Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment

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Balancing trade and investment liberalisation commitments with other values that states and their constituents hold dear, such as the protection of the environment, public health, financial stability, or national security, is one of the most difficult questions in international economic law. Most trade and investment agreements allow states to regulate for a range of specified purposes subject to certain conditions, such as non-discrimination between domestic and imported products, and fair treatment of foreign investors. However, when interpreting these agreements, international tribunals have at times taken an expansive view of the obligations, or a restrictive view of the exceptions that allow for domestic regulation. As a result, trade and investment agreements have come under closer scrutiny as states, legal scholars, and civil society organisations attempt to better understand the extent to which these agreements curtail states' right to regulate.

The book under review examines how the 21 Bilateral Investment Treaties (BITs) and the 10 Preferential Trade Agreements (PTAs) that Australia has entered into in the past three decades have affected its regulatory autonomy. Examining and comparing 31 agreements is a mammoth task, and the authors are to be commended for the ambitious scale of the project. A deep dive into the obligations of a single state reveals the inconsistencies created by the 'spaghetti bowl' of BITs and PTAs,[1] with different agreements defining the scope of the obligations differently or providing for different exceptions. Even though the analysis focuses on Australia, its relevance extends to Australia's bilateral trade partners, who are bound by the same agreements[2] as well as to other states with similar provisions in their BITs and PTAs. Australia's experience is also of broader interest due to its involvement in recent trade law developments, such as the Trans-Pacific Partnership Agreement (TPP) and its successor the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP-TPP), the negotiations towards a Trade in Services Agreement (TiSA), and the introduction of – and the subsequent legal challenges to – legislation on the plain packaging of tobacco products.

The book defines regulatory autonomy as 'the ability of a State to determine its regulatory goals … and to adopt and implement policies to pursue those goals' (p. 2). The first Chapter introduces this concept by addressing in general terms why we have international economic law, why it constrains states' regulatory autonomy, and how concerns about regulatory autonomy arose. Given the centrality of the concept of regulatory autonomy to the book's analysis, I found the discussion of its content on the light side. The authors rightly point out that international agreements by their very purpose constrain regulatory autonomy. Indeed, it has long been settled in international law that the conclusion of an international agreement is an exercise of state sovereignty,

[1] The term 'spaghetti bowl' was famously coined in this context by Jagdish Bhagwati, *US Trade Policy: The Infatuation with FTAs* (April 1995) Columbia University Academic Commons, <https://doi.org/10.7916/D8CN7BFM>.

[2] Even if they are not necessarily bound to exactly the same obligations as states can modify these through exclusions and non-conforming measures.

even if it restricts how that sovereignty can be exercised.[3] Thus, as the authors themselves recognize, 'to say that international economic law … imposes limitations or constraints on regulatory autonomy is neither profound nor necessarily a criticism' (p. 4).

The key question in relation to regulatory autonomy in trade and investment agreements is not to what extent these agreements require states to reduce tariffs, to remove non-tariff barriers to trade, to protect foreign investors within their jurisdiction, or to submit to investor-state dispute settlement (ISDS), but to what extent the obligation to liberalize trade or investment restricts a state's autonomy in an area that is not covered by the agreement or for which the agreement provides an exception. As Titi has pointed out in the context of investment law, 'the right to regulate … is a technical term, one that is much narrower in meaning and which should not be confused with the [freedom to engage in political, economic, legislative and other regulatory activity as the state sees fit]'.[4] Titi defines the right to regulate as 'a legal right that permits a departure from specific investment commitments assumed by a state on the international plane without incurring a duty to compensate',[5] and her definition can be applied *mutatis mutandis* in the trade context.

In contrast, the authors' definition of regulatory autonomy includes the obligations as well as the exceptions included in international trade and investment agreements. This choice is not without its difficulties. First, it broadens the scope of the study to include not only permitted departures from commitments made, but also the substance of these commitments. It is, however, hard to do justice to all this in only 257 pages. As a result, some chapters of the book are more of a general discussion of the evolution of Australia's policy on trade and investment. While this corresponds to the book's subtitle, it sits in tension with the book's main title and ostensible focus on regulatory autonomy. A second consequence is that key questions in relation to Australia's regulatory autonomy remain unanswered: in particular, there is very little attention paid to how Australia could realistically negotiate amendments to existing obligations. Finally, the broad definition forces the authors to say that regulatory autonomy is 'not an absolute good' (p. 39 and 244). There is an undeniable truth to that statement; if regulatory autonomy were an absolute good, states would not be willing to, nor should they, restrict it by signing up to international obligations. However, if regulatory autonomy is not an absolute good and thus only worthy of protection in some situations, we need criteria to identify when and why regulatory autonomy deserves protection and we need an authority to determine these criteria. The book does not provide either. To illustrate my point, the authors imply (p. 244) that a state should not use its regulatory autonomy to attract investment through lower environmental standards. But who decides what the appropriate level of environmental protection is, if not the state individually (subject to any other international obligations it may have)? Trade and investment agreements do not generally include minimum environmental standards.[6]

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[3] SS 'Wimbledon' (United Kingdom, France, Italy & Japan v. Germany) [1923] PCIJ (Ser A) No 1, 25.

[4] Aikaterini Titi *The Right to Regulate in International Investment Law* (Nomos, 2014) 33.

[5] Ibid 52.

[6] As the authors point out in Chapter 6, change may be afoot in the investment arena if lower environmental standards reduce the value of an investment. However, this is a recent development, and it raises the question whether an investment tribunal is a more legitimate authority than the state to decide on the minimum level of environmental protection, assuming that the state is complying with all its obligations under international environmental law.

After the discussion of regulatory autonomy, Chapter 1 gives a historical overview of the BITs and PTAs included in the book. The agreements of the last three decades are grouped in three 'generations', with the first generation spanning two of the three decades studied. With the exception of the 1983 *Australia-New Zealand Closer Economic Relations Trade Agreement* (ANZCERTA), which is the oldest agreement included in the study, all the first generation agreements are BITs that focused solely on investment and left trade issues to be solved multilaterally at the World Trade Organization. A second generation starts with the 2003 *Singapore-Australia Free Trade Agreement* (SAFTA), and runs until the 2009 Free Trade Agreement with New Zealand and ASEAN. This generation is characterised by the shift from multilateral to bi- or plurilateral PTAs that include 'WTO-plus' obligations, i.e. liberalisation commitments that go beyond those agreed to within the WTO, as well as investment obligations that were traditionally dealt with in BITs. The authors point out that civil society concerns about these agreements 'varied greatly', depending on the agreement (p. 29–30). This changed from 2010 onwards, when there was a backlash against these agreements, particularly against the inclusion of ISDS mechanisms and compounded by concerns about treaty-making processes (p. 32–4). Although Australia continued to sign onto PTAs, the third generation is characterised by an increased wariness that translated into 'small but significant changes' in the wording of key provisions (p. 37). This historical overview and the tripartite generational division is interesting, but unfortunately does not feature much in the later chapters.

The next four chapters compare in detail the substantive obligations and their exceptions in four different areas: intellectual property (IP), trade in services, investment, and ISDS.

Chapter 2, on IP, is divided in three parts, dealing respectively with copyright, trademarks, and patents. The first part, on copyright, criticizes the extension of the minimum copyright term to 70 years; points out that, for fair use and parallel imports, Australian legislation is more restrictive than what the PTAs require; and adds that domestic law and PTAs are not clear about the legality of circumvention methods. These are not so much questions of regulatory autonomy as questions of the appropriate level of IP protection. What we see here is the impact of the broad definition of regulatory autonomy in Chapter 1 whereby any obligation accepted by a state becomes a limit on its regulatory autonomy. This impact is also visible in the discussion on patents, which reviews how the United States, through the conclusion of the *Australia-United States Free Trade Agreement* and the negotiations of the TPP, have pushed Australia towards more favourable protection of patent holders. In contrast, the debate surrounding Australia's plain packaging legislation, covered in the Chapter's part on trademarks, goes to the heart of regulatory autonomy. The central question in this debate is whether plain packaging, motivated by public health reasons, cuts against the copyright protection offered under trade and investment agreements and against the prohibition to indirectly expropriate investments.

Chapter 3 analyses Australia's commitments in trade in services. Here the book compares PTAs that include services on three different issues: the scope of the respective services chapters, the core obligations, and the general exceptions. A discussion of the agreements' chapters on specific services, such as financial services or telecommunications, is not included. In comparison to the IP chapter, this chapter focuses more on the question of regulatory autonomy but does not address in much depth the evolution of Australia's trade policy.

Attention then turns to investment in Chapter 4. Investment obligations are an important determinant of regulatory autonomy, particularly when services are supplied across the border through the commercial presence of a foreign provider. Such presence requires an investment, and any regulation of the service or its provider could therefore be open to challenge if it interferes with the investment. The investment chapter is structured similarly to chapter 3, in that it first describes the substantive obligations before moving on to the exceptions. The authors label Australia's efforts to protect its policy space in relation to investment as haphazard: despite being aware of the need to reform overly expansive obligations, Australia has not undertaken a systematic effort to renegotiate international investment agreements (IIAs, an umbrella term that refers to BITs and PTAs with an investment chapter). The authors provide some suggestions for change and usefully illustrate their argument with examples from other jurisdictions (p. 137–8, 161–2). They also critically reflect on proposals to transplant general exceptions from the trade model onto investment obligations. This discussion was illuminating, and adds a dimension that is missing in other chapters.

When discussing investment obligations in IIAs, ISDS is never far away, and it is the subject of Chapter 5. Australia made waves in 2010 when the Productivity Commission took an anti-ISDS stance.[7] However, a change of government has meant a change of heart, with the reintroduction of the previous ad hoc approach. As the authors point out, this approach is not without risks for Australia's regulatory autonomy as it leads to inconsistencies that investors can exploit by structuring their claims to fall within the scope of the most investor-friendly treaty. Although such an attempt failed in the case of Philip Morris' claim against Australia's plain packaging legislation,[8] this may not always be the case. Unlike the other chapters, this chapter explicitly tries to make sense of the inconsistencies regarding the inclusion of ISDS (p. 171–180) and concludes that ISDS has become a partisan issue as well as a bargaining chip in negotiations. The chapter also includes a discussion of reforms that have been included in PTAs with an investment chapter, and briefly discusses EU proposals for a standing investment court. Once again the discussion fits better with the book's subtitle, in that its main focus is on the evolution of Australia's policies on ISDS rather than on regulatory autonomy per se.

The book then takes a different turn in Chapter 6 to consider how Australia's PTAs and BITs affect Australia's ability to regulate to protect the environment. This is of course where the impact of trade and investment obligations on regulatory autonomy has been most keenly felt, and this chapter thus provides a case study for the earlier chapters. Indeed, it would have made the earlier chapters more engaging if the example of the environment had been incorporated in those chapters. Chapter 6 sidesteps trade in goods, which the authors justify on the basis that the impact of environmental regulation on trade in goods is most likely to be raised at the WTO's established state-to-state dispute settlement system rather than under the investor-state arbitration mechanisms of PTAs and BITs. With the WTO being outside the scope of this study, the authors have chosen to discuss seven investor-state disputes that arose under the North-American Free Trade Agreement (NAFTA) to gain insight about how Australia's PTA and BIT obligations might be interpreted in an environmental context. After a comparison of NAFTA's key provisions with those from Australian PTAs and BITs, the chapter briefly describes the facts and findings in the seven NAFTA cases, before

[7] Productivity Commission, 'Bilateral and Regional Trade Agreements' (Research Report, November 2010) 265-77, 285.

[8] *Philip Morris Asia Ltd v Australia (Award on Jurisdiction and Admissibility)* (Permanent Court of Arbitration, Case No 2012-12, 17 December 2015).

outlining lessons for Australia. The general takeaway of these cases, according to the authors, is that 'arbitral tribunals are capable of distinguishing between legitimate environmental measures and breaches of investment obligations' (p. 226). Nevertheless, the authors also discuss how a broader use of exceptions could safeguard Australia's regulatory autonomy in relation to the environment. In its last part, the Chapter points to a more recent evolution of deploying PTAs and BITs to improve domestic environmental standards through, first, the incorporation of minimum environmental protection standards and, second, the use of ISDS by investors claiming that insufficient environmental regulation reduced their investment's value.

The final chapter concludes that, while Australia has made some efforts to preserve its regulatory autonomy, it still has a way to go. The authors suggest that Australia should reduce inconsistency between agreements, pursue balanced and comprehensive negotiations, and resist further ratcheting up of IP protections (p. 246). The most useful recommendation is the 'need to pay greater attention to more mundane matters', such as reviews of existing obligations (internally as well as with treaty partners), joint interpretations, and mutual terminations (p. 251). However, details are lacking. Far more time is spent on recommendations to improve Australia's treaty-making processes (p. 252–6), but these lessons are the least transferable to other states.

The authors also suggest that more research should be done on the economic and legal impact of existing PTAs on regulatory autonomy. Given that the book set out to provide an 'extended legal analysis of how Australia's current framework of PTAs and BITs affects Australia's regulatory autonomy' (p. 2), this was a surprisingly modest conclusion. In my view, the root of the problem is the initial decision to define regulatory autonomy broadly. A narrow definition would have enabled the authors to focus on the scope of the exceptions which is where states will have to do the hard work in justifying their regulation against claims made by investors or trading partners. However, with its detailed description of key provisions of Australia's BITs and PTAs, the book helpfully summarizes the extensive primary texts for legal researchers and those in other disciplines. Moreover, the book is written accessibly in that it does not assume prior knowledge of trade and investment law and its associated jargon. Future researchers will find the book's detailed analysis of the legal texts a useful springboard from which to explore the reasons for the inconsistencies between the different agreements, to evaluate which alternatives are economically superior, and to examine what Australia and similarly situated states could realistically do to protect their regulatory autonomy.

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