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Foreign Investor Protection in Zimbabwe

The "Principle of Non-Discrimination" and Foreign Investor Protection:

A Zimbabwean Perspective

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The World Trade Organisation (WTO) is the body that regulates international rules of trade. Its role is to:

> "Facilitate international trade in goods by progressively reducing and, in many cases, eliminating national governmental measures that are restrictive of trade, which traditionally almost always meant import-restrictive measures."[3]

Zimbabwe has been a member of WTO since 5 March 1995 and a member of GATT since 11 July 1948. Zimbabwe forms part of the 162 member nations to the WTO.[4] The WTO consists of a number of agreements that have been recognized and signed by the bulk of trading countries across the world. The purpose of the WTO is to provide the legal ground rules for international commerce that will facilitate the smooth operation of international trade.

The agreement that established the WTO[5] (Marrakech Agreement) succinctly states in its preamble that one of the main objectives of the WTO is the "substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations."[6]

The agreements established by the WTO are designed to achieve the objectives outlined in the WTO agreement. In line with this, the WTO has developed standards or principles that are deeply rooted in the desire to meet trade goals. The binding nature of WTO agreements on its member States is expounded in Article II of the Marrakesh Agreement. It states,

> "The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.[7] The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.[8] The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them."[9]

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[1] LLB (Hons), LLM, LLD
[2] LLB (Hons), LLM (Imp & Exp)
[3] Desta "GATT/WTO law" 148-191.
[4] WTO *date unknown* https://www.wto.org/…/the wto…/org6_e.
[5] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organisation (1994) hereinafter called the WTO Agreement.
[6] The WTO Agreement.
[7] A II (1) of the WTO Agreement.
[8] A II (2) of the WTO Agreement.
[9] A II (3) of the WTO Agreement.

The scope of the WTO as stated above is that, by virtue of being a member state to the WTO, the principles and agreements that are comprised therein are legally binding on such member states. As aforementioned, exclusions will in certain instances be made to member states who have not signed particular agreements. These agreements and principles are what comprise the WTO law. This law is taken to be binding on WTO member states.

With this in mind, central to the WTO law has been the principle of "non-discrimination". The non-discrimination principle is captured in the General Agreement on Tariffs and Trade (GATT),[10] the Agreement on Trade-Related Aspects of Intellectual Property Rights[11] (TRIPS) and the General Agreement on Trade and Services[12] (GATS). This principle is designed to ensure that investments shall not be impaired by arbitrary or discriminatory measures adopted by a State, such that they hinder or prohibit the flow of trade.[13] This concept is the crux of the principle of non-discrimination.

The WTO explicitly qualifies the principle of non-discrimination as comprising of the most favoured nation (MFN) treatment obligation[14] and the national treatment (NT) obligation.[15] However, as a closer examination will show, the principle of non-discrimination has developed such that it is broader in its application and is not necessarily limited to these two factors.

The most favoured nation principle can be explained as follows:

> The most favoured nation treatment, [enables] the nationals of the [contracting] parties to profit from favourable treatment that may be given to nationals of third states by either contracting state.[16]

In essence, where favourable treatment is extended to one state by way of its citizens who engage in the trade of goods, citizens of a third state engaging in trade of goods are entitled to claim the same treatment. The most favoured nation treatment obligation under the non-discrimination principle simply put, is "how a state deals with foreign goods and persons when they enter its territory and thereafter."[17]

The national treatment obligation also "entitles the foreign investor to be treated equally with national entrepreneurs."[18] At its heart and over the course of time, the national treatment obligation has been seen as providing “a level playing field between the foreign investor and

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[10] A 1 and 3 of the GATT, A 1 makes provisions for the MFN treatment obligation and A 3 makes provision for the NT obligation

[11] A 3 and 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) hereinafter called TRIPS, A 3 provides for the NT obligation in intellectual property and A 4 provides for the MFN treatment obligation in intellectual property.

[12] A 2 and 17 of the General Agreement on Trade in Services (1994) hereinafter called GATS. A 2 provides for the MFN treatment obligation in trade of services and A 17 provides for the NT obligation in the trade of services.

[13] Dolzer and Schreuer *Principles of International Investment Law*

[14] A 1 of the GATT states "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." The provision is specific to products in the context of international trade which is not necessarily the same as investment.

[15] A 3 of the GATT states "the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." The GATT states the NT obligation in the context of products.

[16] Sonorajah *The International Law on Foreign Investment* 236.

[17] Acconci "Most-Favoured-Nation Treatment" 363-406.

[18] Sornarajah *The International Law on Foreign Investment* 336.

the local competitor."[19] In general terms, the national treatment principle encourages that a foreign investor and his investments are "accorded treatment no less favourable than that which the host state accords to its own investors."[20] It is evident that the alternate treatment obligations work in complementing each other in preventing discrimination in the field of international trade.

As this discussion will revolve around concepts of trade in goods and services and investment, there is a need to define these terms. The concept of trade in goods and services can be defined as,

> "The supply of [goods and services] from one Member country to another, within one Member country to service consumers of any other, that is, to foreigners, and in another Member country through either 'commercial presence ,' that is legal presence in the form of subsidiaries, branches, or agencies, or through the 'presence of natural persons."[21]

On the other hand, investment may be defined as,

> "The transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets."[22]

The concept of trade in goods and services is as specific as its name sounds. It deals with the trade or exchange of various goods and services for profit between States. Investment, on the other hand involves concepts of the transfer of tangible and intangible assets for profit which is broad in its scope. Essentially,

> "International trade and investment are bound at the hip. When businesses trade internationally, goods or services cross borders; when they invest, it is capital and other factors of production that do so."[23]

As stated under Article II of the WTO agreement, Zimbabwe, by virtue of being a member state to the WTO has agreed to be bound by the law and principles of the WTO. This means that Zimbabwe is obliged to observe the non-discrimination principle in its entirety.[24]

Whilst the WTO is predominantly focused on trade in goods, it has taken seriously the need to eliminate discrimination in both international trade and investment. This is due to the fact that "investment is generally supportive or complementary to trade."[25] It is true to say that,

> "Investment needs a predictable, transparent, and non-discriminatory business climate. A balanced framework of rules on FDI would be in the interests of all countries. This is especially true of the developing countries, for which a rules-based system would increase the opportunities to attract investment and make domestic reforms more credible."[26]

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[19] Dolzer and Schreuer *Principles of International Investment Law* 198.
[20] Dolzer and Schreuer *Ibid* at 198.
[21] Muchlinski, Ortino and Schreuer *International Investment Law* 192.
[22] Sornorajah *The International Law on Foreign Investments* 8.
[23] DiMascio and Pauwelyn 2008 *AJIL* 48.
[24] A II of the WTO Agreement states "The agreements and associated legal instruments (Multilateral Trade agreements) are integral parts of this agreement, binding on all members." As a member of the WTO, South Africa is bound by WTO law.
[25] WTO Report (1998) of the Working Group on the Relationship between Trade and Investment to the General Council.
[26] OECD date unknown https://www.oecd-library.org/foreign-direct-.

Essentially, "eliminating barriers to foreign direct investment (FDI) is a means of achieving global market integration [and ultimately] increased trade in goods."[27] More simply put, trade barriers erected through discriminatory practices or legislation "may affect FDI growth, or FDI measures may restrict or distort trade."[28] Furthermore, the legal and regulatory framework applicable to investments is essential to trade as it ought to foster "equal competitive opportunities between nations."[29] A thriving investment regime leads to a healthy trade system, which is encouraged and facilitated by Foreign Direct Investment (FDI). "The WTO is aware of the link between trade and FDI and the dynamic effects of FDI on trade,"[30] and it is within this sphere that the principle of non-discrimination is most relevant and operational.

> "To ignore the need to remove barriers to trade in the form of discriminatory practices would ultimately lead to the standstill of international trade and the WTO has made clear that such practices are intolerable within the framework of its member states."[31]

In order for Zimbabwe to attract foreign direct investment, it is essential to assess whether or not adequate regulatory protection is afforded foreign investors. To invest, foreign investors need reassurance that there will be a fair and non-discriminatory framework in terms of their investments within Zimbabwe.

The WTO is an international organization that has "successfully encouraged multilateral trade liberalization,"[32] between its member states. This is largely due to its dedicated effort to remove international barriers to trade which may take on various forms. Barriers to trade have always posed the greatest threat to international trade. Realising this risk, the WTO, from its inception as the GATT to its transition to the WTO, took and has continued to take various measures that serve to facilitate trade. Among the greatest barriers to trade have been discriminatory practices between states in conducting trade. The WTO being aware of this has established the non-discrimination principle as a fundamental principle to the facilitation of trade.

The WTO operates through various agreements formulated between itself and member states.[33] These agreements make up the WTO law. These agreements are formulated to facilitate trade and are constructed so as to remain within the ambit of the fundamental principles upon which the agreement establishing the WTO is built. The Marrakesh Agreement which established the WTO entrenches the fundamental principle of non-discrimination in its preamble. It aptly states that the WTO and its member states are:

> "…desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations, practices essential between trading states."

All measures, strategies and policies concerning trade are cognisant of the founding principle of non-discrimination." Non-discrimination is a fundamental principle [to] the world trading system."[34] It has been acknowledged by WTO Ministers as being an "important

[27] Gordon 2001 https://www.unctad.org.en/docs/pogdsmdpbg24d9.en.pdf.
[28] Hai-Qing The Relationship between Trade and FDI and the Implications for the WTO 11.
[29] OECD 2004 https://dx.doi.org/10.1787/518757021651.
[30] Hai-Qing The Relationship between Trade and FDI and the Implications for the WTO 11.
[31] The preamble to the WTO agreement states that the WTO is desirous of reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international trade relations.
[32] Bagwell and Staiger 2004 *JIE* 1.
[33] In terms of the WTO agreements relating to the principle of non-discrimination in trade and investment the main agreements to focus on are the GATT (Article 1 and 3), the GATS (Article 2 and 17) and TRIPS (Article 3 and 4).
[34] Qin 2005 *BUILJ* 216.

element in securing" transparent, stable and predictable conditions for long-term investment…and will contribute to the expansion of trade.[35]

The principle of non-discrimination as encapsulated within the WTO law is wide and varying. The WTO singles out two treatment obligations in relation to it, namely, the Most-Favoured Nation obligation (MFN) and the National Treatment (NT) obligation which are found in various sources within the WTO law.[36] The MFN and NT obligations are applied in various forms, dependant on the context in which they are used. Regard is also had to the particular agreement or clause to which each or both obligations are considered necessary or relevant. However, the principle of non-discrimination has developed over the years to become much broader than the MFN and NT obligations and this development will be further discussed so as to attain a holistic understanding of the principle of non-discrimination.

This discussion will begin with a consideration of the MFN treatment obligation and NT obligation respectively. Thereafter, there will be a discussion concerning the development of the non-discrimination principle as it pertains to trade and investment. Ultimately, this approach will allow for an informed conclusion.

Based on the definition of the Most Favoured Nation treatment obligation found in the GATT,[37] the MFN treatment obligation is accorded by the:

> Granting state to the beneficiary state, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third state or to persons or things in the same relationship with that third State.[38]

The MFN treatment obligation creates rights and obligations not only on the host country, but also on the States contracting with the host country. Consequently all WTO members have the right to expect equal advantage, favour, privilege and immunity of their products as is accorded to the most favourable or “strongest” of contracting states within the State that they are trading in.

All WTO members have the right to demand immediate and unconditional equal advantage, favour, privilege and immunity where they become aware of such treatment being extended to a contracting state with a WTO member state.

Flowing from the aforementioned rights are similar obligations that attach to WTO member states.

Member states to the WTO are under a binding obligation to observe the MFN principle as established in Article 1 of the GATT. Therefore where a member state is extending favourable treatment in any way, shape or form to the like product of a contracting state it is under a duty to extend that favourable treatment to all other member states contracting with

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[35] WTO Report (1998) of the Working Group on the Relationship between Trade and Investment to the General Council.

[36] MFN provisions are found in A 1 of the GATT, A 2 of the GATS (General Agreement on Trade in Services) and A 4 of the TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights).
NT provisions are found in three main WTO agreements, being, A 3 of the GATT, A 17 of the GATS and A 3 of TRIPS.

[37] A 1 of the GATT states that "Any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

[38] International Law Commission 2015 https://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/1_3_1978.pdf.

it. To fail to do so would be to breach an undertaking by that state in terms of the WTO/GATT.

The “simple goal of [the] MFN is to ensure that the relevant parties treat each other in a manner at least as favourable as they treat third parties.”[39] When a country becomes a member of the WTO by process of accession,[40] the country is bound by the rules and obligations as set out under the WTO law. This obligates it to observe the MFN treatment obligation.[41]

It is important to note that the MFN treatment obligation as embodied under the WTO generally refers to the treatment of "goods" in trade.[42] It is trite that states are free to enter into trade agreements or treaties with other states.[43] Within these treaties or agreements the incorporation of treatment standards, particularly the MFN treatment obligation is generally seen as "promoting the flow of foreign investment."[44] Therefore, it is correct to say, the intended effect of the MFN obligation, clearly, is to create equal and uniform treatment in the trade of goods as well as within the investment arena, particularly to all investors operating in a host country.[45] As this discussion evolves around the WTO law, it is necessary to state the definitions accorded the MFN treatment obligation by the key agreements and provisions within the WTO law.

Under the GATT as incorporated and annexed into WTO law, the MFN obligation is provided for in three important articles. Article 1:1 of the GATT provides for the instances in which the MFN obligation ought to be extended. Article 1:1 highlights that the MFN treatment ought to be extended to all WTO members. The MFN treatment, in terms of trade of goods, is to be extended to all 'like' products of members. Furthermore, the MFN treatment is taken to incorporate all regulations on imports and exports, tariffs, internal charges and taxes as well as internal regulations.

Any violation of this treatment obligation by an importing country that is a member of the WTO is an infringement of its duty under the WTO law. The concept of equal treatment of 'like' products has always been prone to much debate. However in the *BISD (Basic Instruments and Selected Documents)* 28S/102 Spain case, the facts and findings of the WTO tribunal were as follows:

> “Departing from the practice of most countries, Spain had introduced different tariff rates on different kinds of unroasted, non-decaffeinated coffee beans. The panel's first conclusion in assessing most-favoured nation treatment was that the various types should be regarded as "like products". The panel then noted that Brazil mainly exported to Spain the types falling within the higher duty category and concluded that the new Spanish tariff scheme discriminated against unroasted coffee originating in Brazil.”[46]

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[39] Dolzer and Schreuer *Principles of International Investment Law* 206.
[40] Article XII of the WTO Agreement states that accession to the WTO will be "on terms to be agreed" between the acceding government and the WTO. Accession to the WTO is essentially a process of negotiation (2016) https://www.wto.org>acc_e>acces_e.
[41] According to A 2 (2) of the Marrakesh agreement, members to the WTO agree to be bound by the Multilateral Trade Agreements of the WTO which include the GATT. Provisions on the MFN treatment obligation are found in A 1 of the GATT, A 2 of the GATS and A 4 of the TRIPS.
[42] A 1:1 of the GATT.
[43] Sornorajah *The International Law on Foreign Investment* 172.
[44] Sornorajah *Ibid* at 172.
[45] Muchlinski, Ortino and Schreuer *International Investment Law* 381.
[46] Panel Report, *Spain-Tariff treatment of unroasted coffee* (11 June 1981) BISD28S/102 paras 4.5, 4.9 and 4.10.

It was established that *de facto* discrimination existed where products that ordinarily were considered as "like" were classified under different tariff headings and ultimately had a discriminatory effect on the investing states in terms of the duty applied. This case serves as an example of the different forms in which discriminatory practices may be perpetrated. It has been said that this case is noteworthy because,

> "The panel did not merely conclude that Spain failed to extend the more advantageous treatment to the more highly burdened sub-categories within the like products. Instead, the panel established a link between the disfavoured types and their predominant presence among goods originating in Brazil. On that basis the panel labelled the treatment of the entire group of unroasted coffee beans as discriminatory."[47]

The point to draw from this case is that the considerations placed upon the MFN treatment obligation extend to "discriminatory impact" or effect on member states.

Another commonality established by the aforementioned case is that the MFN treatment obligation is applicable to investment in much the same way that it is applicable to trade. This can be inferred from the fact that export of coffee beans for profit can be considered a form of investment.[48] It is clear and has been stated that the concept of non-discrimination has "emerged as a specific trait of international trade regulation and the protection of foreign direct investment.[49]"

In the matter of *Canada-Certain Measures Affecting the Automotive Industry,*[50] a dispute arose as to Canada's import duty exemption for imports by certain manufacturers. The panel found that,

> "The duty exemption was inconsistent with the most-favoured-nation treatment obligation under Art. I:1 on the ground that Art. I:1 covers not only *de jure* but also *de facto* discrimination and that the duty exemption at issue in reality was given only to the imports from a small number of countries in which an exporter was affiliated with eligible Canadian manufacturers/importers."[51]

The findings by the panel confirm and support that *de facto* discrimination is recognised in terms of the GATT and falls under the MFN treatment obligation

The application and management of *de facto* discrimination is essential to the operation of the MFN treatment obligation in that it directly attributes to the prohibition of "protectionism and ensures equal treatment" of all stakeholders. By observing this, there is an assurance of continued stability and confidence in the trade and process.

Article XIII of the GATT makes provision for Non-Discriminatory Administration of Quantitative Restrictions. In essence, this article provides for instances in which quantitative restrictions or tariff quotas are applied to like products. The provision states that these measures may be instituted but only in as far as they are non-discriminatory. No particular definition or scope is set out however as to what non-discriminatory in this context entails. This article may be read as complementary to the MFN treatment as set out in Article 1 of the GATT. It provides specific instances in which the MFN treatment ought to be applied.

Article XVII of the GATT provides for "States Trading Enterprises." State trading enterprises are "defined as governmental and non-governmental enterprises, including marketing

[47] Author unknown 1996 https://jeanmonnetprogram.org>archive>papers.
[48] Watson and Achinelli 2008 *GJ* 1-Brazil has established itself as a coffee exporting country whose coffee producers invest in the export and marketing of their coffee for profit.
[49] Cottier and Oesch 2011 *NCCR* 2.
[50] Canada-Certain Measures Affecting the Automotive Industry 2013 WT/DS412/AB/R.
[51] Canada-Certain Measures Affecting the Automotive Industry 2013 WT/DS412/AB/R.

boards, which deal with goods for export and/or import."[52] The working definition of State Trading Enterprises as established by the WTO comes in three parts. State enterprises (owned by the state), enterprises granted special privileges by the State (e.g. a subsidy or its equivalent) and enterprises granted exclusive privileges (monopolies in production, consumption or trade of particular goods). The definition extended by Article XVII of the GATT appears monopolistic in its nature as the operation of state trading enterprises seemingly hinges on the sole discretion of the State. However, the concern that arises, is whether discriminatory practices can be justified in instances where the trading or investing party does not fall under the definition of a state trading enterprise. Essentially, provisions such as these may undermine both trade and investment. By so doing, it can directly impact economic intergration as between foreign and domestic players. Article XVII takes cognisance of this however and makes it obligatory for such enterprises to operate within the ambit of the non-discrimination principle which comprises of the MFN treatment obligation so as to prevent the abuse of this provision.

The most detailed provisions on the MFN treatment obligation are found in the GATT as it primarily deals with trade. It must however be mentioned that the MFN treatment obligation has been extended into other areas through other agreements in the WTO. Trade related aspects under the WTO are also found in the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In both the GATS and the TRIPS there has been the inclusion of MFN treatment obligation. The MFN treatment obligation has been extended to services and service providers as stated in Article II of the GATS,

> Each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than it accords to like services and service suppliers of any other country.

Likewise, the MFN treatment obligation has also been extended to intellectual property rights as enshrined in Article 4 of the TRIPS. It states:

> With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

While both these agreements make provisions for the MFN treatment obligation they are no different from the GATT as they also make provisions for specific exceptions to the MFN rule. These will however not be discussed here.

The MFN treatment obligation as discussed is clearly intended to ensure a uniform standard of treatment of parties engaged in trade (treaty States) by a host or contracting state. The MFN treatment obligation under the GATT relies heavily on the MFN treatment only being applicable to "like" products. It is suggested that this critical aspect to the MFN treatment obligation creates a possible loophole which begs the question "Is discrimination acceptable in cases where products are deemed to be unlike?[53]" If the MFN treatment obligation is designed to ensure progressive liberalization and promotion of trade and investment there is need to seriously consider the implications of what the term "like" entails as it is at best vague.[54]

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[52] WTO date unknown https://www.wto.org/english/.../statra_e.htm.
[53] Herrmann and Terhechte 2011 *EYIEL* 181.
[54] Muchlinski, Ortino and Schreuer *International Investment Law* 368.

Having said that, the MFN principle is useful in that it is applicable to matters such as market access, performance requirements and the right of establishment.[55] It also works hand in hand with the National Treatment obligation which further elaborates on the operation of the non-discrimination principle as well as the MFN treatment obligation and how all three components work together in the pursuit of foreign trade protection.

National treatment works hand in hand with the MFN treatment obligation in order to fulfil and make effective the principle of non-discrimination. Like the MFN treatment obligation, provisions for the national treatment obligation are found in all three of the WTO main agreements, these being the GATT, GATS and TRIPS.

National treatment under the GATT can be looked at in two sections, firstly, that:

> "Internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production…"[56]

Furthermore:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."[57]

The national treatment obligation in essence is not much unlike the MFN obligation. It contains the "like" requirement which is designed to prevent discrimination between imported products and those produced locally. However it is important to state that the operation of the NT obligation does not preclude taxes or levies at the border. The NT obligation "only applies once a product, service or item of intellectual property has entered the market."[58]

Article XVII of the GATS, as with the MFN treatment obligation, extends the National Treatment obligation to services and service providers. Article 3 of the TRIPS agreement also extends the National treatment obligation to the protection of intellectual property rights. Essentially all foreign services and service providers in a host State are to be treated equally with those of nationals of that State. The same applies to intellectual property rights.

The NT obligation effectively addresses possible "hidden" barriers to trade that may be erected through measures such as inflated domestic consumption tax. The treatment obligation compels members to treat "like" imported products no less favourably than those which are of national origin. It places national and imported products on a level playing field. By so doing, a stable environment is created for trade which positively impacts investment as a stable trade regime to encourage investment. This principle is extremely important as several rights and obligations can be taken to flow from it which directly impact trade and investment.

This treatment obligation has been framed as follows under the GATT:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that

[55] UNCTAD 2010 https:// unctad.org/.../diae.
[56] A III: 1 of the GATT.
[57] A III: 4 of the GATT.
[58] WTO date unknown https://www.wto.org>tif_e>fact2_e.

> accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."[59]

The rights that flow from the NT obligation are predominantly vested in the state contracting with the host nation. The contracting state has a right to equal treatment in terms of the laws, regulations and requirements that pertain to the sale of products within the host nation, presuming that such products have originated from within the host nation.

A contracting state has the right to demand equal treatment between itself and the nationals of a host state with regards the laws, regulations and requirements of trade goods originating from within the host state where the host state is failing to extend such treatment to the foreign trading state or person.

The obligations that arise from the NT obligation predominantly falls on the host state. A WTO member state has the obligation to ensure that the like products between foreign trading entities and local traders are treated equally in terms of regulations, laws and requirements that relate to the sale of such products in the host state. In this manner there is a lessening of the risk of discriminatory practices in trade that may lead to the decrease of international trade and investments.

The national treatment obligation may be viewed as a minimum standard of treatment that must be accorded to all foreign traders and their products.[60] The obligation essentially stipulates that treatment which is accorded to nationals of a State must be equally accorded to foreign traders and their products. It has been said that the advantages of national treatment in modern times are invaluable as "states reserve many of their economic sectors and privileges to their nationals." The national treatment obligation encourages foreign investment as it assures the foreign trader or foreign trading state of uniform and equal application of the law and regulations as they pertain to the treatment that will be extended to them as well as their products.

An important consideration to be made as mentioned earlier is the rights and obligations that stem and flow from the national treatment obligation. First, it places the products of foreign traders and local products on a par, but what is probably most important is that:

> "National Treatment at the stage of entry is regarded as an important right, as it entitles the foreign investor to a right of entry and establishment. The granting of national treatment after entry may confer advantages on aliens, as it will grant them the same privileges enjoyed by nationals."[61]

This will however be discussed at a later stage.

Essentially, the NT obligation is an important tool in promoting trade and investment within and between states.

The NT obligation when applied correctly is designed to ensure that a foreign entity engaging in the trade of goods and products and a domestic entity engaged in the same activity are treated in the same manner, in terms of the laws and regulations applicable to them. Where this balance is disturbed a situation is created whereby a country may find itself

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[59] A 3 (4) of the GATT.
[60] *Pope and Talbot v Canada* (2001) Awarded on the Merits 9.
[61] Sornorajah *The International Law on Foreign Investment* 335.

suffering from a lack of foreign direct investment as there is a correlation between the observance of treatment standards and foreign direct investment.[62] This correlation is founded on the notion that foreign investors require a guarantee of uniform and fair treatment in order to invest outside of their borders.[63]

Having considered the principle of non-discrimination under the provisions of the WTO, it becomes necessary to consider the non-discrimination principle outside the limitations of the MFN and NT obligation as encapsulated in the GATT.

The WTO is not mandated as the regulatory body of investment law, however, that is not to say the operation of the principle of non-discrimination is limited to trade of goods. It has been rightly observed that,

> "Trade in goods, trade in services, and foreign direct investment are distinct forms of economic activity. All are liable to benefit from creating an environment that is "non-discriminatory."[64]

The observance and development of the principle of non-discrimination in trade can be tracked in terms of WTO law. In terms of investment, the "definition and application of the concept of non-discrimination involves a range of policy considerations."[65] Amongst the most important policy considerations to creating an attractive investment environment is the creation of a system of "transparency and protection.[66]" This entails observing the non-discrimination principle in investment.[67]

The definition of non-discrimination in investment is similar to that used in the WTO. It "provides that all investors, both foreign and domestic, are [to be] treated equally."[68] Furthermore, the MFN treatment obligation and NT obligation are not isolated to trade of goods but are applied similarly in investment.

The MFN treatment obligation is a useful tool in the protection of foreign investors against non-commercial risks that could deter foreign investors from investing in host states.[69] This is because the MFN treatment obligation under investment law operates in much the same way as it does under trade law. In investment, an investor from a party to an agreement, or its investment, would be treated by the other party "no less favourably" with respect to a given subject-matter, than an investor from any third country, or its investments.[70] The NT obligation with regards to investment, stipulates that a foreign investor must be accorded treatment "no less favourable than that which the host state accords to its own investors."[71] The wording and operation of the NT obligation in both trade and investment are similar and may be seen as complimentary to each other in terms of their operation.

Therefore, it is reasonable to consider aspects of non-discrimination in trade as being relevant to cases of investment and *vice versa.*

The WTO states that the MFN treatment obligation and NT obligation form the non-discrimination principle. However,

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[62] Cottier and Oesch 2011 *NCCR.*
[63] Cottier and Oesch *Ibid*.
[64] OECD 2002 https://www.oecd.
[65] OECD 2002 https://www.oecd.
[66] OECD 2006 https://www.oecd.
[67] UNCTAD 1992 https://www.unctad.org>PublicationChapters.
[68] OECD 2006 https://www.oecd.
[69] OECD 2006 https://www.oecd.
[70] OECD 2004 https://www.oecd.org>investmentpolicy.
[71] OECD 2005 https://www.oecd.org/.../.

> "It is well established that non-discrimination not only prohibits measures which differentiate directly – or *de jure*, but also indirectly – or *de facto* – discriminatory measures."[72]

De jure discrimination and *de facto* discrimination can be distinguished on the following grounds. *De jure* discrimination can be defined as "*discrimination in law"* or *"explicit" "overt"* or *"formal"* discrimination[73] and *de facto* discrimination has been described in the following manner:

> "The meaning of de facto discrimination appears to be close to that of implicit discrimination in that it is based on practice rather than a legislative requirement. The term of de facto discrimination was firstly used in the report by the WTO Appellate Body in the 1996 banana panel decision.[74] The Appellate Body contrasted de facto discrimination with de-jure, or formal, discrimination."[75]

In light of this, the non-discrimination principle may be confined to a narrow legal definitive interpretation (*de jure)* or it may be subject to a wider and more sweeping definition (*de facto*) that includes the practical application and implication of certain trade and investment measures that override or undermine the spirit behind the non-discrimination principle.[76]

As a starting point, there is a need to state and acknowledge that international law is "based on the principle of sovereign equality of states."[77] Sovereign equality may be construed to mean,

> "All states [are] equal Members of the international community, notwithstanding differences of economic, social or political characteristics, or of any other kind."[78]

Essentially such equality extends to the legal status of every state at an international level. However,

> "It does not entail equal treatment in terms of treaty relations and policies. Indeed, sovereignty entitles states to discriminate among their peers and to prefer some over others in unilateral policies and bilateral relations. Equally, it has been the *raison d'être* of nation states to protect and thus to privilege their own citizens and domestic products within their jurisdiction."[79]

The significance of the principle of non-discrimination as encapsulated under WTO law is clear when contrasted against the nature of state sovereignty under international law and the way in which it may be exploited with regards to international trade. It essentially provides an equal standard of protection and uniformity to aspects of trade that may otherwise be

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[72] Diebold 2010 *IILJ* 2.
[73] Ortino "WTO Jurisprudence on De Jure and De Facto Discrimination" 217 – 262.
[74] *EU Communities-Regime for the Importation, Sale and Distribution of Bananas* 1996 WT/ds 27/ab/r - The complainants (Ecuador, Guatemala, Honduras, Mexico and the United States of America) alleged that the EU communities' regime for importation, sale and distribution of bananas was inconsistent with Article I on non-discrimination and MFN and Article III.4 on national treatment in the GATT (1994). The Panel found that the EU's regime for the importation, sale and distribution of bananas was indeed inconsistent with the GATT on the grounds that it was discriminatory in its effect. In its *obiter dictum,* the panel stated "Articles I and II of the GATT have been applied, in past practices to measures involving *de facto* discrimination.
[75] Goode *Dictionary of Trade Policy Terms* 119.
[76] Rihova *The Evolution of the Non-Discrimination Principle in International Trade* 28.
[77] Brownlie *Principles of Public International Law* 289.
[78] See, *e.g.*, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United States, G.A. Resolution 2625 (XXV), 24 United Nations Year Book (1970), 788.
[79] Schwarzenberger 'Equality and Discrimination' 163.

abused to create technical barriers to trade which ultimately the WTO is seeking to disperse with altogether.[80]

The advent of the formation of the WTO has been significant in that:

> "… Governments [have] agreed to contractually limit their sovereign rights to discriminate and to meet the obligations of equal treatment, thus implementing the principles of substantive equality in international relations."[81]

The principle of non-discrimination has been said to have been created specifically to inhibit protectionism and ensure equal treatment in international investment law.[82]

Non-discrimination and its limitation of sovereign powers to engage in policies privileging one state over another, emanates from the principle of equality.[83] The notion of equality being, "equals must be treated on equal terms." In relation to the WTO, this concept of equality is reflected within the non-discrimination principle as the prohibition of distinction based on nationality or the origin of trade goods. The non-discrimination principle essentially creates and establishes an environment of equal competition in trade. The operation of the WTOs non-discrimination principle and its effect has been neatly summed up in the following statement:

> "Non-discrimination does not guarantee results and outcomes, but rather the potential to operate successfully on markets on equal terms and unimpaired by unfair restrictions imposed either by governments or private actors. Equality of opportunity looks at real condition ns of competition and does not stop at legal discrimination. It entails direct/legal as well as indirect/*de facto* discrimination."[84]

A *de jure* interpretation of the principle of non-discrimination may lead to the very thing which the principle seeks to avoid, namely it may create an environment that stifles equal opportunity and competition. This may happen due to the fact that in practice, states may employ a variety of exceptions and mechanisms that effectively undermine the operation of the non-discrimination principle.[85] This point has been acknowledged in a number of instances. For example, the MFN treatment obligation as well as the NT obligation operates from a basis of non-discrimination between 'like products."[86] This "comparative system" may easily be used in order to propagate discriminatory practices. However as acknowledged and acted upon in *Occidental v Ecuador,*[87] the tribunal opted to disregard a construction that would have limited the matter to a comparison of the same (like) economic sector or activity and ultimately would have had a discriminatory effect on the matter. Instead, the tribunal opted to interpret and decide the matter based on the effect of a *de jure* application of the law. It has been said that,

> "Tribunals generally favour an objective approach that looks at the consequences of a particular measure and not at discriminatory intent."[88]

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[80] The preamble to the *Agreement Establishing the World Trade Organization* (Marrakesh Agreement) explicitly states that it is *desirous* of contributing to these objectives by entering into reciprocal and *mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations* (italics my own).

[81] Cottier and Oesch 2011 *NCCR.*

[82] Cottier and Oesch 2011 *NCCR*.

[83] Cottier and Oesch 2011 *NCCR.*

[84] Cambridge 2013 https://www.cambridge.org/...trade.../liberalising.

[85] Rihova *The Evolution of the Non-Discrimination Principle in International Trade* 8.

[86] See A1(1) and A3 (40 of the GATT (1986).

[87] *Occidental* v *Ecuador* (Award) 2004, the tribunal found the practice of "like products" within the GATT/WTO as not pertinent.

[88] *Myers* v *Canada* 2000 Award on Liability paras 252-4.

This statement can be seen as the basis upon which the broader principle of non-discrimination is based. It embraces the notion of *de facto* discrimination as a part of the non-discrimination principle.

In the case of *Japan-Alcohol,*[89] the Panel had to decide whether discrimination existed under the GATT Article III (2). In its consideration of the question, the panel acknowledged that a claim of *de facto* discrimination would require an examination of the "the design, the architecture and the revealing structure" of a measure. Furthermore, the Panel in the *Bananas*[90] case had to decide whether Article II (1) of the GATS applied only to *de jure* (formal) discrimination or whether it also applied to *de facto* (material) discrimination. The panel confirmed and stated that the provision would be applicable to both *de jure* and *de facto* discrimination. The purpose of the aforementioned cases is to establish that the non-discrimination principle has developed over the years to include *de facto* discrimination. Furthermore, that *de jure* and *de facto* discrimination are distinguishable from each other is evident from the discussed cases.

With this in mind, it is only appropriate that the approach adopted in this discussion will not be limited in scope to non-discrimination as it applies to the MFN and NT obligation but rather to trade and consequently investment as a whole. This is in recognition of the fact that the non-discrimination principle is not limited to the legal definition accorded it in the relevant provisions of WTO law but also encompasses *de facto* discrimination that goes against the inherent nature of the non-discrimination principle which is to protect foreign persons and their merchandise from disadvantages in foreign markets.[91]

As previously stated, the non-discrimination principle aims to level the playing field between foreign and domestic investors in the field of trade. This has been pursued by member states through a variety of regulatory approaches (which shall be considered here) aimed at balancing sovereign regulatory powers with the inherent goals of non-discrimination. "Discrimination is essentially addressed and removed by employing positive integration."[92] Examples of such intergration can be drawn from member states to the WTO. The approaches to be considered (that have been taken by member states to the WTO) will be limited to those that directly reflect or have bearing on the current provisions of the Protection of Investment Act.

According to Cottier and Oesch,[93] the principle of non-discrimination is best secured by a transference of regulatory powers to the international law-maker (being the WTO). This would result in "common and uniform rules administrated by the same authority for stakeholders and members alike."[94] The WTO has an adjudicatory body in the form of panels and an Appellate body which only have powers to adjudicate matters as chosen by a member state. This is premised on the fact that such adjudicatory bodies are not supranational in nature and ultimately have no inherent rule-making powers in implementing the law.

Secondly, non-discrimination is secured through the harmonisation of law.[95] Common rules may be established by the WTO, but the member states must ensure compliance with such rules as reflected in their domestic legislation.[96] One may say harmonisation is achieved by

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[89] *Japan – Taxes on Alcohol Beverages*, WT/DS28, DS10, DS11, adopted 1 November 1996.
[90] European Communities – Regime for the Importation, Sale and Distribution of Bananas III, WT/DS27, adopted 25 September 1997.
[91] Cottier and Oesch 2011 *NCCR.*
[92] *Ibid*.
[93] *Ibid*.
[94] *Ibid*.
[95] Cottier and Oesch 2011 *NCCR.*
[96] *Ibid*.

virtue of the autonomous application and interpretation of WTO law but that is not always the case.

Lastly, non-discrimination can only be secured where the core rules or regulatory system (domestic law) of a member state is in compliance with the WTO law.[97] Where nations insist on the application of their domestic law, which they are free to create as best suits their needs, there is a danger of creating a governing body of rules that may constitute barriers to trade and ultimately be non-conforming with the spirit of the non-discrimination as provided for under WTO law.

Giving due regard to the various forms in which discrimination may be perpetrated in a *de facto* manner, and acknowledging that discrimination as it pertains to trade and investment law as a whole need not be limited in scope and application to the MFN and NT obligation.[98] This discussion will proceed to consider the regulatory framework applicable investment in Zimbabwe.

Zimbabwe has several pieces of legislation that are applicable to investment. Namely;

- Constitution of Zimbabwe (No 20) 2013
- Securities Act [*Chapter 24:25]*
- Collective Investment Schemes Act [*Chapter 24:19*]
- Zimbabwe Investment Authority Act [*Chapter 14:30*]

In terms of the Constitution of Zimbabwe[99] which is the supreme source of law in the country, the rights of all people in Zimbabwe is confirmed and founded in the Declaration of Rights.[100] As a starting point, the Constitution establishes equality before the law and confirms equal protection and benefit of the law "to the extent that it is applicable"[101] or "can be appropriately extended." The Constitution further states:

> "Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, and colour."[102]

Whilst the Constitution prevents unfair discrimination on the grounds of nationality, no specific reference is made to the concept of non-discrimination as encapsulated in the MFN or NT obligation. This can be said to create a gap in the law with regards the scope of the principle of non-discrimination.

It goes without saying, that fair administrative treatment is vital to ensuring non-discriminatory application of the law. The principle of non-discrimination as discussed earlier is designed to ensure "a general standard of fair and equitable treatment."[103] To this end, the Constitution provides:

> "Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."[104]

This provision is important in that it guarantees administrative justice in any dispute or issue that may arise with regards investments that fall within the Zimbabwean jurisdiction.

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[97] *Ibid*.
[98] Cambridge 2013 https://www.cambridge.org/...trade.../liberalising.
[99] Constitution of Zimbabwe, 2013.
[100] Chapter 4 of the Constitution.
[101] Section 45 of the Constitution.
[102] Section 56
[103] Muchlinski, Ortino and Schreuer *International Investment Law* 23.
[104] Section 68 (1) of the Constitution.

It is interesting to note however, that in each respective legislative instrument aforementioned, there is no express mention of non-discriminatory treatment of foreign investors. This raises a number of concerns which will be discussed below.

An examination of the relevant legislation reveals a number of limitations applicable to the field of investment law that deserve consideration.

In terms of the Constitution,[105]

> "Subject to section 72, every person has the right, in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others."

Security in terms of property rights is essential to all foreign investors as it ensures that they will not face arbitrary disposition of any property they may invest in and suffer loss. However, the Constitution places limitations upon said property rights. Section 72 (3) of the Constitution states:

> "No person may be compulsorily deprived of their property except where the following conditions are satisfied
> (a) the deprivation is in terms of a law of general application
> *(*b) the deprivation is necessary for any of the following reasons-
>
> (i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or
>
> (ii) in order to develop or use that or any other property for a purpose beneficial to the community."

In essence, the limitation of a right, whilst not taken lightly, may for all intents and purposes be exercised. The concern that arises in view of this is, it cannot be guaranteed that a claim of public interest consideration will not be used to create a discriminatory environment that may negatively impact foreign investment.

Furthermore, all the legislation stated earlier that has direct bearing on the field of investment law creates similar limitations that may have adverse inferences for foreign investors in Zimbabwe.

The Securities Act governs a number of aspects amongst which is the control and regulation of investment in securities.

In terms of the objectives set out in section 4 (1) (a) of the Act, the Securities Commission aims to maintain high levels of investor protection. However, the Act does not make any further specific provisions as to how the Commission shall protect and promote principles of non-discrimination to protect investors.

Essentially the Act provides no guidance or reflection of the principle of non-discrimination.

The Zimbabwe Investment Authority Act is:

AN ACT to provide for the establishment of the Zimbabwe Investment Authority and its functions; to provide for the promotion and co-ordination of investment[106]

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[105] Section 71 (2) of the Constitution.
[106] Preamble to the Zimbabwe Investment Authority Act [*Chapter 14:30*].

The operations of the Zimbabwe Investment Authority are vested in its Investment Committee[107] which has the power to regulate investment as set out in terms of the Act;

> "The Board shall establish an Investment Committee which shall be responsible for making recommendations to the Board to approve or refuse to approve any investment applications submitted to the Authority by any prospective domestic or foreign investors."[108]

Furthermore, the Investment Committee is vested with the following powers:[109]

> "(a) to deal with applications for investment licences;(b) to plan and implement investment promotion strategies for the purpose of encouraging investment by domestic and foreign investors;
>
> (c) to identify sectors of the economy with potential for investment for the purpose of attracting domestic and foreign investors;
>
> (d) to respond to proposals from any domestic or foreign investor for joint ventures with the State or otherwise;
> (e) to promote the decentralisation of investment activities in accordance with the development policy of the Government;
> (f) to supervise, monitor and evaluate the implementation of approved investment projects and to submit reports to the Minister concerning such projects;
> (g) to promote and co-ordinate investment activities in enterprises or sectors of the economy which—
> (i) are of strategic importance to national development; or
> (ii) require additional investment for the purpose of any sectoral objectives;
> (h) to recommend to the Minister, the granting of additional incentives, where necessary, outside of existing policy investment procedures;
> (i) to advise the Minister on investment policy so as to enhance the development of the economy; and
> (j) to advise the Minister on all matters relating to investment in Zimbabwe."

Whilst the Act makes no express mention of the principle of non-discrimination, the MFN obligation or the NT obligation, it is clear that the terms contained in the Act are applicable to both foreign and domestic investors which implies an equal standard of treatment. It bears mentioning that the regulatory powers vested in the committee are extensive. The concern that rises in this particular instance is that the centralisation of such powers may easily result in abuse of said powers.

The Act does however state that the Minister of Industry and International Trade or any other Minister to whom the President may from time to time assign the administration of this Act, may;[110]

> "(1) The Minister may give to the Authority such directions in writing of a general character relating to the exercise by it of its functions as appear to the Minister to be requisite in the national interest.
>
> (2) The Authority shall, with all due expedition, comply with any direction given to it in terms of subsection (1)."

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[107] Section 6 (2) of the Zimbabwe Investment Authority Act [*Chapter 14:30*].
[108] Section 6 (1) of the Zimbabwe Investment Authority Act [*Chapter 14:30*].
[109] Section 7 of the Zimbabwe Investment Authority Act [*Chapter 14:30*].
[110] Section 7 of the Zimbabwe Investment Authority Act [*Chapter 14:30*]

No further exposition is made as to the criteria to be used when determining the scope of "national interest." It may be inferred from a literal translation of the provision that the qualifications placed on the considerations to be made when assessing the context of "national interest" will lean heavily on considerations of national, economic and social implications. This approach may potentially undermine the principle of non-discrimination in its failure to balance the interests of foreign investment protection with that of nationalistic considerations.

Essentially investment security as between local and foreign investors in terms of the Act can be seen as not being provided for on a strict basis, but rather on a “general” sphere of application due to nationalistic considerations. Protectionist policies may be promoted at the expense of equitable and fair investment protection.

The notion of national or public interest is wide and varied and, because of this, is susceptible to abuse. It may certainly provide a gateway to which nationalistic goals are achieved at the expense of protection that ought to be extended to foreign investors. The lack of precise parameters in which considerations of public policy will operate makes this a threat to the exercise and observance of the principle to the non-discrimination. Furthermore, it may limit the security that may be seen as existing under the provision of fair administrative treatment as encapsulated in the Constitution.

The Collective Investment Schemes Act regulates and controls the promotion and operation of collective investment schemes in Zimbabwe and provides for matters connected with or incidental to the foregoing.

A relatively small Act, there are no provisions that are identifiable that are reflective of or have a direct correlation with the principle of non-discrimination. It is therefore impractical and beyond the scope of this discussion to engage in further analysis of the Act.

Ultimately the principle of non-discrimination is meant to foster goodwill between States and ensure that benefits are had by all parties involved in the field of trade or investment. It is to this end, that the non-discrimination principle has been developed over the years to be much broader in its scope and application than the MFN and NT obligations.

In light of the discussion afore, the preservation of the principle of non-discrimination is essential to all domestic legislation that is enacted by any WTO member. It has been proven over time that trade and investment flourish where there is equal and fair treatment between States.

In light of the discussed issues, it is recommended that the regulatory framework extending protection to foreign investors be revisited.

The qualifications established in relation to the protections offered to foreign investors must be more concisely defined so as to prevent possible future interpretational difficulties. It is essential for the qualifications to investor protection to be worded precisely and as extensively as possible as the qualifications in question (as discussed earlier) are potential weapons in the circumvention of the non-discrimination principle as set out by WTO law.

It is also recommended that checks and balances be established with regards to considerations of national interest so as to minimise its potential for abuse. A system of checks and balances is essential to any provision that has the potential to be used to negate obligations placed on the state.

By adopting these measures, it is submitted that any concerns of foreign investors may be quelled regarding their protection as well as that of their investments in Zimbabwe. Whilst small, an adoption of such recommendations has the potential for far reaching effects in assuring investors that the country is committed to its obligations in terms of the non-

discrimination principle to ensure that they as investors and their investments will be treated in the most non-discriminatory way possible.