1. Introduction

The prohibition of discrimination based on nationality has been a central concept in international trade law since the inception of GATT 1947. Nevertheless, the content of the obligation varies widely across different provisions of World Trade Organization (‘WTO’) agreements, and the term ‘discrimination’ is rarely used in the provisions of these agreements. Instead, non-discrimination manifests in requirements to treat foreign ‘like’ products and services and foreign service-providers as favourably.
as those of domestic origin (national treatment) and of any other foreign origin (most favoured nation (‘MFN’) treatment).

Protection from discrimination on the basis of nationality is also a core standard contained in almost all bilateral investment treaties and investment chapters in preferential trade agreements (referred to as ‘international investment agreements’ or ‘IIAs’). Most IIAs oblige states to accord national treatment (treating foreign investors or investments no less favourably than domestic investors or investments in like circumstances), and MFN treatment, extending this protection (and others) to investors/investments of third states.\(^3\)

The fundamental normative basis for the concept of non-discrimination is that like cases should be treated alike (whereas different cases may be treated differently). Thus, an obligation not to discriminate raises two key issues: first, whether the things being compared are sufficiently similar that they should be considered to be ‘like’; and, secondly, whether the treatment meted out to them is in substance relevantly different. We say ‘relevantly different’ because legal prohibitions on discrimination typically prohibit discrimination on certain bases or for certain reasons—the purpose of the enquiry necessarily informs both the assessment of sufficient similarity and different treatment. These assessments turn on both evidence and normative judgement.

A pressing issue facing both international trade law and international investment law is whether, if at all—and, if so, how—the so-called ‘regulatory purpose’ of a measure is relevant to the question whether the measure infringes national treatment or MFN treatment obligations. In this book, we argue that regulatory purpose can be indirectly relevant to the comparison of two products, services, service-providers, investors or investments (‘PSI’)—that is, the criterion of likeness—and is necessarily relevant to a comparison of their treatment. We also argue that the purpose of the comparison—that is, the purpose of the WTO agreements or the relevant IIA—must be considered in any non-discrimination analysis and, to date, has often been inadequately considered.

‘Regulatory purpose’ is, unfortunately, a phrase that has been used by different authors and adjudicators to mean different things. We explain

\(^3\) IIAs also frequently contain a ‘fair and equitable’ treatment obligation, which is understood to require that a host state not act in a discriminatory manner to foreign investors and investments. Some IIAs contain separate provisions prohibiting discriminatory expropriation. However, as this obligation is not mirrored in the WTO agreements, we leave it, and other IIA provisions containing obligations of non-discrimination, to one side.
what we mean by this term in Chapter 2: we define it as a measure’s actual or potential effects or the effects a measure is claimed to and could (on a rational view) have. Chapter 2 also explains the unavoidable value judgments inherent in any conception of discrimination, generally and in the trade and investment context.

Any engagement with regulatory purpose must be framed within and permitted by the provisions applied, which requires acute attention to them. This has been somewhat lacking in the commentary and decisions to date. Accordingly, Chapter 3 analyses the key WTO provisions (from the GATT, GATS, TBT Agreement and SPS Agreement) and prototypical IIA provisions. Further, both the likeness and the treatment enquiries require consideration of the purpose of the obligation of non-discrimination, the object and purpose of the relevant agreement, and an appreciation of the balance it strikes between reducing obstacles to trade or investment and protecting other societal interests. Again, consideration of these issues has been wanting in the decisions to date; Chapter 3 analyses these issues also.

Chapter 4 explains how regulatory purpose is potentially indirectly relevant to the analysis of whether two PSI are ‘like’, ‘in like circumstances/situations’ or (absent explicit treaty language) otherwise sufficiently comparable. We argue that, contrary to some early and overly broad Appellate Body statements, regulatory purpose may be—but is not necessarily—useful evidence of differences between PSI, and which might demonstrate that they are not like or sufficiently comparable. Our basic thesis is that differential treatment afforded by a measure may often indicate important differences between PSI, which is the position that the Appellate Body seems to have reached. We argue, on the other hand, that it is not possible to take regulatory purpose any further in the analysis of the appropriate comparator, in particular to say that a legitimate regulatory purpose of a measure means that PSI are not sufficiently comparable, contrary to the approach of some international investment decisions.

Chapter 5 surveys the WTO and international investment approaches to less favourable treatment (and the various standards of treatment that exist), in particular the different approaches to regulatory purpose that the Appellate Body has taken under the GATT and the TBT Agreement

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4 General Agreement on Tariffs and Trade 1994 (WTO Agreement Annex 1A) (‘GATT’); General Agreement on Trade in Services (WTO Agreement Annex 1B) (‘GATS’); Agreement on Technical Barriers to Trade (WTO Agreement Annex 1A) (‘TBT Agreement’); and Agreement on the Application of Sanitary and Phytosanitary Measures (WTO Agreement Annex 1A) (‘SPS Agreement’).
(which we critique) and the manifold approaches of international investment tribunals. Our core argument is that recourse to the purpose of the relevant agreement will reveal what kind of differential treatment is and is not prohibited discrimination, and that differential treatment that arises exclusively from legitimate regulatory purposes is generally not forbidden by the WTO agreements or IIAs. We argue that the question whether sufficiently similar PSI have been impermissibly treated less favourably is a question that is (or should be) concerned with the effect of a measure on the foreign PSI. As mentioned, our definition of regulatory purpose encompasses a measure’s actual and objectively ascertainable and rational intended effects; so defined, regulatory purpose must be considered in determining whether less favourable treatment has been afforded to foreign PSI. We also consider several subsidiary issues, including the manner in which regulatory purpose should be considered (for example, as a central part of the less favourable treatment analysis or as a separate justificatory step), institutional and practical reasons advanced against considering regulatory purpose (which are unconvincing), the appropriate test for determining whether a measure pursues a legitimate regulatory purpose under IIAs, and the extent to which a state’s assertion of regulatory purpose should be accepted by a WTO or international investment tribunal.

The main conclusions in Chapter 5 are that the Appellate Body’s inconsistent treatment of the TBT Agreement and the GATT—in relation to an implied exception for de facto differential treatment where the differential treatment stems exclusively from a legitimate regulatory distinction—is unsustainable and unconvincing. We argue, on the other hand, that the approach adopted by most investment tribunals is sound in principle; we thus suggest that a measure must be necessary to achieve or at least rationally connected to a legitimate objective as a separate justificatory step in considering whether measures that appear to discriminate de facto do not in fact contravene the relevant IIA. The analysis throughout this book, but particularly in Chapter 5, demonstrates the confusion and difficulty that has beset this area due to the failure of both WTO and international investment adjudicators to articulate the reasons for their decisions. As such, we spend considerable time seeking to identify the various approaches that have been taken in these cases. We hope that our analysis of these issues in the following chapters brings some coherence to the decisions of WTO and international investment tribunals and that it will assist principled, clear and transparent decision-making in their application of non-discrimination norms.