

The "Principle of Non-Discrimination." The protection of foreign investors under the Protection of Investment Act.

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My parents, Mr C.R and	
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Tawanda	Everything I strive to be is for you.

Abstract

The *Protection of Investment Act* was assented to by the President of South Africa on 15 December 2015. The objective of this study is to ascertain if the Act adequately protects foreign investors in terms of the World Trade Organisation's principle of non-discrimination.

The study begins with an introduction to the history and legal implications of the World Trade Organisation. It establishes the binding nature of the non-discrimination principle to the South African legal system and the consequent obligation to ensure non-discriminatory practices in the investment law regime adopted by South Africa.

The Act is accordingly critically discussed in the context of the provisions concerning, fair administrative treatment, the right to establishment, national treatment and the effect of the regulation of security of investments. Elements of these provisions give rise to possible negation of the non-discrimination principle. These elements are based predominantly on nationalistic and ultimately protectionist considerations. They are contained in several qualifications established with regards to provisions dealing with non-discriminatory practice in terms of the Act.

Recommendations are subsequently made with regards to ways in which to lessen the potential of the Act to be used for promulgating discriminatory practices. The recommendations made include the establishment of checks and balances in relation to the states' right to regulate investment. This is useful in quelling the promotion of protectionist measures within the South African investment regime at the expense of foreign investor protection.

Keywords: Protection of Investment Act, WTO law, Non-Discrimination principle, legal-framework, foreign investor protection.

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LIST OF ABBREVIATIONS

AIAL	Australian Institute of Administrative Law
AJIL	American Journal of International Law
BIT	Bilateral Investment Treaty
BUIJ	Boston University International Law Journal
EYIEL	European Yearbook of International Economic Law
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GJ	Geographical Journal
IILJ	Institute for International Law and Justice
JIE	Journal of International Economics
NCCR	Swiss National Centre of Competence in Research
OECD	Organisation for Economic Co-operation and Development
WTO	World Trade Organisation

Chapter 1 INTRODUCTION

1.1 Background

The World Trade Organisation (WTO) is the body that regulates international rules of trade. Its role has been 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.¹

As of March 2016 there are 162 member nations to the WTO.² 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 WTO³ (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.⁴

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 deep 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.⁵ 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

¹ Desta "GATT/WTO law" 148-191.

² WTO *date unknown* https://www.wto.org/.../the_wto.../org6_e.

³ WTO Agreement: Marrakesh Agreement Establishing the World Trade Organisation (1994) hereinafter called the WTO Agreement.

⁴ The WTO Agreement.

⁵ A II (1) of the WTO Agreement.

Members.⁶ 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.⁷

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 to 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),⁸ the Agreement on Trade-Related Aspects of Intellectual Property Rights⁹ (TRIPS) and the General Agreement on Trade and Services¹⁰ (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.¹¹ 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 obligation¹² and the national treatment (NT) obligation.¹³ However, as a closer examination will show, the principle of non-

⁶ A II (2) of the WTO Agreement.

⁷ A II (3) of the WTO Agreement.

⁸ 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

⁹ 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.

¹⁰ 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.

¹¹ Dolzer and Schreuer Principles of International Investment Law

¹² 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.

¹³ 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

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.¹⁴

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."¹⁵

The national treatment obligation also "entitles the foreign investor to be treated equally with national entrepreneurs."¹⁶ 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 the local competitor."¹⁷ 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."¹⁸ 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

affecting their internal sale, offering for sale, purchase, transportation, distribution or use." The GATT states the NT obligation in the context of products.

¹⁴ Sonorajah *The International Law on Foreign Investment* 236.

¹⁵ Acconci "Most-Favoured-Nation Treatment" 363-406.

¹⁶ Sornarajah *The International Law on Foreign Investment* 336.

¹⁷ Dolzer and Schreuer *Principles of International Investment law* 198.

¹⁸ Dolzer and Schreuer *Principles of International Investment Law* 198.

in the form of subsidiaries, branches, or agencies, or through the 'presence of natural persons'.¹⁹

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.²⁰

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.²¹

In view of this there arises the need to briefly consider the position of South Africa within the WTO and its implications for the Protection of Investment Act.

1.1.1 South Africa and the Protection of Investment Act

South Africa was a founding member of the GATT as well as one of the founding members of the WTO.²² It's involvement with the GATT and the WTO can be stated in the following manner:

South Africa was a member of the GATT and participated in the Uruguay Round of negotiations. The country ratified the Marrakesh Agreement in December 1994 and thus became a founding member of the WTO when the Organization was established.²³

As stated under Article II of the WTO agreement, South Africa, by virtue of being a member state to the WTO has agreed to be bound by the law and principles of the

¹⁹ Muchlinski, Ortino and Schreuer *International Investment Law* 192.

²⁰ Sornorajah *The International Law on Foreign Investments* 8.

²¹ DiMascio and Pauwelyn 2008 *AJIL* 48.

²² WTO *date unknown* https://www.wto.org/.../the_wto.../org6_e.

²³ Anon *date unknown* <https://www.dfa.gov.za/foreign/.../interwto.htm>.

WTO. This means that South Africa is obliged to observe the non-discrimination principle in its entirety.²⁴

The *Protection of Investment Act*²⁵ was precipitated by the gap left in terms of the protection of foreign investors in the wake of South Africa's non-renewal of several of its bi-lateral investment treaties and its termination of others,²⁶ in particular with member states of the European Union (EU) such as Belgium, Netherlands and Germany.²⁷ The non-renewal of these BIT's and in some instances, their termination, was precipitated by the fact that most of the BIT's signed by South Africa were based on flawed and outdated models that were created in the late 1950's to the early 1960's with the express design to singularly protect foreign investors and made inadequate provision for the protection of local investors. The removal of the foreign investment protection that was provided by these BIT's has left a gap in terms of foreign investment protection within South Africa. The Act has consequently been formulated in order to bridge the gap created by this turn of investment policy in South Africa which aims to provide a satisfactory framework that is up to date with the times and protects its nationals as well as its foreign investors.

Section 3 (c) of the Act affirms that:

This Act must be interpreted and applied in a manner that is consistent with any relevant convention or international agreement to which the Republic is or becomes a party.

As a signatory to the WTO, it may be taken to mean that the state recognises, acknowledges and reaffirms the non-discrimination principle. Furthermore, the Department of Trade and Industry in South Africa is a cooperating department in terms of the WTO.²⁸ It is responsible for the preparation and implementation of strategies that are in tandem with the WTO. The WTO law is therefore relevant and essential in guiding the process of investment protection in South Africa.

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 *Protection of Investment Act* 22 of 2015 hereinafter called the Act.

²⁶ CIP 2014 <https://blogs.sun.ac.za/ip-law/tag/investment-bill/>.

²⁷ SAIIA "Promotion and Protection of Investment Bill" 1-10.

²⁸ Department of Trade and Industry date unknown https://www.thedti.gov.za/.../ited_trade.

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."²⁹ 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.³⁰

Essentially, "eliminating barriers to foreign direct investment (FDI) is a means of achieving global market integration...[and ultimately] increased trade in goods."³¹ More simply put, trade barriers erected through discriminatory practices or legislation "may affect FDI growth, or FDI measures may restrict or distort trade."³² Furthermore, the legal and regulatory framework applicable to investments is essential to trade as it ought to foster "equal competitive opportunities between nations."³³ 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,"³⁴ 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.³⁵

The fundamental principle of non-discrimination is essential to any legislation that embodies investment regulation within South Africa. The harmonisation of the Act with

²⁹ WTO Report (1998) of the Working Group on the Relationship between Trade and Investment to the General Council.

³⁰ OECD date unknown <https://www.oecd-library.org/foreign-direct->.

³¹ Gordon 2001 <https://www.unctad.org/en/docs/pogdsmdpbpg24d9.en.pdf>.

³² Hai-Qing *The Relationship between Trade and FDI and the Implications for the WTO* 11.

³³ OECD 2004 <https://dx.doi.org/10.1787/518757021651>.

³⁴ Hai-Qing *The Relationship between Trade and FDI and the Implications for the WTO* 11.

³⁵ 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.

the principle of non-discrimination as outlined by the WTO is therefore an aspect of the Act that requires assessment in the specific area of foreign investor protection.

The question to consider in light of the relationship between South Africa and the WTO law with regard to the *Protection of Investment Act*, is, whether the Act is in compliance with the World Trade Organisation's principle of non-discrimination, such that it does not create barriers to trade, and adequately promotes and protects investments in South Africa.

There are four sections of the Act that will be considered in relation to the non-discrimination principle. Section 6 of the Act provides for fair administrative treatment as provided for in the Constitution and applicable legislation. This requires an examination of the degree of administrative protection accorded foreign investors in terms of the stated domestic law. This is necessary to ensure that there is sufficient foreign investor protection and that the non-discrimination principle is upheld. Section 7 of the Act expressly states that the Act does not "create a right of establishment for foreign investors..." which poses its own set of problems that need to be considered. Section 8 of the Act addresses the operation of the National Treatment obligation in South Africa. It is crucial to discuss the NT obligation, as it essentially sets out the framework in which the National Treatment obligation will be operational within the South African context. Lastly, section 12 of the Act provides for the right of the state to regulate investment within South Africa and the considerations thereof. This provision at first glance appears to establish a number of justifications to discriminate. It is on this basis that there is a need to more closely examine this particular section.

At first glance it appears there are real issues under the mentioned sections that may possibly negate aspects of the non-discrimination principle. It is in this context that an examination of these vital sections to the Act shall be carried out with due regard to their role in the protection of foreign investors in South Africa, in as far as the non-discrimination principle is concerned.

1.2 Conclusion

In order for South Africa to attract foreign direct investment, it is essential to assess whether or not adequate protection is afforded foreign investors in terms of the *Protection of Investment Act*. To invest, foreign investors need reassurance that there will be a fair and non-discriminatory framework in terms of their investments within South Africa. Currently there are a number of indications to the contrary. These indications require an examination in terms of their impact on the protection of foreign investors in South Africa. This will form the focus of this discussion.

The research will be broken down into five main components which will consist of:

- The introduction and background to the study as set out hereinbefore.
- An examination of the WTO's non-discrimination principle.
- An examination of the *Protection of Investment Act*.
- An analysis of the *Protection of Investment Act*, in light of the principle of non-discrimination, with specific reference to the provisions on fair administrative treatment, establishment, national treatment and the right of the state to regulate investment in South Africa.
- Concluding remarks and recommendations to the study.

Chapter 2 ANALYSIS OF THE NON-DISCRIMINATION PRINCIPLE UNDER THE WORLD TRADE ORGANIZATION LAW

2.1 History of the WTO

In discussing the non-discrimination principle, there is a need to outline the history and sources of law that are applicable to it.

The starting point to the developments that led to the establishment of the WTO can be traced back to the roots of the Second World War. The importance of an established international trade organization has been perfectly captured in the following statement:

History is littered with examples of trade disputes turning into war. One of the most vivid is the trade war of the 1930s when countries competed to raise trade barriers in order to protect domestic producers and retaliate against each other's barriers. This worsened the Great Depression and eventually played a part in the outbreak of World War 2.³⁶

The erection of trade barriers by nations played a sizeable role in the international tensions that led to the outbreak of the Second World War. It is for this reason, that after the Second World War, "there was a proliferation of international investment agreements."³⁷ These agreements were an international effort to ensure that there would not be a repetition of the trade tensions that existed prior to and during the Second World War.³⁸

It is against this backdrop that the General Agreement on Tariffs and Trade (GATT 1948) was established. The General Agreement on Tariffs and Trade (GATT)³⁹ arose in 1947 "out of the ashes of the Second World War."⁴⁰ It was an unprecedented effort at international cooperation in order to create an international organization tasked with regulating the way in which international trade was to be conducted.⁴¹ In spite of the

³⁶ WTO date unknown https://www.wto.org/english/.../10b_e.pdf.

³⁷ Segger, Gehring and Newcombe Sustainable Development in World Investment Law 15.

³⁸ WTO date unknown https://www.wto.org/english/.../10b_e.pdf.

³⁹ General Agreement on Tariffs and Trade (1948) hereinafter called GATT.

⁴⁰ VanGrasstek 2013 https://www.wto.org/.../historywto_e.pdf.

⁴¹ Lamy 2013 https://www.wto.org/.../historywto_e.pdf.

prevailing spirit of international cooperation post war, the GATT suffered a failed attempt to create an International Trade Organization.⁴² The GATT essentially became the "only multilateral instrument governing international trade from 1946 until the WTO was established on 1 January 1995."⁴³ The GATT (1948) must be noted as having been 'updated' in 1986 at the Uruguay Round of Negotiations. The GATT must therefore be distinguished in its various forms. There is the GATT as established in 1948, the GATT as updated in 1986 and the GATT in 1994 which consisted of the 1948 GATT as incorporated with the updates of 1986 at the Uruguay Round of negotiations.

It was in the aftermath of the initial failed venture that the GATT morphed into what is now the World Trade Organization (WTO).⁴⁴ The WTO Director-General Pascal Lamy succinctly described the WTO as the "successor organization that inherited the GATT."⁴⁵ The GATT (1994) however still remains operative under the WTO and is its founding document.

The emphasis on the GATT is rooted in the fact that it is considered the 'founding' document to the WTO. Many essential aspects, standards and principles in the current WTO were assimilated from the GATT. Having outlined the sources of law to be utilised, the principle of non-discrimination as reflected in the WTO will be studied.

2.2 Non-Discrimination as a Principle of the WTO

The WTO is an international organization that has "successfully encouraged multilateral trade liberalization,"⁴⁶ 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 has been discriminatory practices between states in

⁴² Lamy 2013 https://www.wto.org/.../historywto_e.pdf.

⁴³ World Trade Organization 2015 https://www.wto.org_e/English/thewto_e/whatis_e/fact4_e.htm.

⁴⁴ World Trade Organization (1995) hereinafter called WTO.

⁴⁵ Lamy 2013 https://www.wto.org/.../historywto_e.pdf.

⁴⁶ Bagwell and Staiger 2004 *JIE* 1.

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.⁴⁷ 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."⁴⁸ It has been acknowledged by WTO Ministers as being an "important element in securing" transparent, stable and predictable conditions for long-term investment...and will contribute to the expansion of trade.⁴⁹

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.⁵⁰ The MFN and NT obligations are applied in various forms, dependant on the context in which they are used. Regard

⁴⁷ 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).

⁴⁸ Qin 2005 *BUI LJ* 216.

⁴⁹ WTO Report (1998) of the Working Group on the Relationship between Trade and Investment to the General Council.

⁵⁰ 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.

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, 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.

2.3 Most Favoured Nation Treatment Obligation

Based on the definition of the Most Favoured Nation treatment obligation found in the GATT,⁵¹ 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.⁵²

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.

⁵¹ 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.

⁵² International Law Commission 2015
https://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/1_3_1978.pdf.

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 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."⁵³ When a country becomes a member of the WTO by process of accession,⁵⁴ 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.⁵⁵

It is important to note that the MFN treatment obligation as embodied under the WTO generally refers to the treatment of "goods" in trade.⁵⁶ It is trite that states are free to enter into trade agreements or treaties with other states.⁵⁷ 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."⁵⁸ 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.⁵⁹ 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.

⁵³ Dolzer and Schreuer *Principles of International Investment Law* 206.

⁵⁴ 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.

⁵⁵ 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.

⁵⁶ A 1:1 of the GATT.

⁵⁷ Sornorajah *The International Law on Foreign Investment* 172.

⁵⁸ Sornorajah *The International Law on Foreign Investment* 172.

⁵⁹ Muchlinski, Ortino and Schreuer *International Investment Law* 381.

2.3.1 The MFN Treatment obligation under the GATT

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.⁶⁰

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.⁶¹

⁶⁰ Panel Report, *Spain-Tariff treatment of unroasted coffee* (11 June 1981) BISD28S/102 paras 4.5, 4.9 and 4.10.

⁶¹ Author unknown 1996 <https://jeanmonnetprogram.org/archive/papers>.

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

Another commonality established by the aforementioned case is, 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.⁶² 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."⁶³

In the matter of *Canada-Certain Measures Affecting the Automotive Industry*,⁶⁴ 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.⁶⁵

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-

⁶² 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.

⁶³ Cottier and Oesch 2011 *NCCR* 2.

⁶⁴ *Canada-Certain Measures Affecting the Automotive Industry* 2013 WT/DS412/AB/R.

⁶⁵ *Canada-Certain Measures Affecting the Automotive Industry* 2013 WT/DS412/AB/R.

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 boards, which deal with goods for export and/or import.⁶⁶' 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 can discriminatory practices 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.

2.3.2 The MFN treatment obligation outside of the GATT

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,

⁶⁶ WTO date unknown https://www.wto.org/english/.../statra_e.htm.

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.

2.4 Conclusion on MFN

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?⁶⁷" 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.⁶⁸

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.⁶⁹ 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.

⁶⁷ Herrmann and Terhechte 2011 *EYIEL* 181.

⁶⁸ Muchlinski, Ortino and Schreuer *International Investment Law* 368.

⁶⁹ UNCTAD 2010 [https:// unctad.org/.../diae](https://unctad.org/.../diae).

2.5 THE NATIONAL TREATMENT OBLIGATION

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...⁷⁰

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.⁷¹

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."⁷²

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.

⁷⁰ A III: 1 of the GATT.

⁷¹ A III: 4 of the GATT.

⁷² WTO date unknown https://www.wto.org/tif_e/fact2_e.

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 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.⁷³

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

⁷³ A 3 (4) of the GATT.

manner there is a lessening of the risk of discriminatory practices in trade that may lead to the decrease of international trade and investments.

2.5.1 Effects of the National Treatment Obligation

The national treatment obligation may be viewed as a minimum standard of treatment that must be accorded to all foreign traders and their products.⁷⁴ 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. Firstly, 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.⁷⁵

This will however be discussed at a later stage.

2.6 Conclusion on NT

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

⁷⁴ *Pope and Talbot v Canada* (2001) Awarded on the Merits 9.

⁷⁵ Sornorajah *The International Law on Foreign Investment* 335.

applicable to them. Where this balance is disturbed a situation is created whereby a country may find itself suffering from a lack of foreign direct investment as there is a correlation between the observance of treatment standards and foreign direct investment.⁷⁶ 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.⁷⁷

2.7 Development of the Principle of Non-Discrimination

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.

2.7.1 The Principle of Non-Discrimination in Investment

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."⁷⁸

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."⁷⁹ Amongst the most important policy considerations to creating an attractive investment environment is the creation of a system of "transparency and protection."⁸⁰ This entails observing the non-discrimination principle in investment.⁸¹

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."⁸²

⁷⁶ Cottier and Oesch 2011 *NCCR*.

⁷⁷ Cottier and Oesch 2011 *NCCR*.

⁷⁸ OECD 2002 <https://www.oecd>.

⁷⁹ OECD 2002 <https://www.oecd>.

⁸⁰ OECD 2006 <https://www.oecd>.

⁸¹ UNCTAD 1992 <https://www.unctad.org>>PublicationChapters.

⁸² OECD 2006 <https://www.oecd>.

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.⁸³ 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.⁸⁴ 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."⁸⁵ 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*.

2.7.2 *De Facto Discrimination*

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

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.⁸⁶

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*" discrimination⁸⁷ and *de facto* discrimination has been described in the following manner:

⁸³ OECD 2006 <https://www.oecd>.

⁸⁴ OECD 2004 <https://www.oecd.org>investmentpolicy>.

⁸⁵ OECD 2005 <https://www.oecd.org/.../>.

⁸⁶ Diebold 2010 *IILJ* 2.

⁸⁷ Ortino "WTO Jurisprudence on De Jure and De Facto Discrimination" 217 – 262.

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.⁸⁸ The Appellate Body contrasted *de facto* discrimination with *de-jure*, or formal, discrimination.⁸⁹

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.⁹⁰

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."⁹¹ 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."⁹²

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.⁹³

⁸⁸ *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.

⁸⁹ Goode Dictionary of Trade Policy Terms 119.

⁹⁰ Rihova *The Evolution of the Non-Discrimination Principle in International Trade* 28.

⁹¹ Brownlie *Principles of Public International Law* 289.

⁹² 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.

⁹³ Schwarzenberger "Equality and Discrimination" 163.

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 abused to create technical barriers to trade which ultimately the WTO is seeking to disperse with altogether.⁹⁴

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."⁹⁵ The principle of non-discrimination has been said to have been created specifically to inhibit protectionism and ensure equal treatment in international investment law.⁹⁶

Non-discrimination and its limitation of sovereign powers to engage in policies privileging one state over another, emanates from the principle of equality.⁹⁷ 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 WTO's 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 conditions of competition and does not stop at legal discrimination. It entails direct/legal as well as indirect/*de facto* discrimination.⁹⁸

⁹⁴ 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).

⁹⁵ Cottier and Oesch 2011 *NCCR*.

⁹⁶ Cottier and Oesch 2011 *NCCR*.

⁹⁷ Cottier and Oesch 2011 *NCCR*.

⁹⁸ Cambridge 2013 <https://www.cambridge.org/...trade.../liberalising>.

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.⁹⁹ 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.'¹⁰⁰ This "comparative system" may easily be used in order to propagate discriminatory practices. However as acknowledged and acted upon in *Occidental v Ecuador*,¹⁰¹ 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.¹⁰²

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*,¹⁰³ 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*¹⁰⁴ 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*

⁹⁹ Rihova *The Evolution of the Non-Discrimination Principle in International Trade* 8.

¹⁰⁰ See A1(1) and A3 (40 of the GATT (1986).

¹⁰¹ *Occidental v Ecuador* (Award) 2004, the tribunal found the practice of "like products" within the GATT/WTO as not pertinent.

¹⁰² *Myers v Canada* 2000 Award on Liability paras 252-4.

¹⁰³ *Japan – Taxes on Alcohol Beverages*, WT/DS28, DS10, DS11, adopted 1 November 1996.

¹⁰⁴ *European Communities – Regime for the Importation, Sale and Distribution of Bananas III*, WT/DS27, adopted 25 September 1997.

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.¹⁰⁵

2.7.3 Regulatory Approaches to Non-Discrimination

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."¹⁰⁶ 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,¹⁰⁷ 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

¹⁰⁵ Cottier and Oesch 2011 *NCCR*.

¹⁰⁶ Cottier and Oesch 2011 *NCCR*.

¹⁰⁷ Cottier and Oesch 2011 *NCCR*.

for stakeholders and members alike."¹⁰⁸ 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.¹⁰⁹ Common rules may be established by the WTO, but the member states must ensure compliance with such rules as reflected in their domestic legislation.¹¹⁰ One may say harmonisation is achieved by 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.¹¹¹ 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,¹¹² this discussion will proceed to consider the concept of the right to establishment within the context of the non-discrimination principle which will be expanded on further at a later stage.

2.7.4 Right of Establishment

International interest in the right to establishment stemmed from the late 1980's. At this point in history, it became clear to the international community that "economic

¹⁰⁸ Cottier and Oesch 2011 *NCCR*.

¹⁰⁹ Cottier and Oesch 2011 *NCCR*.

¹¹⁰ Cottier and Oesch 2011 *NCCR*.

¹¹¹ Cottier and Oesch 2011 *NCCR*.

¹¹² Cambridge 2013 <https://www.cambridge.org/...trade.../liberalising>.

liberalism promised more growth and innovation than economic protectionism."¹¹³ Economic protectionist mechanisms and policies were taking place within closed national and regional borders. These mechanisms sought to protect the economic interests of nations within themselves through the exclusion and limitation of access to local markets by foreign entities.

It is a popular notion that nations ought to open up their economies in order to facilitate trade. The need to open up economies to further facilitate trade has been "reinforced by acute competition among capital-importing states for foreign investment."¹¹⁴ However, it is unfortunate that national policies in this area are far from uniform.¹¹⁵ The lack of uniformity in this area is spurred on by the fact that from an international perspective "states are in no way compelled to admit foreign investment."¹¹⁶ This fact falls back on the principle of sovereignty and the right of each nation to choose to close or open up their national economy to foreign investors. Unfortunately closing up an economy from access by foreigners may have the effect of deterring foreign investment. This is not a desirable situation, particularly for developing nations who are desirous of developing their economies. On the other hand, developing states need to take into account the need to,

Preserve national economic policy goals, national security, public health and safety, public morals, and other essential public policy goals such as environmental or consumer protection.¹¹⁷

There is a need therefore to balance the potential benefits of opening up an economy to foreign investors with the need to maintain and protect the interests of a state's economy. Such balance, in most instances, is obtained by establishment rights being granted on the basis of "conditional entry [which] is based on specific requirements"¹¹⁸ being imposed on foreign investors.¹¹⁹ This approach promotes the best of both worlds

¹¹³ Dolzer and Schreuer *Principles of International Investment Law* 87.

¹¹⁴ Dolzer and Schreuer *Principles of International Investment Law* 87.

¹¹⁵ Dolzer and Schreuer *Principles of International Investment Law* 87.

¹¹⁶ Dolzer and Schreuer *Principles of International Investment Law* 88.

¹¹⁷ Muchlinski, Ortino and Schreuer *International Investment Law* 21.

¹¹⁸ Muchlinski, Ortino and Schreuer *International Investment Law* 21.

¹¹⁹ UNCTAD 2002 Conditional entry upon investment may include measures such as meeting certain criteria (e.g. environmental responsibility; benefit to national economy) based on outcome of screening evaluation procedures. Investors may be required to comply with requirements related to

in as far as it encourages foreign investment without eroding the right of the state to control and protect its economy.

It is an established principle of international law that sovereign states have a right to self-determination.¹²⁰ In essence it becomes a policy choice,

Regarding the degree of regulation or openness that the host country might adopt in relation to the admission, establishment, and control of FDI.¹²¹

In other words, the decision to a right of establishment, lies solely with the sovereign state deciding the matter. Each sovereign state has an "absolute right to control the admission and establishment of aliens, including foreign investors, on its territory."¹²² It has been said,

The economic rationale for granting open admission and rights of establishment is to allow for the efficient allocation of productive resources across countries...¹²³

Whilst the current position at law leaves the right of establishment at the discretion of a host state, it cannot be ignored that this power may be abused to further the plight of "monopolistic national industries from competition at the cost of consumer welfare and productive efficiency."¹²⁴

The WTO agreement states in its preamble, that it recognises

that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.

In line with this objective, the GATT provides,

national security, policy, customs, public morals as conditions of entry
<https://www.unctad.org/.../iteii...>

¹²⁰ UNPO 2006 <https://www.unpo.org>>article- The principle of self-determination is most notably embodied in Article I of the Charter of the United Nations which provides that its purpose is to "develop friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples..." Its inclusion in the UN Charter marks the Universal recognition of the principle and is fundamental to the maintenance of friendly relations and peace among states. South Africa has been a member of the UN since its inception on 24 October 1945 and as a member recognizes the principles of the UN Charter.

¹²¹ Muchlinski, Ortino and Schreuer *International Investment Law* 2

¹²² Muchlinski, Ortino and Schreuer *International Investment Law* 20.

¹²³ Muchlinski, Ortino and Schreuer *International Investment Law* 20.

¹²⁴ Muchlinski, Ortino and Schreuer *International Investment Law* 21.

The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement.¹²⁵

It is clear that the WTO recognises and follows in the footsteps of the UN Charter in honouring a countries right to self-determination. The WTO law places particular emphasis on this in developing countries so as to promote their economic development. Therefore, WTO law does not place an obligation on its member states to give foreign investors a right to establishment.

Having established the law, it must be stated that the idea of allowing a right to establishment is founded in the aim of "liberalizing the regime of foreign investment."¹²⁶ Such liberalization is a tool to promoting trade within any nation, especially within developing countries who aim to expand their economies. In light of this, it is necessary to state the scope of the right to establishment.

The right to establishment predominantly pertains to the "conditions under which the investor is allowed to carry out its business during the period of its investment."¹²⁷ The right of establishment will be less impactful on a person or entity carrying out one or two business transactions within a host state "than for one who needs to rely on a longer business presence in the host state."¹²⁸

It is evident that States must pay particular attention to this aspect as it directly impacts the entry stages of trade and investment. Furthermore it is a point of interest and debate as to its effect on the non-discrimination principle and ultimately on FDI.

2.8 Conclusion

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

¹²⁵ A XVIII (2) of the GATT.

¹²⁶ Dolzer and Schreuer *Principles of International Investment Law* 87.

¹²⁷ Dolzer and Schreuer *Principles of International Investment Law* 88.

¹²⁸ Dolzer and Schreuer *Principles of International Investment Law* 88.

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. It is against this backdrop that we turn to consider the *Protection of Investment Act* that has been subject to much debate in South Africa. This Act will be considered within the context of the principle of non-discrimination as set out above.

Chapter 3 THE PROTECTION OF INVESTMENT ACT

3.1 INTRODUCTION

On the 13th of December 2015 the President of the Republic of South Africa assented to and signed into law, the *Protection of Investment Act*.¹²⁹

The Act came into being shortly after:

South Africa decided to unilaterally terminate its bilateral investment treaties ("BITs") with certain European states and specifically Belgium, the Netherlands, Luxemburg, Germany, Spain and Switzerland.¹³⁰

The sphere of investment in South Africa has, until recently been predominantly governed and regulated by bilateral investment treaties (BITs) between South Africa and its respective contracting States. The non-renewal and termination of a number of South Africa's BITs has left a gap in terms of the regulatory framework that investments in South Africa are to operate within. It is against this backdrop that the Act has come into being.

The Act states in its preamble that it has been established,

To provide for the protection of investors and their investments; to achieve a balance of rights and obligations that apply to all investors; and to provide for matters connected therewith.

In view of this, this discussion will begin by looking at the events that have taken place within the realm of investment regulation in South Africa, leading up to the establishment of the *Protection of Investment Act*. Thereafter, there will be need to consider the balance of rights and obligations as they relate to non-discrimination under the WTO law and ultimately the description of the rights and obligations that are presented in the *Protection of Investment Act*.

¹²⁹ The *Protection of Investment Act* (No. 22 of 2015) was published to the public in the GG 39154 of 15 December 2015.

¹³⁰ CIP 2014 https://blogs.sun.ac.za/ip_law/tag/investment_bill/.

The Act itself is a short document and the scope of this discussion will be restricted to sections that bear directly on aspects of non-discriminatory practices as established under WTO law.

3.2 South Africa's Foreign Investment Protection History

The field of foreign investment in South Africa has been predominantly embodied in the various BITs South Africa has signed with a number of investor states.¹³¹ In light of the non-renewal or cancellation of most of these BITs, the question arises as to why South Africa has adopted this course of action, particularly with its most important investor states.

As a starting point, it must be acknowledged that,

Whilst the WTO/GATT has successfully established a multilateral process for reaching agreement between countries as to matters of trade, cross border investment has continued to be regulated bilaterally between sovereign states.¹³²

Essentially, although the field of international trade has been predominantly regulated by WTO law, international investment has also been more narrowly defined between contracting parties in the form of BITs. The use of BITs has been far reaching for several reasons. For purposes of this discussion however we will state the main premise upon which BITs have been so widely used in international investment and trade. The basis upon which BITs have been so popular has been succinctly expressed by Sornorajah in the following statement:

The issues that relate to foreign investments made by large multinational corporations give rise to sensitive issues of sovereignty, exploitation of natural resources and internal economic policies. It is unlikely that developing states will commit themselves readily on such issues in a binding multilateral treaty...Bilateral treaties, on the other hand, are different in that they are made on an *ad hoc* basis and their ability to give rise to general principles is remote. In addition such treaties could be negotiated in such a manner as to suit the mutual interests of the parties, whereas a multilateral treaty cannot be. Bilateral solutions become necessary simply because of an absence of a consensus to create multilaterally acceptable norms.¹³³

The use of BITs in South Africa is not unlike the reasons stated in the above passage.

¹³¹ Lang and Gilfillan 2013 <https://www.bowman.co.za/.../South-African>.

¹³² Lang and Gilfillan 2013 <https://www.bowman.co.za/.../South-African>.

¹³³ Sornorajah *The International Law on Foreign Investment* 212.

Having said that, BIT development in South Africa may be summed up as follows:

During the apartheid era South Africa entered into very few BITs. After 1994 the South African government entered into a flurry of bilateral investment treaties with developed countries, principally European countries who were equally keen to support its transition back into the community of nations, with a view to encouraging foreign investment in the new South Africa.¹³⁴

The use of BITs would have been an attractive option to South Africa as a developing nation and also because the rules on investment protection became “considerably diffuse in the post-colonial era”¹³⁵ given the growing concerns by developing countries at the time that the rules being developed in international trade at the time were impractical for the purposes of developing countries.¹³⁶

As a result, South Africa, in its immediate post- apartheid era (1994-1998) entered into a total of 15 BITs predominantly with European countries.¹³⁷ This would allow South Africa more say in its terms with regards its investment treaties with contracting states. As of 2013, South Africa had entered into a total of 47 BITs which, however, not all had been put into effect.¹³⁸

In spite of South Africa’s status as a developing country after the period of apartheid and its concerns regarding the prevailing standards and principles that were being pushed for by developed countries, South Africa in its BITs sought to,

...give foreign investors certain well established protections and assurances in order to promote foreign investment in the economy including assurances as to expropriation (and compensation where it does occur), security, repatriation of capital and income from investments equality of treatment with domestic investors and international arbitration of disputes.¹³⁹

It is evident that South Africa has always been aware of the importance of providing particular “protections and assurances” to its investors in order to preserve the continued growth of trade within South Africa.

¹³⁴ Lang and Gilfillan 2013 <https://www.bowman.co.za/.../South-African>.

¹³⁵ Sornorajah *The International Law on Foreign Investment* 212.

¹³⁶ Sornorajah *The International Law on Foreign Investment* 212.

¹³⁷ Lang and Gilfillan 2013 <https://www.bowman.co.za/.../South-African>.

¹³⁸ Lang and Gilfillan 2013 <https://www.bowman.co.za/.../South-African>.

¹³⁹ Lang and Gilfillan 2013 <https://www.bowman.co.za/.../South-African>.

The subsequent BITs drawn up by South Africa post-apartheid with its investing states were based on a template created by the OECD¹⁴⁰ for BITs.¹⁴¹ It has been said that in South Africa's quest to attract and promote trade investment, it failed to consider the "less obvious, and less attractive, consequences of those treaties."¹⁴² These "consequences" have been based on the premise that the OECD template for BITs which was adopted in almost all of South Africa's BITs (post-apartheid), was created and based on models created in the late 1950's/ early 1960's which were designed to "protect companies from developed countries expanding their investments in developing countries."¹⁴³ The BITs adopted by South Africa at this time did not consider protection of South Africa itself as a sovereign state, particularly in the realm of international investment. That is to say, the BITs implemented by South Africa were inherently formulated in such a way as to solely protect the interests of foreign investors with little regard to the protection of domestic investors. This scenario would inevitably lead to a scenario in which the tides would consistently favour foreign investors in South Africa as opposed to being fair and favourable to all investors in South Africa (including domestic investors).¹⁴⁴

These developments ultimately led South Africa to begin a review process of all of its BITs in 2008.¹⁴⁵ It must however be stated that there has been a wide consensus amongst the international community (particularly developing countries) that the traditional BIT model is flawed and outdated and is in serious need of revision and redress.¹⁴⁶

South Africa's review of its BITs ultimately led the government to come to the decision not to renew a number of its BITs as well as to unilaterally terminate others.¹⁴⁷ In lieu of this decision, government felt it necessary and prudent to formulate a new legislative

¹⁴⁰ The Organisation for Economic Co-operation and Development hereinafter called the OECD is an organisation that was formed to promote policies that will improve the economic and social well-being of people around the world at <https://www.oecd.org/>.

¹⁴¹ Lang and Gilfillan 2013 at <https://www.bowman.co.za/.../South-African>.

¹⁴² Lang and Gilfillan 2013 at <https://www.bowman.co.za/.../South-African>.

¹⁴³ SAIIA "Promotion and Protection of Investment Bill."

¹⁴⁴ SAIIA "Promotion and Protection of Investment Bill."

¹⁴⁵ SAIIA "Promotion and Protection of Investment Bill."

¹⁴⁶ SAIIA "Promotion and Protection of Investment Bill."

¹⁴⁷ SAIIA "Promotion and Protection of Investment Bill."

regulatory framework that would be applicable to all investors in South Africa and govern aspects incidental thereto. These progressive developments have ultimately led to the birth of the current *Protection of Investment Act*.

3.3 The Protection of Investment Act

As a starting point to the examination of the relevant sections regarding the non-discrimination principle, the purpose of the *Protection of Investment Act* has been stated as follows¹⁴⁸,

The purpose of this Act is to—

- (a) protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors;
- (b) affirm the Republic's sovereign right to regulate investments in the public interest; and
- (c) confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic

When looking at this section of the Act, it is important to remember that it sets the tone and basis on which the Act rests.

Whilst it is commendable that the Bill of Rights in the Constitution, and the law as it applies to investment shall be applicable non-discriminatorily to all investors and their investments, it is evident from the word go that the Act leans heavily on the States sovereign right to "regulate investors and investments and to develop national economic policy."¹⁴⁹ This conclusion can be drawn from the fact that investment protection (in terms of the Act) as it pertains to the rights and obligations of investors will be subject to the Constitution, the public interest and the Republic's sovereign right to regulate investments. Whilst it is permissible for this to happen, it is of the utmost importance that the sovereign right of the state to regulate investment in the way it

¹⁴⁸ Section 4 of the *Protection of Investment Act*.

¹⁴⁹ Muchlinski, Ortino and Schreuer *International Investment Law* 19.

deems fit as well as in the public interest is not exercised in such a way as to become a technical barrier to trade and create a discriminatory environment in as far as foreign investors and their investments is concerned.

Having made this observation, this discussion shall turn to specific provisions within the Act.

3.3.1 Fair Administrative Treatment (Section 6)

The provisions regarding fair administrative treatment in the Act are contained in Section 6 of the Act. Section 6 states that:

- (1) The government must ensure administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural justice to investors in respect of their investments as provided for in the Constitution and applicable legislation.
- (2) Administrative decision-making processes must include the right to be given written reasons and administrative review of the decision consistent with section 33 of the Constitution and applicable legislation.
- (3) Investors must, in respect of their investments, have access to government-held information in a timely fashion and consistent with section 32 of the Constitution and applicable legislation.
- (4) Subject to section 13(4), investors must, in respect of their investments, have the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum consistent with section 34 of the Constitution and applicable legislation.

It goes without saying, that fair administrative treatment is vital to ensuring the 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."¹⁵⁰ This is echoed in the preamble of the Act that also confirms the desire of the state to ensure "the protection of investors and their investments...and to achieve a balance of rights and obligations that apply to all investors."¹⁵¹ (Underlining my own)

Furthermore, the Act acknowledges,

¹⁵⁰ Muchlinski, Ortino and Schreuer *International Investment Law* 23.

¹⁵¹ Preamble to *Protection of Investment Act*.

The responsibility of the government to provide a sound legislative framework for the protection of all investments, including foreign investments, pursuant to constitutional obligations.¹⁵²

Essentially section 6 of the Act provides that all investors and their investments have a right to fair administrative treatment. At face value, there is no distinction that is drawn between foreign and/or domestic investors. However, the Act refers this standard of treatment to be subject to the Constitution and applicable legislation. The Constitution is clear and precise in its provisions regarding fair administrative treatment which makes it fairly easy to discuss. However, the term "applicable legislation" is impractical to analyse for purposes of this discussion, as it would require an investigation into all legislation that may be applicable to fair administrative treatment in the Republic of South Africa. It is assumed that all legislation in this regard is in tandem with the Constitution, therefore, the discussion will limit itself to the provisions in the Constitution.

In terms of the Constitution of South Africa¹⁵³ the rights of all people in South Africa is confirmed and founded in the Bill of Rights.¹⁵⁴ As a starting point, the Constitution establishes equality before the law and confirms equal protection and benefit of the law.¹⁵⁵ Whilst the Act makes no specific reference to the principle or concept of non-discrimination, the Constitution provides that no person, including the state may unfairly discriminate directly or indirectly against anyone as "everyone is equal before the law and has the right to equal protection and benefit of the law."¹⁵⁶ Furthermore, national legislation must be reflective of this principle.¹⁵⁷ These provisions are in tandem with the principle of non-discrimination and as far as they apply to section 6 of the Act pose no particularly identifiable issue.

Specific regard and confirmation of the provisions in section 6 of the Act are also found in the Constitution which explicitly provides for access to information,¹⁵⁸ just

¹⁵² Preamble to the *Protection of Investment Act*.

¹⁵³ *Constitution of the Republic of South Africa*, 1996.

¹⁵⁴ Chapter 2 Section 7 of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁵ Section 9 of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁶ Section 9 (1) of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁷ Section 9 (2), (3) and (4) of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁸ Section 32 of the *Constitution of the Republic of South Africa*, 1996 states- Everyone has the right of access to-(a) any information held by the state; and any information that is held by another person

administrative action¹⁵⁹ and access to the courts.¹⁶⁰ Essentially, the provisions in the Constitution mirror those found in the Act.

Having said that, the Constitution goes on to establish the grounds upon which a limitation of rights as provided for in the Bill may be exercised.¹⁶¹ Limitations may be placed on the above mentioned provisions on the following basis:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

In essence, the limitation of a right, whilst not taken lightly, may for all intents and purposes be exercised. As shall be discussed in the following chapter, the question that arises and needs to be considered in view of this is, how far can a claim of public interest consideration or the Republic's sovereign right to regulate constitute a violation of the non-discrimination Principle if at all?

and that is required for the exercise or protection of any rights.(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

¹⁵⁹ Section 33 of the *Constitution of the Republic of South Africa*, 1996 states- **(1)** Everyone has the right to administrative action¹ that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has; the right to be given written reasons. **(3)** National legislation must be enacted to give effect to these rights and must- (a) provide for the review of administrative action by a court or, where appropriate,(6) impose a duty on the state to give effect to the rights in subsections **(1)** and (2); an independent and impartial tribunal; and (c) promote an efficient administration.

¹⁶⁰ Section 34 of the *Constitution of the Republic of South Africa*, 1996 states- **Access to courts.**- Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

¹⁶¹ Section 36 of the *Constitution of the Republic of South Africa*, 1996.

3.3.2 Establishment (Section 7)

As a starting point it is important to state that the Act provides that it is applicable to all investors within the Republic.¹⁶² By implication, the Act should apply without discrimination to all investors. An investor in terms of the Act "means an enterprise making an investment in the Republic regardless of nationality."¹⁶³ The scope of "investment" in the Act is wide in its application. According to the Act,¹⁶⁴

an investment is—

(a) any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic, committing resources of economic value over a reasonable period of time, in anticipation of profit;

(b) the holding or acquisition of shares, debentures or other ownership instruments of such an enterprise; or

(c) the holding, acquisition or merger by such an enterprise with another enterprise outside the Republic to the extent that such holding, acquisition or merger with another enterprise outside the Republic, has an effect on an investment contemplated by paragraphs (a) and (b) in the Republic;

Furthermore, an "investment" in terms of the Act¹⁶⁵ may exist in the following assets,

(a) shares as defined by the Companies Act, 2008 (Act No. 71 of 2008), stocks, debentures, securities as defined in the Financial Markets Act, 2012 (Act No. 19 of 2012), or other equity instruments of the enterprise or another enterprise;

(b) a debt security of another enterprise;

(c) loans to an enterprise;

(d) movable or immovable property or other property rights such as mortgages,

¹⁶² Section 5 of the *Protection of Investment Act*.

¹⁶³ Section 1 of the *Protection of Investment Act*.

¹⁶⁴ Section 2 of the *Protection of Investment Act*.

¹⁶⁵ Section 2 (2) of the *Protection of Investment Act*.

liens or pledges;

(e) claims to money or to any performance under contract having a financial value;

(f) copyrights, know how, goodwill, or intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent that they are recognised under the law of South Africa;

(g) returns such as profits, dividends, royalties or income yielded by an investment; or

(h) rights or concessions conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources.

Therefore, investment protection as set out in the Act will extend to these various “investments” where they are “made in accordance with the Constitution and applicable legislation.”¹⁶⁶

Having stated the applicability of the regulations and protection of the Act, it needs to be noted that such recognition and protection of investors and their investments is deemed as not creating “a right for a foreign investor or prospective foreign investor to establish an investment in the Republic”¹⁶⁷ As discussed earlier, the term “right of establishment” pertains to “the conditions under which the investor is allowed to carry out its business during the period of the investment.”¹⁶⁸ Matters which may fall under the right to establishment are “issues such as expansion of the investment, payment of taxes or transfer of funds.”¹⁶⁹ In essence section 7 of the Act denies any such right to foreign investors or potential foreign investors.

Whilst this provision does not appear to contravene the MFN treatment obligation technically, as the denial to a right of establishment clearly extends to all foreign investing states/parties. It does however create a discretion for the state to discriminate

¹⁶⁶ Section 4 of the *Protection of Investment Act*.

¹⁶⁷ Section 7 (2) of the *Protection of Investment Act*.

¹⁶⁸ Dolzer and Schreuer *Principles of International Investment Law* 88.

¹⁶⁹ Dolzer and Schreuer *Principles of International Investment Law* 88.

against foreign investors. This requires further discussion which will be considered in the following chapter.

It is interesting to note that Section 7 of the Act however essentially creates an environment where "discrimination could be made between aliens and nationals as far as access to economic activity is concerned."¹⁷⁰ Whilst it is desirable to have equality between foreign and domestic investors in terms of their access to economic activity, it is evident that the denial of such right creates a very real possibility of a discriminatory environment. This may ultimately give investors pause in deciding whether or not investing in South Africa is worth their while. Any detriment caused by this provision will directly impact trade as a decline in investment will undoubtedly negatively impact trade and inevitably the economy.¹⁷¹

A further exposition of this concept as it relates to the *Protection of Investment Act* shall be carried out in detail in the following chapter.

It must not be forgotten that the protection of foreign investment is subject to the Constitution, public interest and compliance with applicable domestic legislation.¹⁷²

3.3.3 National Treatment (Section 8)

The regulation and scope of national treatment in investment is contained within section 8 of the Act. In terms of the Act,¹⁷³

Foreign investors and their investments must not be treated less favourably than South African investors in like circumstances.

The provision in the Act is similar to the WTOs definition of the NT obligation except for the fact that the Act refers to "investor and their investment" and not "products" which is the predominant focus of the WTO. However, as mentioned earlier, the NT obligation is applied in much the same way in trade as it is in investment. The commonality being

¹⁷⁰ Sornorajah *The International Law on Foreign Investment* 153.

¹⁷¹ Hai-Qing *The Relationship between Trade and FDI and the Implications for the WTO* 11.

¹⁷² Section 4 of the *Protection of Investment Act*.

¹⁷³ Section 8 of the *Protection of Investment Act*.

that there will be equality of treatment as between locals and foreigners in respect of investment or trade respectively.

The discussion regarding national treatment will however be carried out in terms of the provisions of Section 8 of the Act. The operation of national treatment as enshrined in the Act acts as an assurance of equality of treatment of foreign investors within South Africa with that of local investors. Furthermore, it serves as a security measure in maintaining the balance between sovereign powers and the obligation to ensure non-discrimination in any form so as to undermine the ultimate goals of the non-discrimination principle. It essentially is designed to place foreign investors in the same position as that of local investors.¹⁷⁴

Having said that, the national treatment provision goes one step further and provides the following¹⁷⁵:

For the purposes of this section, "like circumstances" means the requirement for an overall examination of the merits of the case by taking into account all the terms of a foreign investment, including the—

(a) effect of the foreign investment on the Republic, and the cumulative effects of all investments;

(b) sector that the foreign investments are in;

(c) aim of any measure relating to foreign investments;

(d) factors relating to the foreign investor or the foreign investment in relation to the measure concerned;

(e) effect on third persons and the local community;

(f) effect on employment; and

(g) direct and indirect effect on the environment.

(3) The examination referred to in subsection (2) must not be limited to or be biased towards any one factor.

¹⁷⁴ Steyn 2013 http://www.werksmans.com/... investment.

¹⁷⁵ Section 8 (2) of the *Protection of Investment Act*.

(4) Subsection (1) must not be interpreted in a manner that will require the Republic to extend to foreign investors and their investments the benefit of any treatment, preference or privilege resulting from—

(a) taxation provisions in any international agreement or arrangement or any law of the Republic;

(b) government procurement processes;

(c) subsidies or grants provided by the government or any organ of state;

(d) any law or other measure, the purpose of which is to promote the achievement of equality in South Africa or designed to protect or advance persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability in the Republic;

(e) any law or other measure, the purpose of which is to promote and preserve cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage

(f) any special advantages accorded in the Republic by development finance institutions established for the purpose of development assistance or the development of small and medium businesses or new industries.”.

The provisions on national treatment and “like circumstances” is extensively detailed which is extremely useful in assessing the scope of national treatment as embodied in the Act.

It is evident that it is necessary to examine the qualifications utilised in determining “like circumstances” in order to assess whether or not they pose a form of discrimination or “hidden barrier” to trade in terms of the WTO law or in terms of the non-discrimination principle in general. These considerations will be discussed in further detail in the following chapter so as to draw a distinction between the provisions of the Act as they are and their possible consequences and effect in terms of South Africa’s responsibility to ensuring non-discrimination in trade and investment.

It will suffice at this stage however, to point out that the qualifications placed on the considerations to be made when assessing the context of "like circumstances" appears to 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. With this in mind, these aspects will be more fully considered in the following chapter.

3.3.4 Right to Regulate (Section 12)

Section 12 of the Act provides for the right of state to regulate investment. This right of regulation has direct bearing on the security of investments in South Africa. It provides for possible exceptions to the protection of investments. In this regard, this section of the Act is crucial to study. The right to regulate provides the greatest area of concern as it is the most susceptible, if improperly exercised to undermine the principle of non-discrimination. The provision is worded as follows¹⁷⁶:

- (1) Notwithstanding anything to the contrary in this Act, the government or any organ of state may, in accordance with the Constitution and applicable legislation, take measures, which may include—
- (a) redressing historical, social and economic inequalities and injustices;
 - (b) upholding the values and principles espoused in section 195 of the Constitution;
 - (c) upholding the rights guaranteed in the Constitution;
 - (d) promoting and preserving cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage;
 - (e) fostering economic development, industrialisation and beneficiation;
 - (f) achieving the progressive realisation of socio-economic rights; or
 - (g) protecting the environment and the conservation and sustainable use of natural resources.

¹⁷⁶ Section 12 of the *Protection of Investment Act*.

(2) The government or any organ of state may take measures that are necessary for the

fulfilment of the Republic's obligations in regard to the maintenance, compliance or

restoration of international peace and security, or the protection of the security interests,

including the financial stability of the Republic.

Security in terms of investment protection is crucial to foreign investment as it's the driving force that instils confidence in a foreign investor to directly invest in a host state. In practice, and in terms of this discussion, security of investments is centred on "governmental regulatory acts which disturb the legal stability surrounding the investor's business."¹⁷⁷ The MFN and NT obligations as embodied in the non-discrimination principle are inherently formulated to contribute and complement efforts towards economic stability and development.¹⁷⁸ Therefore, provisions regarding the status of security of investments is directly linked to the non-discrimination principle.

Security of investors and their investments is generally founded in the protection of the investor's rights which takes on three forms, legal protection (fair and equitable treatment in terms of the law), security of tenure and physical protection (such as protection against physical violence and harassment).¹⁷⁹ It is therefore vital for the legal framework concerned with security of investments to reflect the non-discrimination principle.

The provision made for the right of the state to regulate investment, at first glance appears to lean heavily on nationalistic considerations as opposed to a situation in which there is equal security for both foreign investors and local investors. An examination of the grounds upon which the provisions of the Act may be abused makes it evident that the notion of "equality" in terms of foreign and local investment security is highly questionable due to the qualifications placed upon it. Essentially investment security as between local and foreign investors in terms of the Act can be seen as not

¹⁷⁷ Dolzer and Schreuer *Principles of International Investment Law* 161.

¹⁷⁸ WTO date unknown https://www.wto.org/...e/.../fact2_e.html.

¹⁷⁹ Dolzer and Schreuer *Principles of International Investment Law* 161.

being provided for on a strict basis, but rather on a “general” sphere of application due to nationalistic considerations.

At this stage, it appears that the right to regulate as contained in section 12 of the Act poses the greatest possible threat to undermining the non-discrimination principle and ultimately the protection of foreign investors as contained within the Act.

Having discussed the provisions that are under scrutiny for their role in maintaining the non-discrimination principle, it follows that an analysis of them must be made with specific regard to the obligations that are tied to them by virtue of WTO law and consider the implications and consequences that fall on foreign investors and investments within South Africa.

Chapter 4 An analysis of the Protection of Investment Act with respect to its adherence to the Non-Discrimination principle as expounded under the WTO law

4.1 Introduction

The *Protection of Investment Act* has been formulated to,¹⁸⁰

- (a) protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors;
- (b) affirm the Republic's sovereign right to regulate investments in the public interest; and
- (c) confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.

It is evident that the intention behind the Act is to provide for matters related to the protection of investors which ultimately will lead to the promotion and protection of investment in South Africa. In spite of the well-meaning intention and goals of the Act as stated therein, it has unfortunately been met with "controversy and criticism from various quarters."¹⁸¹ Such concerns arise from the balance established in the Act between the protection of foreign investors and their investments and considerations of national interest.

Many of these criticisms have been levelled towards the seemingly insufficient protection accorded foreign investors. The previous aspects of this discussion have considered the events leading up to the enactment of the *Protection of Investment Act* in South Africa. Furthermore, there has been a discourse relating to South Africa's history and involvement in the WTO which has ultimately placed it in a position where it is bound in terms of the WTO (Marrakesh) Agreement, to observe the non-discrimination principle.

¹⁸⁰ Section 4 of the *Protection of Investment Act*.

¹⁸¹ Steyn 2013 [https://www.werksmans.com/.../ investment](https://www.werksmans.com/.../investment).

The principle of non-discrimination may be used as a tool to create checks and balances in relation to the power that may be exercised in the sphere of national sovereignty¹⁸² (which gives an inherent right to discriminate) with that of creating an equal platform between foreign and domestic investors, such that there is a collective effort and undertaking by WTO member states to promote and protect investment. It is fundamental to this body of work to reiterate and acknowledge that the non-discrimination principle cannot be limited in scope to the MFN and NT treatment obligation but must be recognised as encompassing a broader sphere of application that includes discriminatory effect and the violation of the essence of the non-discrimination principle.¹⁸³ One must always take into account the policy considerations behind the principle and adopt a "purposive approach" as it were. On this basis, the aim of this chapter is to establish the extent to which section 6, 7, 8 and 12 of the *Protection of Investment Act* reflects the principle of non-discrimination as embodied under WTO law and recognises and remains in the spirit of the policy considerations for which the principle was created.

4.2 Fair Administrative Treatment

As established earlier, Section 6 of the *Protection of Investment Act* provides that all investors and their investments have a right to fair administrative treatment as provided for in the Constitution and applicable legislation.¹⁸⁴ At first glance this appears to be in tandem with the principle of non-discrimination. The right to fair administrative treatment is provided for in the Constitution, more specifically, it is embodied in the Bill of Rights, which Bill states that,

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.¹⁸⁵

In terms of the Bill,

Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.¹⁸⁶

¹⁸² Muchlinski, Ortino and Schreuer *International Investment Law* 261.

¹⁸³ Rihova *The Evolution of the Non-Discrimination Principle in International Trade* 28.

¹⁸⁴ Section 6 (1) of the Protection of Investment Act.

¹⁸⁵ Section 8 (1) of the Constitution.

It may be concluded therefore that "everyone" is entitled to fair administrative treatment. The fair administration of investments is applied across the board, regardless of nationality or whether one is classified a foreign or domestic investor. The right to fair administrative treatment is extended to all investing parties and nations and such treatment establishes a legal recognition within the Act of the equal treatment to be extended to all investors and their investments regardless of their origin. This means that the most favourable treatment extended to any investor or investment within South Africa in terms of fair administrative treatment will be applicable to all operating as such within the country. Essentially the non-discrimination principle is honoured in terms of the Act in that the application of this provision is done so non-discriminatorily.

It has been established that the fair administrative treatment provision is subject to the Constitution of the Republic of South Africa. Whilst the Constitution makes provision for fair administrative treatment, exception may be found in the limitation of rights as stated in the Constitution. The exercise of the limitation of rights as provided for in the Constitution will be discussed below as therein lies possible grounds upon which discrimination may be exercised.

4.2.1 Limitation of rights

According to Section 36 of the Constitution,

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

It has been highlighted in the course of this discussion that one of the main threats to the promulgation of the principle of non-discrimination has been that of "hostility and

¹⁸⁶ Section 33 of the *Constitution of the Republic of South Africa*.

antagonism towards foreign investment generated by national fervour.¹⁸⁷ National protectionism places emphasis on,

The positioning of the state in the international order, with its characteristic emphasis on the importance of national interests, states as central actors and self-help¹⁸⁸

An overview of the limitation of rights as stated in the Constitution does not provide for specific circumstances in which rights may be limited, but rather for considerations that must be made in the limitation of a right. Whilst the limitation of rights provision is applicable to both foreign and domestic investors, these considerations thereof are wide and when looked at create room in which protectionist policies may be promoted at the expense of equitable and fair investment protection. Protectionist considerations may particularly be masked by aspects such as the importance of the purpose of the limitation¹⁸⁹ and the relation between the limitation and its purpose,¹⁹⁰ which are extremely vague and essentially provide a blank canvas upon which nationalistic policies prevail to the detriment of foreign investment protection.

The constitutional court of South Africa has stated in a number of cases¹⁹¹ that the exercise of limiting rights must not be taken lightly. A wide definition of the protected right must be adopted such that it does not exclude conduct not worthy of constitutional protection from the protective ambit of rights. This position supports the notion that the limitation of rights should not be used arbitrarily. Furthermore, Klatt and Meister¹⁹² state that,

Once certain behaviour is protected *prima facie*, the state has to justify the infringement of the right by applying the right's limitations, *inter alia* the proportionality test. Within the proportionality test, balancing has to be done according to the law of balancing, that means openly and traceably...This burdens the state with the duty to give reasons for the limitations, instead of burdening the people with the duty to justify exercising their rights, and thus prevents judicial arbitrariness. Therefore, broad definitions of rights are preferable.

¹⁸⁷ Sornorajah *The International Law on Foreign Investment* 22.

¹⁸⁸ Rihova *The Evolution of the Non-Discrimination Principle in International Trade* 1.

¹⁸⁹ Section 36 1 (b) of the Constitution.

¹⁹⁰ Section 36 1 (d) of the Constitution.

¹⁹¹ Ackermann, O'Regan and Sachs JJ in *Prinsloo v Van der Linde* 1997 3 SA 1012 para 17 and *Bernstein v Bester* 1996 2 SA 751 para 79 ("... the content of the right is crystalized by mutual limitation...by the rights of the community as a whole.")

¹⁹² Klatt and Meister *Constitutional Structure* 18.

According to case law and the theory contained therein, the limitation of rights clause is not one that is exercised lightly. However, in terms of the preamble to the Act, the rights and obligations bestowed on foreign investors may be adjusted so as to effectively comply with the government's right to regulate in the public interest in accordance with the law.

Public policy considerations are the basis upon which the purpose to a limitation and relation to a limitation would be considered with regards to aspects of the *Protection of Investment Act*. Inarguably, provisions such as these effectively create a right to discriminate on considerations of state or public interest. Whilst the state has the right to regulate, the concept of "public interest" is indeterminate in its nature.¹⁹³ Ascertaining an established definition of the term is next to impossible, however considerations of public interest may be considered as,

referring to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of citizens. It has also been described as being for the benefit of society, the public or the community as a whole.¹⁹⁴

The notion of 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.

4.3 Right of Establishment

As discussed previously, the right to establishment is founded on the aim of "liberalizing the regime of foreign investment."¹⁹⁵ It establishes a right to economic access within a country. The *Protection of Investment Act* explicitly denies a right of establishment to foreign investors, which means there is no legal right for foreign investors to expand

¹⁹³ Wheeler 2006 *AIAL* 34.

¹⁹⁴ Wheeler 2006 *AIAL* 35.

¹⁹⁵ Dolzer and Schreuer *Principles of International Investment Law* 87.

their business or expect set rules of payment of taxes and transfer of funds.¹⁹⁶ It is submitted that this provision is in line with the Act's apparent focus on the protection of the sovereign rights of the South African government as opposed to an equal balance between such sovereign rights and foreign investor protection.¹⁹⁷

It is trite that,

Under international law, a state has an absolute right to control the admission and establishment of aliens, including foreign investors, on its territory. Thus a state has a free choice as to the degree of open admission and the extent of rights of establishment it sees fit to offer to foreign investors.¹⁹⁸

This right is based on considerations of a states sovereign right to regulate such that it may preserve

National economic policy goals, national security, public health and safety, public morals, and other essential public policy goals such as consumer protection.¹⁹⁹

Whilst governments are at liberty to close their economies and regulate the involvement and access of foreign investors to said economies and investment regimes, there is a need to bear in mind (as emphasised earlier) that protectionist measures employed by states are often masked behind such rights. Such rights must be exercised with caution, as most developing states require capital investments from foreign direct investment.

Furthermore, such right must be recognised as creating a right to discriminate. The non-discrimination principle may be readily misused to "insulate inefficient or monopolistic national industries from competition at the cost of consumer welfare and productive efficiency."²⁰⁰ It is a dangerous tool that must be exercised with great caution.

In order to attract investors, the investment regimes adopted by the nation must be structured in such a manner as to ensure that investors feel secure in making their investments on the premise that they will be treated no less favourably or equally with

¹⁹⁶ Section 7 (2) of the Act.

¹⁹⁷ Steyn 2013 at <https://www.werksmans.com/.../ investment>.

¹⁹⁸ Muchlinski, Ortino and Schreuer *International Investment Law* 20.

¹⁹⁹ Muchlinski, Ortino and Schreuer *International Investment Law* 21.

²⁰⁰ Muchlinski, Ortino and Schreuer *International Investment Law* 21.

all other investors (including domestic investors). The uncertainty that is inherent in the denial of a right to establishment, is bound to have negative repercussions on the Republic of South Africa.

Whilst the WTO law does not prevent a state from denying establishment to foreign investors, it is submitted that in the broader context of the non-discrimination principle, the material effect of denying establishment to a foreign investor is to immediately place domestic and foreign investors and investments on an uneven playing field. Essentially foreign investors may be denied the opportunity to expand their business in the same way a local investor might or to operate in an environment of an assured set rules for payment of taxes and transfer of funds. It means foreign investors are operating from an uncertain set of rules to local investors from the get-go. This discrimination is most evident when taken against the definition of the NT treatment obligation which provides 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...²⁰¹

It must not be forgotten that the NT obligation only comes into effect once products have entered a country. In terms of the Act however, a denial to a right to establishment potentially entails that taxes, internal charges, laws and regulations may be applied indiscriminately such that it constitutes protection of domestic production at the expense of foreign investors and their production of goods within South Africa. This is based on the fact that the right to establishment is directly concerned with "the conditions under which the investor is allowed to carry out its business during the period of the investment."²⁰² Such conditions may include "issues such as expansion of the investment, payment of taxes or transfer of funds."²⁰³

The denial of a right to establishment means that the application of regulations pertaining to taxes and ultimately the treatment of domestic and foreign products

²⁰¹ A III: 1 of the GATT.

²⁰² Dolzer and Schreuer *Principles of International Investment Law* 88.

²⁰³ Dolzer and Schreuer *Principles of International Investment Law* 88.

become unbalanced due to the uncertainty of the law as encapsulated within the Act. This would most likely act as a deterrent to foreign investment within South Africa.

As discussed earlier, the WTO has a desire to remove barriers to trade and the denial of a right to establishment, for all intents and purposes, creates an environment that is rife for exploitation and essentially is open to becoming a hidden barrier to trade, whether or not that was the intention of the government.

The denial of a right to establishment mostly impacts and undermines the MFN treatment obligation, in as far as it places foreign investors on potentially different footing with regards the laws and regulations applicable to each group respectively in matters of economic access. When considered in the context of the aims and obligations of the WTO as set out earlier, it is submitted that there is a pressing need to revisit this particular provision. It is submitted that "discrimination could be made between aliens...as far as access to economic activity is concerned,"²⁰⁴ and in this instance it appears that this is the case. Essentially this could be viewed as a violation of the non-discrimination principle in terms of its effect.

This is not to say that the denial of a right to establishment is *ultra vires* WTO law, but rather that it is potentially discriminatory in its effect. As stated earlier, remedy can be found in the development of conditional rights to establishment, which allow the State to maintain its right to regulate in the economic interest of the nation, without completely closing its economy to foreign investors by way of a total denial to a right of establishment.

4.4 National Treatment

Section 8 of *Protection of Investment Act* provides exclusively for non-discrimination in the form of national treatment. The Act states,

Foreign investors and their investments must not be treated less favourably than South African investors in like circumstances.²⁰⁵

²⁰⁴ Sornorajah *The International Law on Foreign Investment* 153.

²⁰⁵ Section 8 (1) of the *Protection of Investment Act*.

The Act emphatically applies this national treatment to foreign investors in "like circumstances."²⁰⁶ With domestic investors.

According to the Act considerations of like circumstances will be based on the following:

An overall examination of the merits of the case by taking into account all the terms of a foreign investment, including the—

- (a) effect of the foreign investment on the Republic, and the cumulative effects of all investments;
- (b) sector that the foreign investments are in;
- (c) aim of any measure relating to foreign investments;
- (d) factors relating to the foreign investor or the foreign investment in relation to the measure concerned;
- (e) effect on third persons and the local community;
- (f) effect on employment; and
- (g) direct and indirect effect on the environment.

The first point of consideration and concern is not unlike that raised in the previous discussion pertaining to the grounds on which the limitation of rights is exercised within the Constitution. Essentially, the Act provides that the national treatment provision will be subject to a wide array of national considerations which may be used to promote protectionist policies and ultimately discriminate against foreign investors. Whilst the Act is applicable to both foreign and domestic investors, it is widely acknowledged that economic policies of nationalism or economic nationalism is based on "protectionist ideologies,²⁰⁷" and as discussed earlier, protectionism proffers protection to its own people (citizens) over foreign citizens. The qualifications applied to the term like circumstances leans heavily on considerations of public policy which ultimately places emphasis on a,

²⁰⁶ Section 8 (1) of the *Protection of Investment Act*.

²⁰⁷ Helleiner and Pickel *Economic Nationalism in a Globalizing World* 3.

conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation.²⁰⁸

The reason for stating that the qualifications applied to like circumstances in the Act lean towards the pursuance of public interest considerations is based on the fact that,

Most attempts to describe what is meant by the 'public interest' refer to the 'community', 'common' good or welfare, 'general' welfare, 'society', 'public', or the 'nation'.²⁰⁹

It is clear that the considerations stated in the Act are based on public interest ideals. This may be seen in the effort to balance like circumstances with effects to the Republic,²¹⁰ the effect on third persons or the community,²¹¹ and effect on employment.²¹² Whilst there is nothing wrong with this, it must be exercised (as has been mentioned earlier) with extreme caution. This is because, it is essential to create a balance between national interest goals and ensuring a friendly foreign investment environment. There are no checks and balances in the Act with regards the basis on which the qualifications relating to like circumstances will be used. This opens a rift in terms of balancing the right to protect the public interest with creating a protectionist measure which may become discriminatory in its effect.

Having said that, "like circumstances" are to be ascertained on the merits of the case.²¹³ In essence, the standard to be used in deducing whether or not like circumstances exist, is automatically subjective and not necessarily certain. In terms of the Act, it means that, where there are no "like circumstances" there is room for discrimination to take place against the investor and his investments. The examination of like circumstances on a case by case basis is subject to considerations such as the "effect of the foreign investment on the Republic,"²¹⁴ and the "aim of any measure relating to foreign investments,"²¹⁵ among other things. Ultimately what this comes down to is a consideration of the protection of "the sovereign rights of the South

²⁰⁸ Wheeler 2006 *AIAL* 36.

²⁰⁹ Wheeler 2006 *AIAL* 37.

²¹⁰ Section 8 (2) (a) of the Act.

²¹¹ Section 8 (2) (e) of the Act.

²¹² Section 8 (2) (f) of the Act.

²¹³ Section 8 (2) of the Act.

²¹⁴ Section 8 (2) (a) of the Act.

²¹⁵ Section 8 (2) (c) of the Act.

African government to legislate in the "public interest,"²¹⁶ which as discussed above must be handled and applied pragmatically in order to avoid encroaching on the non-discrimination principle, particularly in terms of its effect.

It is further submitted that the qualifications pertaining to "like circumstances" and the conditions under which they will be examined, are wide and unclear and would ultimately result in a situation of interpretational difficulties concerning the national treatment principle. This undermines the non-discrimination principle as established under the WTO law, as vague provisions regarding discriminatory practices indicates a lack of legal certainty in terms of ensuring that the Republic honours its obligations as a WTO member. Furthermore, it creates uncertainty on the role of the state in ensuring that there the highest form of protection accorded to foreign and local investors.²¹⁷ Where legislation is not clear cut in terms of the extent to which foreign investors will be protected there will be, in all likelihood a decrease in the willingness of foreign investors to invest within South Africa. This is based on the aforementioned fact that there is a direct correlation between a sound legislative framework and investment.²¹⁸

Essentially, there is need for the national treatment principle to be more precisely qualified and extended, such that it is implemented in a way that most closely adheres to and ensures the Republics responsibility to uphold the non-discrimination principle as established by WTO law.

4.5 Right to Regulate

One of the most important aspects to the field of trade and investment law, inarguably, is the legal framework setting out the scope of security accorded to investors and their investments. It is doubly important to foreign investors to know that their investments are sufficiently secure in terms of the law of the foreign states in which they choose to invest.²¹⁹ This security is embodied in the Protection of Investment Act. The

²¹⁶ Steyn 2013 https://www.werksmans.com/... investment.

²¹⁷ It is acknowledged in the preamble to the Act that it is the responsibility of the government to provide a sound legislative framework for the protection of all investments, including foreign investments.

²¹⁸ OECD 2000 <https://www.oecd.org>.

²¹⁹ Cottier and Oesch 2011 *NCCR*.

effectiveness of the protection set out in the Act however is most closely tied to the right of state to regulate. This is because, the right to regulate is the most powerful tool in cementing or undermining the protection of investments. It is also crucial to the effectiveness or derogation from the non-discrimination principle.

Security of investors and their investments is related to two aspects, the investor's right to legal protection (which is fair and equitable treatment in terms of the law) and physical protection (such as protection against physical violence and harassment).²²⁰

The Act states that,

The State is committed to maintaining an open and transparent environment for investments as well as [providing] a sound legislative framework for the protection of all investments, including foreign investments²²¹

In other words, the government undertakes to ensure that their "governmental regulatory acts [will not] disturb the legal stability surrounding the investor's business,"²²² and that they will "grant physical protection and security... in relation to encroachment by state organs or in relation to private acts."²²³

However, section 12 of the Act proffers instances and considerations that the state may take in exercising its right to regulate. Essentially these considerations may be used in justifying the non-application of guarantees provided in terms of the Act. This section creates grounds on which an equal standard of treatment (in terms of security available) between foreign investors and domestic investors may effectively be undermined.

The application of the Act extends to all investors in South Africa regardless of nationality.²²⁴ This essentially means that there is an observance of the NT treatment obligation in that the law has been stated to apply to foreign investors as it does to local investors. The Act provides for security of foreign investors in the same manner it provides for its local investors. Furthermore, and by implication, the most favourable

²²⁰ Dolzer and Schreuer *Principles of International Investment Law* 161.

²²¹ Preamble to the Act.

²²² Dolzer and Schreuer *Principles of International Investment Law* 161.

²²³ Dolzer and Schreuer *Principles of International Investment Law* 162.

²²⁴ Section 5 as read with Section 2 of the Act.

treatment extended to one nation in terms of security measures is automatically applied to the "lesser" nation. The provision spins on the axis of "equality to all investors." In this regard, the aspect of equality with regards the security of foreign investors and their investments can be said to be in compliance with the principle of non-discrimination as set out by the WTO law. It has been said that,

In the context of treatment of foreign investment, the most frequent problem is discrimination on the basis of nationality.²²⁵

The fact that nationality is not a ground on which discrimination may be applied with regards one of the most essential considerations to a foreign investor (namely security) is vital in ensuring the continued promotion of investment within South Africa.

However, like the previously discussed provisions, the Act subjects this position to the exceptions set out in Section 12 which state that,

The government or any organ of state may, in accordance with the Constitution and applicable legislation, take measures, which may include—

(a) redressing historical, social and economic inequalities and injustices;

(b) upholding the values and principles espoused in section 195 of the Constitution;

(c) upholding the rights guaranteed in the Constitution;

(d) promoting and preserving cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage;

(e) fostering economic development, industrialisation and beneficiation;

(f) achieving the progressive realisation of socio-economic rights; or

(g) protecting the environment and the conservation and sustainable use of natural resources.

Notions of investment regulation being susceptible to considerations of historical, social and economic inequalities and injustices and other such considerations as stated above, is treading on a dangerous and slippery slope. It opens up the field of investment

²²⁵ Dolzer and Schreuer *Principles of International Investment Law* 195.

protection to possible "market-distorting policy controls that may serve to discriminate between foreign and domestic investors.²²⁶ Whilst it is true to say historical

Inequality of opportunities can have a negative impact on economic performance and well-being, inequality can also fuel protectionist sentiments.²²⁷

This is the concern with Section 12 of the Act. It is unclear what measures would be adopted to balance historical, social and economic inequalities with that of abusing this provision in pursuance of protectionist measures.

Furthermore, the problem with incorporating these provisions as the basis on which the state may regulate investment is that the considerations are broad in such a way as to make them open to abuse. The fact that protection offered to foreign investors and their investments is subject to such vast and dynamic areas of consideration creates, yet again, a situation where the protection offered investors and their investments is "unclear and result[s] in interpretational issues and provide[s] a means to circumvent and neutralise the protections."²²⁸ Essentially, this provision means that foreign investors may be prejudiced in the protection available to them should the government decide that it doesn't suit the purposes outlined in the Act. This fact renders the provision on the right to regulate as it currently stands as potentially dangerous in undermining the provisions designed to create equal measures of security to all investors.

Having said that, it is submitted that where a legal instrument can be used to undermine the obligations of the Republic to adhere to WTO law, in the form of the Non-Discrimination Principle, such legislation can be taken as not being conforming to the WTO law. It is for this reason that such provisions should be treated with caution so as to most efficiently negate their potentially subversive effects.

²²⁶ Muchlinski, Ortino and Schreuer *International Investment Law* 26.

²²⁷ Forster and Martin 2012 *Balancing Economic Efficiency and Social Equity* <https://www.oecd.org>.

²²⁸ Steyn 2013 http://www.werksmans.com/... investment.

Chapter 5 Concluding Remarks and Recommendations

5.1 Concluding Remarks

Ultimately, the *Protection of Investment Act* is designed to do what its name suggests, which is to protect investments within the Republic of South Africa. Considering the issues raised in this discourse, it is submitted that the *Protection of Investment Act* fails to adequately protect foreign investors in accordance with the World Trade Organisation's principle of non-discrimination. This conclusion is based on the seemingly inadequate balance between the protection of foreign investors and national considerations. It appears that the balance struck leans more favourably towards national interests which is potentially protectionist in its effect. It is submitted that protectionist policies may create a discriminatory environment with regards foreign investment.

The principle of non-discrimination is a key tool in ensuring that there is continued promotion of investment between states. Therefore, with regard to the qualifications attached to the aforementioned sections of the Act which have been the focus of this discussion, there is an urgent need to reconsider and perhaps redress their provisions so as to bring them more in line with the non-discrimination principle.

With this in mind, there shall be a brief discussion considering possible ways in which the discussed aspects may be addressed so as to more closely place the *Protection of Investment Act* in line with the principle of non-discrimination

5.2 Recommendations

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.

Furthermore, it is recommended that the Act be revisited and amended in terms of the clear drive towards a protectionist policy as opposed to one that opens up the economy and encourages foreign investors to invest. While South Africa is a sovereign state, it is one that is still developing and the Act, particularly in instances or investment protection provisions, leans heavily on protecting local investments without achieving necessary balance with the rights that must be extended to foreign investors so as to continue to encourage foreign investment within South Africa. A perfect example is the denial to a right of establishment. Whilst the WTO law makes the right to establishment discretionary to each state, it is recommended that extending a conditional right of establishment to foreign investors will more effectively balance the right of the State to regulate investment in the interests of the national economy whilst still attracting foreign investment.

It is also recommended that where the Act subjects provisions of the Act to the domestic law of South Africa, such provisions be made with the requisite checks and balances so as to minimise their 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 foreign investors may be quelled in their worries concerning their protection as well as that of their investments in South Africa. Whilst small, an adoption of such recommendations has the potential for far reaching effects in assuring investors that the country is committed to their 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.

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