

GLOBAL REGULATORY STANDARDS IN ENVIRONMENTAL AND HEALTH DISPUTES. REGULATORY COHERENCE, DUE REGARD, AND DUE DILIGENCE

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Do we have universally recognized expectations for how states should regulate in today's complex and globalised landscape, and what is the nature of these expectations? These are the crucial questions that animate *Global Regulatory Standards in Environmental and Health Disputes. Regulatory Coherence, Due Regard, and Due Diligence* by Caroline Foster. On the basis of a wide-ranging yet thorough analysis of decisions from international adjudicatory bodies including the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), World Trade Organization Dispute Settlement Bodies (WTO DBS), and investment treaty arbitration awards, she identifies a shared requirement of regulatory coherence as a precondition for the international legality of government action. Regulation is furthermore assessed against benchmarks of due regard and due diligence, although these standards feature less frequently and in a narrower range of cases. In the light of these findings, Foster confirms the emergence of a body of global regulatory standards. At the same time, the book documents the still fragmentary nature of global standard-setting and the diversity in interpretation across different forums. This leads the author to conclude that global regulatory standards are best understood from a vantage point of legal pluralism, as balancing tools that enable ordering the relationship between domestic and international legal systems. Foster forcefully argues that their development is not a constitutionalisation project, and moreover that it should not be. She considers the legitimacy of international adjudication as too constrained to bear the weight of constitution building, which demands a firmer footing in the democratic process. Hence, governance principles such as proportionality, which are often constitutionally enshrined and which empower adjudication bodies to scrutinise the substance as well as the form of domestic decision making, may be too intrusive to suit the transnational context. Instead, Foster is drawn to the currently under-used standard of due regard as a more promising foundation for the reconciliation of international legality and domestic regulatory sovereignty.

Global Regulatory Standards is a hugely impressive work which significantly contributes to several legal disciplines. Most prominently, the book delivers a shot in the arm to global administrative law (GAL) – a field which, after a flurry of scholarly activity in the previous decade, has slightly struggled to bridge the gap between conceptual ideas and practical application. Moreover, Foster's careful analysis of case law contributes to fields ranging from international environmental law to trade and investment treaty law, and her reflections on the status and impact of global regulatory standards add depth to the discipline of transnational regulation and governance studies.

The book is organised in five parts. The first offers a general introduction to the standards of regulatory coherence, due regard and due diligence as well as a theoretical framing of the research in the context of the legitimate authority of international law. Parts II, III and IV take a deeper dive into the development and application of the three standards in international decision making. Part V, finally, brings the theoretical framing in conversation with the lessons drawn from the analysis at the centre of the book in order to deliver a critical and normative evaluation of the state and future of global regulatory governance.

Unquestionably, the dominant quality of *Global Regulatory Standards* is its analytical depth. In a true tour de force, Parts II to IV of the book navigate the varied (and notoriously lengthy) texts of ICJ and

ITLOS adjudication, Permanent Court of Arbitration (PCA) decisions, WTO dispute settlement, and investment treaty arbitration to crystallise the reasoning that steers courts and tribunals as they balance the demands of international law against the need to respect domestic sovereignty. The discussion deftly conveys both the distinctive controversies of each case and their contribution to the development of global regulatory standards – a task which is exceedingly challenging when it comes to reviewing regulatory coherence. As defined by Foster, regulatory coherence refers to the appropriateness of the relationship between government measures and their intended objectives (p. 23). It is effectively a composite term which, depending on the circumstances, may be expressed as a requirement of capability, necessity, proportionality, or reasonableness. Reasonableness, moreover, inevitably muddies the waters between regulatory coherence and due regard, as well as due diligence, since being reasonable could alternately refer to not acting in a manner which is disproportionate to the goal; to having consideration (or due regard) for the impact on other parties; or to considering the consequences of state conduct in relation to non-state actors (acting with due diligence). Conversely, as Foster illustrates in her analysis of the Seabed Disputes Chamber's *Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with regard to Activities in the Area*, acting with due diligence may be interpreted as reasonably entertaining various options that are 'relevant and conducive to the benefit of mankind' (p. 111-112). To the author's great credit, these entanglements do not get in the way of the reader's comprehension. In sum, the analysis at the core of Foster's work reveals a world of international adjudication which is characterised by a combination striking similarities as well as persistent idiosyncracies. At the same time, in each of the forums examined by Foster, decision makers remain highly deferential to government authority.

While the author's approach is resolutely doctrinal, politics inevitably bubble under the surface. She does not explicitly engage with questions of global social justice and the distributional consequences of international adjudication – which, given the richness and nuance of the analytical work being done, is arguably the wiser choice – but the work can serve as a point of departure for further contextualisation. For instance, her discussion of the *Chagos* case offers insight into the differential treatment of states in international disputes and hints at underlying systemic inequalities. These observations invite deeper explorations into the geopolitical dimension of emerging global regulatory standardisation.

Foster's precise analytical work lays the foundation for an equally nuanced conclusion. Decisions of international courts and tribunals are indeed shaped by shared understandings of what constitutes acceptable domestic rulemaking in the light of a state's obligations under international law. Essentially, ICJ justices, WTO bodies and investment treaty arbitrators all insist upon a reasonable or rational relation between disputed regulatory measures and an acceptable and legitimate government policy. Yet beyond this shared minimum, the application of regulatory standards is uneven. This is illustrated, for example, in the *Indus Waters Kishenganga Arbitration* between India and Pakistan, in which the PCA addressed the question whether India's contested water diversion plans were necessary in the context of its HydroElectric Power project. Foster points out that "the Court saw no need to associate the term 'necessity' with indispensability or emergency action as Pakistan had argued. The Court considered inapposite concepts of necessity developed in international trade law, investment law and other special areas" (p. 71). Moreover, it transpires from the book that the only standard to be applied across-the-board is the composite norm of regulatory coherence. So far, due regard and due diligence apparently have failed to make inroads into WTO dispute settlement and investment treaty arbitration. Secondly, decisions typically remain highly deferential to national regulatory sovereignty. In the absence of convincing evidence of irrationality

or disproportionality, international courts and tribunals will typically err on the side of dismissing the complaint.

This inchoate body of norms, the author concludes, does not amount to a nascent global constitution for regulation. Instead, it is a softer tool; a mechanism to balance competing claims to legality emanating from different legal orders. This perspective permeates all dimensions of the book, from its terminology and its structure to its critical commentary. It explains why Foster couches her discussion of regulatory coherence, due regard, and due diligence in the technocratic language of 'standards' rather than the rights-based language of 'principles', even though the latter feature more commonly in international law (indeed, in his foreword Andrew Lang refers to Foster's regulatory standards as principles). It explains why Parts II, III and IV of the book are organised along the three different cohorts of ICJ and ITLOS, WTO DBS, and investment arbitration bodies, rather than the three different regulatory standards. Evidently, the level of similarity in reasoning across jurisdictions is still insufficiently aligned to accommodate a more thematic treatment of the subject matter. Most importantly, Foster's conclusions about the nature of global regulatory normativity shape her recommendations for future development.

In line with its pluralist perspective the book argues for the further advancement of 'due regard' as a global regulatory standard. Due regard explicitly acknowledges the interests of third states in regulatory decision making, but it does not pass judgment on the substance or quality of domestic regulation as such. Correspondingly, the application of a due regard standard affirms the role of international courts and tribunals as one of balancing interests vested in different legal orders, rather than one of judicial review. For international bodies legitimately to assume the latter role, and to review state decision making against more intrusive, substantive standards such as proportionality, would require more intense international legislative engagement, and a fuller politicization of the international public sphere. The seeds for such development might be present in certain intergovernmental settings – most notably within the context of the Paris Agreement and its rapidly growing implementation infrastructure – but by the same token it is difficult under present volatile geopolitical conditions to discern a clear appetite for global constitutionalisation. In such circumstances, Foster advises, international courts and tribunals make a greater contribution to good governance by engaging with relatively deferential standards such as due regard, than by overreaching and delegitimising their role in the process.

Global Regulatory Standards is an essential work for those interested in international law, global administrative law, and the intricate world of global regulatory standards. As we continue to grapple with the challenges posed by environmental and health-related disputes in our increasingly interconnected world, Foster's work offers an invaluable guide for navigating this complex terrain.

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