

BOOK REVIEW

NON-DISCRIMINATION AND THE ROLE OF REGULATORY PURPOSE IN INTERNATIONAL TRADE AND INVESTMENT LAW BY ANDREW D MITCHELL, DAVID HEATON AND CAROLINE HENCKELS (EDWARD ELGAR, 2016) 192 PAGES. PRICE €75 (HARDCOVER) ISBN 9781785368103.

Of the reasons why the international trade and investment regimes remain controversial, the power of adjudicators to review domestic laws and regulations must be among the most frequently cited.¹ With the rise of populism and scepticism over global economic interdependence, it is wise to give acute attention to the way adjudicators have approached this matter. In their new book, Andrew Mitchell, David Heaton and Caroline Henckels undertake a technical and sophisticated analysis of this critical topic.

Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law provides a dense and thoughtful critique of the way in which adjudicators within the World Trade Organization and international investment tribunals have examined the relevance of a regulation's intended, stated or asserted purpose when deciding legal claims. The authors use this topic as a vehicle to describe what they view as an illogically inconsistent and unnecessarily rigid approach to economic discrimination. Displaying nuanced understanding of case law and excellent doctrinal accuracy, the authors argue that adjudicators should place greater weight on the regulator's intentions when determining whether or not a regulation amounts to the discrimination prohibited under international trade and investment agreements. While their analysis is highly technical and not designed for the merely casual follower of international law, their book is of great use to trade or investment scholars and practitioners. More importantly, relevant government officials, trade adjudicators and current or future investment arbitrators would be wise to also take note of this examination.

At the most basic level, the book is an exploration of how trade and investment adjudicators have failed to find a consistent and defensible normative basis when assessing the regulatory purpose of governmental actions. The entry point is cases of non-discrimination: one foundational principle of both trade and investment regimes embodied in the rules of national treatment and most favoured nation ('MFN'). Simply put, trade and investment law requires states to refrain from implementing laws or regulations that discriminate based on the origin of a product, service or investment ('PSI').²

¹ See, eg, Kent Jones, *Who's Afraid of the WTO?* (Oxford University Press, 2004); Geoffrey Allen Pigman, 'The Sovereignty Discourse and the US Debate on Joining the World Trade Organization' (1998) 12 *Global Society* 75; Matthias Bauer, 'The Political Power of Evoking Fear: The Shining Example of Germany's Anti-TTIP Campaign Movement' (2016) 15 *European View* 193.

² See, eg, *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A, arts I, III ('*General Agreement on Tariffs and Trade 1994*'), annex 1B, arts II, IV, VII ('*General Agreement on Trade in Services*'), annex 1C (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) arts 3, 4.

In practice, non-discrimination is difficult to operationalise and to distinguish from good faith regulation, which happens to impact different PSIs differently. When determining whether or not a measure is discriminatory, the Appellate Body, as well as most investment tribunals, typically engages in a two-step analysis. First, they look at the relationship between different PSIs to determine whether or not competing, differently regulated products are ‘like’, or whether competing, differently regulated services or investments are ‘in like circumstances’. Second, if the PSIs are considered to be sufficiently alike, adjudicators will look to see if by design the measure grants ‘less favourable treatment’.³

Regarding the determination of whether or not two products are ‘like products’, Mitchell, Heaton and Henckels criticise the current method of analysis as overly focused on economic conditions and placing an unnecessarily strong weight on the existence of close competition. They claim that such an approach is not ‘grounded in the object and purpose of the WTO agreements as a whole’.⁴ They go on to argue that the WTO agreements do not guarantee the right to compete freely, but instead, ‘what matters are the benefits and detriments that might flow from free competition, such as — to draw on the preamble to the WTO Agreement — “rais[ed] standards of living” or environmental consequences’.⁵ The authors propose that future panellists and members of the Appellate Body should place a greater weight on a measure’s regulatory purpose when determining whether a PSI is like. According to them, ‘a measure’s regulatory purpose might highlight important differences between [PSIs]; indeed, it might be compelling evidence of such approaches’.⁶

Such a proposal by the authors is reasonable and not likely to be controversial. By taking greater notice of the role in which a regulation’s intended purpose plays one is likely to understand legitimate differences between PSIs while not forcing the complex task of inferring the subjective intent of lawmakers, or worse, determining the legitimacy of a measure’s goal. For example, a regulation on the fuel efficiency standards of diesel cars could be enacted with the intent to improve the quality of the enacting nation’s air. While the fact that one type of vehicle may be more harmful to the environment than another should not be enough to preclude a finding of likeness; instead, it should be used as evidence by an adjudicator of the regulatory purpose.

³ See, eg, Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996) 18–19: ‘the words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported and domestic products are “like” and, second, whether the taxes applied to the imported products are “in excess of” those applied to the like domestic products’. See also Nicolas F Diebold, ‘Standards of Non-Discrimination in International Economic Law’ (2011) 60 *International and Comparative Law Quarterly* 831, 834: ‘[t]he principle of non-discrimination consists of two main elements, both of which are comparative in nature. First, the comparator clause calls for a comparison between the *market actors* subject to differential treatment. The second element requires a comparison between the *treatments* accorded to the market actors at issue in order to assess whether one is treated less favourably than the other’.

⁴ Andrew Mitchell, David Heaton and Caroline Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Edward Elgar, 2016) 56–7.

⁵ *Ibid* 57.

⁶ *Ibid* 61.

However, the authors are significantly more audacious in their approach to the analysis of ‘less favourable treatment’. Mitchell, Heaton, and Henckels argue that when looking at whether less-favourable treatment is accorded under all WTO agreements, it is also essential to look at the purpose of the regulation. Such a move by the Appellate Body would prove to be a significant departure from its previous decisions. The authors defend their proposal by referring to arts 2.1 and 2.2 of the *Agreement on Technical Barriers to Trade* (*TBT Agreement*)⁷ — an agreement that is different from, among others, the *General Agreement on Tariffs and Trade* (*GATT*) which also contains non-discrimination provisions. Specifically, the authors point out that when analysing the *TBT Agreement*, the Appellate Body uses a ‘mixed economic and regulatory purpose approach to “less favourable treatment”’.⁸ In their view, the *GATT* and the *TBT Agreement* are not incompatible nor mutually exclusive agreements and if the Appellate Body uses such an approach to technical barriers to trade cases, it should do so under the *GATT* as well.

The problem with such an analysis is that the *TBT Agreement* art 2.2 explicitly states which objectives should be considered legitimate, and art 2.5 states that whenever a regulation is created for the purpose of fulfilling a legitimate objective it is presumed to not ‘create an unnecessary obstacle to international trade’. No such language exists in the *GATT*. Instead, the *GATT* lists exceptions in art XX. The *TBT Agreement* creates a presumption against discrimination based on a regulation’s purpose, whereas the *GATT* lists limited areas where discrimination is tolerated. Yet the authors appear to be less concerned about that distinction and instead defer to the overall goals of the WTO, as listed in its preamble: to secure sustainable development, raise standards of living and ensure full employment.⁹ If the Appellate Body adopts the authors’ proposals, there will be more consistency among the different WTO agreements and a significant change in the way discrimination cases are evaluated. Overall, the virtue of the authors’ proposed approach is in its careful engagement with years of case law in the WTO and lawyerly desire for consistency, while moving beyond textualism and into contextualism — an approach that is clearly within the four corners of the *Vienna Convention of the Law of Treaties*.¹⁰

Regarding investment law, the book’s analysis is thinner, in part because it relies almost exclusively on the few decisions arising under the investment chapter of the *North American Free Trade Agreement* (*NAFTA*)¹¹ — the now controversial agreement that the Trump administration has promised to renegotiate. The book also does not make clear what lessons can be drawn from comparing and contrasting the different approaches adopted by trade and investment adjudicators. Nevertheless, having the consolidated treatise of

⁷ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*Agreement on Technical Barriers to Trade*) arts 2.1, 2.2 (*TBT Agreement*).

⁸ Mitchell, Heaton and Henckels, above n 4, 121.

⁹ *Ibid* 131.

¹⁰ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

¹¹ *North American Free Trade Agreement*, opened for signature 17 December 1992, 32 ILM 289, 605 (entered into force 13 May 1995).

decisions that deal with regulatory purpose in the context of discrimination may prove incredibly useful if the merging of trade and investment laws continues its seemingly inevitable path.¹² Just that alone makes this a necessary book in all international law collections.

In the context of investment, the authors also propose a system that is deferential to a legitimate regulatory purpose. They propose that ‘where a measure is appropriately connected to a legitimate objective, this justifies any differential treatment under the [international investment agreement]’.¹³ While such an approach would obviously not be permissible if explicitly prohibited by the text of the relevant international investment agreement, the authors justify such an approach even when an agreement is silent on the issue of regulatory purpose. In fact, they state that ‘where the purposes of an investment treaty are less than clear or the treaty does not refer to non-investment purposes, an argument can be made that the purpose of the regime of international investment law is to promote the economic development and prosperity of states’.¹⁴ Such a justification appears to be less supported in some treaties. However, it also seems a kind of wishful thinking, especially if arbitrators that have limited familiarity with treaty interpretation continue to dominate the field.¹⁵ Moreover, some pro-investment arbitrators may criticise the argument as forgetting the main objective of investment law: to protect investments. There is certainly room for debate regarding the level of protection an investor should reasonably expect from an investment agreement, but such a strong deference to the state is not unreasonable and should be taken seriously. Perhaps, *NAFTA* re-negotiations could clarify this issue too, as the final version of the now defunct *Trans-Pacific Partnership Agreement* did.¹⁶

Mitchell, Heaton and Henckels make a strong case for the greater consideration of regulatory purpose within both trade and investment law — an approach that has a clear basis in the correct application of rules of treaty interpretation. While their proposals are unlikely to be accepted by all adjudicatory bodies, their analysis highlights the importance of good drafting, the need for a broader focus, and a departure from an analytical structure devoted entirely to economic factors.

Overall, the work of the authors is a contribution to legal scholarship that will undoubtedly make careful readers think. It is unclear exactly what impact the book will have on the main institutions of global economic governance. Yet it is likely that those who read *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* will acquire a greater

¹² Sergio Puig, ‘The Merging of International Trade & Investment Law’ (2015) 33 *Berkeley Journal of International Law* 1.

¹³ Mitchell, Heaton and Henckels, above n 4, 141.

¹⁴ *Ibid* 140.

¹⁵ See Sergio Puig, ‘Social Capital in the Arbitration Market’ (2014) 25 *European Journal of International Law* 387, 397; see also Malcolm Langford, Daniel Behn, and Runar Hilleren Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20 *Journal of International Economic Law* 301, 323.

¹⁶ *Trans-Pacific Partnership Agreement*, signed 4 February 2016, [2016] ATNIF 2 (not yet in force) ch 9 n 14 (‘*TPP*’). The *TPP* also states that ‘[n]on-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances’: at ch 9 annex 9-B art 3(b).

understanding of the importance of considering regulatory purpose in international economic law and what is at stake in non-discrimination cases.

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