Preface and acknowledgements

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Non-discrimination is central to national treatment and most-favoured nation obligations under both World Trade Organization (‘WTO’) agreements and under international investment agreements (‘IIAs’). Yet there are significant inconsistencies in the decided cases in both legal systems on what constitutes like (or sufficiently comparable) products, services or service providers, investors or investments (‘PSI’) and what constitutes less favourable treatment. WTO and international investment tribunals have invoked the concept of ‘regulatory purpose’ to assist in identifying instances of discrimination, but have done so both without articulating a definition of regulatory purpose and in significantly divergent ways. This book argues that these inconsistencies are largely explained by the failure of WTO and international investment tribunals to explain the normative basis of their enquiries—that is, to explain, by reference to the object and purpose of the agreement in question, what kind of discrimination is relevant. The book offers a working definition of regulatory purpose as the actual effects and the objectively ascertainable and rational intended effects of a measure. It surveys and criticises the manner in which adjudicators and commentators have employed the concept to date. It argues first, in relation to the requirement of ‘likeness’, that regulatory purpose is at most evidence of differences or similarities between PSI and cannot be given any further role to play. It argues, in relation to ‘less
favourable treatment’, that regulatory purpose (as defined) should always be considered by a WTO or international investment tribunal. It proposes that (subject to the wording of the relevant IIA) a state should, in general, be able to escape liability in international investment law by establishing that the challenged measure does not have a significant regulatory purpose of protectionism and that the measure is necessary to achieve, or is rationally connected to, a legitimate objective. This would establish that the measure did not cause ‘less favourable treatment’. The book further argues that, in the WTO context, the Appellate Body’s recent jurisprudence under the Agreement on Technical Barriers to Trade indicates a need to reconsider the role of regulatory purpose under the General Agreement on Tariffs and Trade (GATT), in particular in relation to circumstances not falling within the enumerated paragraphs of Article XX. Throughout, the book compares and contrasts WTO and international investment law, drawing out several parallels and suggesting areas in which one legal system might supply answers to questions arising in the other.

This independent research was supported in part by the Australian Research Council pursuant to the Future Fellowship scheme (project number FT130100416). The authors would like to thank Lorand Bartels, Hilary Birks, Tomer Broude, Mireille Cossy, Nicolas Diebold, Rachel Harris, Simon Lester, Gabrielle Marceau, James Munro, Tania Voon, Markus Wagner and Weihuan Zhou for their helpful comments on earlier drafts, the audience at the WTO speakers’ series seminar on 3 July 2015, and Glyn Ayres for his research assistance. Andrew Mitchell would also like to thank the University of Oslo’s PluriCourts (Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order) for welcoming him as a Visiting Professor in August and September 2015 to work on the book.