribunals should retain a broader perspective and focus on the competing interests of the treaty parties, rather than merely focusing on the interests of the claimant investor and the host State.[26] Similarly, Foster argues that in the trade and investment contexts, while a test requiring a State afford due regard to the interests of another State may involve taking into account whether private parties (e.g. the home State's investors) were afforded due process, it should not focus exclusively on this.[27]

Sixthly, Foster offers a significant argument against conceptualizing international adjudication in terms of judicial review, as occurs in certain domestic systems of public law, arguing that this inappropriately views sovereignty in a conferred powers model, which 'overstates the pace of development and may pre-empt future choices'.[28] Although this argument has also been made to a limited degree in some other recent literature,[29] Foster's analysis is carefully considered and important reading.

Seventhly, Foster identifies an under-appreciated emphasis by international tribunals on 'logic and commonsense reasoning grounded in the nature of the rules and regime in question', and on '[t]he interpretive principles of contextualism and effectiveness'.[30] Regarding the principle of effectiveness, Foster shows, through various examples, how 'adjudicators' understanding of why a relevant treaty matters will play into their interpretation'.[31] Thus, regarding UNCLOS tribunals, she suggests, substantiating with significant evidence, that '[t]heir pronouncements are necessarily a communication to the world at large of a vision for the future operation of the law of the sea regime'.[32]

Among the many questions raised and addressed by this book, two that are likely to resonate with many readers on a first impression are: where, exactly, do the regulatory standards that Foster identifies in the case law come from, and what is the proper role of international tribunals in developing such standards? Foster provides the following answers. Regulatory standards are

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[23] ibid 327–35.
[24] ibid 26, 324–25.
[25] ibid 21.
[26] ibid 259–61.
[27] ibid 331–32.
[28] ibid 341–42.
[29] See Johannes Hendrik Fahner, *Judicial Deference in International Adjudication: A Comparative Analysis* (Hart Publishing 2020) 190–212. Başak Çalı, 'International Judicial Review' in Anthony Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017) esp. 291–97.
[30] Foster (n 2) 290–92.
[31] ibid 292. See also 89, 97–98, 150, 173, 195.
[32] ibid 54. See also 113–15, 65.

said to be based in States' obligations under applicable legal provisions and are 'formulae that international courts and tribunals read into the law in successive regulatory disputes [which] gradually elaborate the "standards" inherent in some of the less determinate aspects of relevant international legal provisions'.[33] Such regulatory standards 'are not formulae for one-off application', nor are they:

> just statements of principle, for instance that regulatory action be 'rational' or 'diligent'. [Rather] [t]hey are intended to identify and lay down potentially enduring requirements and are often accompanied by an articulation of what will for instance be 'diligent' across varying situations in the particular legal context.[34]

Foster argues that regulatory standards are being developed 'due to the practical need for international courts and tribunals to deploy reasoning that will enable decisions giving effect to the balance of legal interests among the parties that is written into the relevant international legal provisions or rules'.[35] That is:

> Regulatory standards finetune international legal rules, making them more amenable to application. This generates greater certainty as to the content of international rules and should promote consistent behaviour by relevant actors as well as providing a basis for the development of further international rules and regimes addressing common problems.[36]

Ultimately, the need to resolve the disputes coming before them 'in a reasoned way has led international courts and tribunals to develop regulatory rubrics or formulae establishing how competing legal rights and interests are to be balanced under the applicable international legal provisions and rules'.[37] Foster also rightly highlights that regulatory standards may evolve over time, e.g. noting various evolutions in the 'necessity formulae' developed in the WTO context, such as to recognise the realities of 'long term risks [which] only realise and reveal themselves gradually over time, and … multifaceted policies to address complex and challenging health and environmental challenges'.[38]

At several points in the book, Foster rightly acknowledges that:

> The developments we are seeing in the international adjudicatory space do not represent the full story of the development of global regulatory standards. These developments are complemented by the inclusion of innovative formulae governing the exercise of States' regulatory freedom in negotiated instruments.[39]

Thus, Foster briefly discusses the regulatory coherence chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and how the requirements for regulatory activity elaborated therein may compare to a 'due regard' standard developed by international tribunals.[40] Overall, this is more of an acknowledgement that 'the dicta and formulae articulated in international courts' and tribunals' decisions contribute to a broader sequence of developments', rather than a sustained attempt to compare how States may be (dis)approving of judicially-developed standards through the negotiation of agreements which discipline regulatory authority.[41] Another aspect of the book that might have been developed further is the call for greater involvement of representative and deliberative political processes in the development of regulatory standards.[42] While there is a brief argument that '[f]acilitation of

[33] ibid, 34, 20.
[34] ibid 287, 302.
[35] ibid 20.
[36] ibid 281. See also 12, 258.
[37] ibid 347.
[38] ibid 149.
[39] ibid 6.
[40] ibid 21, 332.
[41] ibid 21–22, 265, 332.
[42] ibid 285–90, see also 47, 280, 131.

community discussion on the emergence of global regulatory standards … is to be encouraged, and for this a greater diffusion of accurate information on the issues at stake will be needed', and some brief discussion of advisory opinions as being promising in enabling wider participation, Foster does not really manage to pin down what '[g]reater international political involvement' in the process looks like.[43] Perhaps this is too much to ask, given the book's forensic focus on the details of adjudicatory processes. Yet, overall, the book might have given greater attention to the idea that the substantial role of international tribunals in developing regulatory standards arises precisely because of States' inability to agree on such standards in diplomatic fora, a point which is acknowledged briefly in relation to WTO dispute settlement.[44]

Methodologically, an interesting aspect of the book under review is that it is not confined to a desk-based review of primary legal materials and secondary literature. Foster supplements these conventional techniques with 'a series of interviews with present and former adjudicators, lawyers, legal advisors, registrars, and secretariat staff', which help 'sensitise the work to the lived realities of international adjudication'.[45] The interviews are referred to anonymously (to respect ethical commitments), and nicely supplement the analyses of case law and debates based on existing literature, providing real value-added that rounds out certain discussions in the book.[46] Another method-related point pertains to the selection of case law that serves as a focus for the book. The book explains at the outset that it focuses on '[r]egulatory disputes in the environmental and health spheres', including as '[e]nvironmental and health policy is central to States' regulatory functions and these are areas where pressures and difficulties for international tribunals are palpable'.[47] It also explains that '[t]he term "regulatory" is used in a broad sense throughout the book, with regulatory freedoms and obligations understood as including freedoms and obligations both to establish rules and policies, and to monitor and enforce them.'[48] Given the marked diversity of the case law reviewed throughout the book, it may have been worth addressing in greater detail what makes a dispute count as an environmental or a health dispute, and which kinds of disputes count as regulatory disputes and which do not.[49] At least in relation to environmental disputes, existing literature demonstrates that it is far from straightforward to define or delimit what counts as an environmental dispute.[50]

Overall, the book under review is an impressive piece of scholarship, which is deeply researched and contains numerous original insights. The book should be essential reading for anyone with an interest in international courts and tribunals or regulatory autonomy issues, and more specifically, those with an interest in how the trend of judicialization has been transforming States' legal obligations which discipline their exercise of regulatory powers.

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[43] ibid 47, 288.
[44] ibid 139–40.
[45] ibid 9.
[46] See eg ibid 272–73.
[47] ibid 3.
[48] ibid 3.
[49] There is some brief consideration of which kinds of investment disputes are likely to involve the development of regulatory standards: ibid 217–218. See also Yuka Fukunaga, Book Review of Foster (n 2), (2023) 24 JWIT 971, 974–75.
[50] See eg Cesare PR Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (Kluwer Law International 2000) 4–29. Alan Boyle and James Harrison, 'Judicial Settlement of International Environmental Disputes: Current Problems' (2013) 4 JIDS 245, 247–50. In relation to investor–State arbitrations with an environmental component, compare the approach of Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (CUP 2012) 17, with Daniel Behn and Malcolm Langford, 'Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration' (2017) 18 JWIT 14, 17–19.