

LEGAL TRANSPLANTATION OF PRINCIPLES OF NATIONAL TREATMENT IN RETAIL TRADING ACTIVITIES BY FOREIGN DIRECT INVESTMENT

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Abstract

This paper aims to elaborate the extend on how the National Treatment Principle transplanted on Indonesian legal framework as a result of Indonesia's membership in WTO particularly after going through the development of Covid-19 and the enactment of the Job Creation Law, in particular the aftermath of the government's policy to open retail trading business activity to foreign direct investment. This study uses doctrinal legal research form by examining literature materials or sources in the form of written positive legal norms. The Investment Law has accommodated the 5 (five) main principles after the ratification of the GATT; however, it is found that the implementation regulation violates the principles in the ministerial regulation level. Study on the contradiction of the legal transplantation effort is rarely made toward the National Treatment principle due to its broad definition. This study can be useful to foresee the risk of a policy in general and to improve the interest of foreign direct investment in particular as well as to fill the gap of rising concern technical understanding of the retail trading business activity for foreign direct investment.

I. Introduction

Trade liberalization poses a dilemma for the government of the Republic of Indonesia: whether to fully open itself to foreign investors in order to achieve prosperity or to fully open up but not become masters in its own homeland. After the collapse of the Old Order, the government passed Law Number 1 of 1967 concerning Foreign Investment (Law 1/1967) in order to attract foreign investors by offering incentives such as tax exemptions and conditional guarantees that

there would be no nationalization¹. These waves of foreign direct investment reached its peak during the New Order era in 1975 with its first net inflows of USD 1.29 billion, then reach second peak in 1996 with USD 6.19 billion, while after the devastating 1998 monetary crisis and the start of reform period, the foreign direct investment reached its peak in 2014 recording US \$ 25.12 billion².

Although later Law 1/1967 was revised several times because it was considered unprofitable, the spirit of opening up to foreign direct investment for the sake of this prosperity was then continued during the Reformation period with the passing of Law Number 25 of 2007 concerning Investment (Law 25/2007) because it was proven that Foreign investment capital brings benefits, namely the absorption of labor, creation of demand/demand for domestic products as raw materials, additional foreign exchange especially for foreign direct investment conducting export activities, additional state income from the tax sector, and also the process of transferring technology and knowledge transfer³. Law 25/2007 also further regulates business fields that are open and closed for investors. Provisions for open and closed business fields for investors took the form of a priority list until 1987 and a negative investment list from 1989 to 2020. In general, the negative list stably regulates closed, open business fields with reserved conditions or partnerships with Micro, Small, Medium Enterprises and Cooperatives, and open with certain conditions.

In terms of international trade, Indonesia has become a member of the World Trade Organization (WTO) since January 1, 1995 and a member of the General Agreement on Tariffs and Trade (GATT) since February 24, 1950. The purpose of Indonesia's participation in the WTO is stated in the considerations of the Law of the Republic of Indonesia Number 7 of 1994 concerning Ratification of the Agreement Establishing the World Trade Organization (Law 7/1994), namely to create an equitable just and prosperous society and also increase the expansion of strengthening and securing markets for all products, both goods and services, including aspects of investment and intellectual property rights related to trade, as well as increasing competitiveness, especially in international trade. ⁴ Indonesia's decision to become a member of the WTO is thus submitting itself to trade liberalization initiated through WTO rules so that there are almost no barriers to market entry for WTO member countries as well as tariff setting as a means of protecting foreign products from entering the domestic market. WTO members inevitably either directly or indirectly adopt a market economy with

¹ Undang-Undang Nomor 1 Tahun 1967 Tentang Penanaman Modal Asing.

² 'Foreign Direct Investment, Net Inflows (BoP, Current US\$) - Indonesia', *The World Bank* <<https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>>.

³ Hendrik Budi Untung, *Hukum Investasi* (Jakarta: Sinar Grafika, 2013).

⁴ Undang-Undang Nomor 7 Tahun 1994 Tentang Pengesahan Agreement Establishing The World Trade Organization (*Persetujuan Pembentukan Organisasi Perdagangan Dunia*).

decentralized decisions given to business actors.⁵ It is recorded that Indonesia won several times at the WTO for violation cases and also lost several times when it was sued by other WTO member countries.

The National Treatment principle, as one of the main principles the GATT, is a principle which in this case is contained in the 3 main agreements of the WTO, namely the GATT, the General Agreement on Trade in Services/GATS and the Agreement on Trade-Related Aspects of Intellectual Property Rights/TRIPS. In Article 3 of the GATS (General Agreement on Trade and Service), GATS is part of the GATT sub-regulation itself⁶. The principle of National Treatment means that there are provisions requiring participating countries to provide equal treatment between domestic business actors and foreign business actors.

In line with developments and also driven by the COVID-19 pandemic, the Indonesian government passed Law Number 11 of 2020 concerning Job Creation (Law 11/2020) with the hope that jobs will be created and absorbed by Indonesian workers so that they are filled with jobs and a decent living for humanity. Law 11/2020 was passed and immediately reaped pros and cons in society. From the Omnibus Law method used, the lack of public participation, provisions that are considered very pro-corporate and of course after the Constitutional Court gave the Constitutional Court Decision Number 91/PUU-XVIII/2020 which stated that Law 11/2020 was proven unconstitutional. Foreign investors generally welcome the Law 11/2020, especially the issuance of Presidential Regulation of the Republic of Indonesia Number 10 of 2021 Concerning Investment Business Fields as amended by Presidential Regulation of the Republic of Indonesia Number 49 of 2021 (Perpres 49/2021) or as published - heralded as a Positive Investment List.

The Positive Investment List in essence states that all business fields are determined to be open for investment consisting of priority business fields, business fields allocated or partnerships with Cooperatives and MSMEs, business fields with certain requirements, and Business fields that are not included in the above classification. The breakthrough in the Positive Investment List, especially in the trading business sector which is determined for foreign investment, is the opening of the retail trading business sector which was previously closed to foreign investment. This was followed by the enactment of Government Regulation Number 29 of 2021 concerning the Implementation of the Trade Sector (PP 29/2021) and Minister of Trade Regulation Number 24 of

⁵ Jur Udin Silalahi; et.al, *Analisis Dan Evaluasi Hukum Tentang Perlindungan Industri Dalam Negeri (UU Nomor 5 Tahun 1984 Tentang Perindustrian)* (Jakarta: Badan Pembinaan Hukum Nasional, Kementerian Hukum dan HAM RI, 2011).

⁶ Article XVII GATS: *A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers*

2021 concerning Agreements for the Distribution of Goods by Distributors or Agents (Permendag 24/2021).

The increasing interest of foreign investors to carry out retail trade in Indonesia is usually motivated by high demand from the Indonesian market. Business actors want to be able to cut the distribution chain as much as possible so that business actors can benefit from lower prices of goods compared to a long distribution chain. The breakthrough in the opening of retail trade which was previously closed to foreign investment was initially greeted with joy, but the excitement disappeared when business players encountered restrictions on activities, especially the prohibition to buy goods from foreign distributors albeit its status of a sister company or within the same group of companies. This raises the question whether this rule change is truly open for the sake of opening up the market or half-way open due to fear of a pandemic? Within this question, this article would like to determine whether the National Treatment principles has been transplanted in the regulation of retail trade activities in the statutory regulations and implementing regulations for foreign investors?.

2. Research Method

The research in this paper is carried out in a doctrinal form. Doctrinal legal research is carried out by examining literature materials or sources in the form of written and unwritten positive legal norms. In doctrinal law research, it is not necessary to formulate a hypothesis, if it is included, it usually only covers the systematic work in the research process. The qualitative approach focuses on written, spoken, and real behavioral data.⁷

The main data source in this study was obtained from secondary data consisting of:

1. Primary legal materials, namely binding legal materials in the form of statutory regulations related to the WTO, National Treatment, foreign investment, and provisions for retail trade activities.
2. Secondary legal materials, namely materials that are closely related to primary legal materials, which can provide an explanation of primary legal materials⁸ in the form of books and research results related to the National Treatment, especially related to foreign investment, and provisions on retail trade business activities.

⁷ Sri Mamudji, et al., *Metode Penelitian Dan Penulisan Hukum* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005).

⁸ Soerjono Soekanto, 'Penelitian Hukum Normatif: Suatu Tinjauan Singkat', 2007.

Tertiary legal materials, namely materials that provide instructions and explanations of primary legal materials and secondary legal materials, such as dictionaries.⁹

3. Results and Discussion

Transplantation in the object of legal knowledge can include (a) legal rules, (b) legal teachings (doctrine), (c) legal institutions or (d) legal structures. The object that was transplanted is still visible today, both in the doctrine used, and in the rules regulated in various laws. For example, the rules governing business competition, the legal doctrines taught in schools and universities, for example regarding the meaning of an unlawful act, still use the boundaries commonly used in foreign/western legal doctrines. Legal transplant thus includes the process of transferring rules, doctrines, legal institutions from one society to another, from one country to another or one family of legal systems into another legal system which may adhere to different state beliefs. Other terms that are similar to this term are legal reception, legal borrowing, legal migration, legal colonization, legal surgery, translocation law and many others. However, this use has the problem of legal contextualization which is often different between countries where thoughts, principles and legal formulations are born and developed and where they are used.

Transplantation is a process of accommodating: (1) legal rules, (2) legal teachings (doctrine), (3) structure, or (4) legal institutions from one legal system to another. other. This process is no longer through a physical colonization process but through a process of globalization either in the form of international conventions or due to the needs of international traffic¹⁰. This legal transplant can be based on the motivation to save costs (cost saving transplant), coercion from other parties (externally dictated transplant), the need of a group (entrepreneurial transplantation) which is the need of a country to be able to compete with other countries, for example in In terms of investment, Indonesia must attract investors' interest by providing equal treatment/National Treatment as offered by its competitors such as Malaysia or Thailand or requests/pressure from other parties against these countries, such as requests from the IMF so that a country can provide protection to foreign investors who invest in the country.

To guarantee the success of a legal transplant, it must be accepted by the public and the legal culture in which it is included. Berkowitz, Pistor, and Richard

⁹ Amiruddin dan Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: Raja Grafindo Persada, 2012).

¹⁰ Jaja Ahmad Jayus, *Pengaruh Hukum Kolonial Pada Budaya Hukum Masyarakat, Dalam "Dialektika Pembaruan Sistem Hukum Indonesia"* (Jakarta: Sekretariat Jenderal Komisi Yudisial Republik Indonesia, 2012).

clearly explain this requirement as follows: "For laws to function effectively, they must be meaningful in the context in which they are applied so that citizens have incentives to use them and to sue institutions to work and develop the law".¹¹ A legal transplantation can be successful, if the transplant is adapted, or if the community has recognized the basic principles of the legal provisions.¹²

The implication of the National Treatment principle for retail trading activities is that as a member of the WTO, Indonesia is bound by a prohibition against discrimination against foreign investment. But on the other hand, Indonesia is also bound by national interests as a constitutional mandate, namely to protect the entire Indonesian nation and its interests. So, on the one hand legally Indonesia must eliminate all forms of discrimination, while on the other hand Indonesia must protect its national interests. In addition, Indonesia's membership in the WTO demands national law in line with Indonesia's obligations and commitments at the international level. These obligations are global and comprehensive. Indonesia, and every member of the World Trade Organization, is obliged to make regulations based on the principles of international trade, namely the most-favored nations and national treatment. These two principles derive from international private law theories of reciprocity and retaliation.¹³

In Law 25/2007, this principle of National Treatment is mentioned in the Elucidation of Article 3 Paragraph (1) letter d which reads, "What is meant by 'principle of equal treatment and does not distinguish national origin' is the principle of non-discrimination service based on statutory provisions, both between domestic investors and foreign investors as well as between investors from a foreign country and investors from other foreign countries" and Article 4 Paragraph (2) letter a which reads: "In establishing the basic investment policy as referred to in Paragraph (1), Government a. provide equal treatment for domestic investors and foreign investors with due observance of the national interest".¹⁴

The application of the principle of National Treatment as stipulated in Law 25/2007 applies after an investment establishes a business entity in Indonesia. This is implied in the Elucidation of Article 4 paragraph 2 letter a as follows: "What is meant by "equal treatment" is that the Government does not differentiate between the treatment of investors who have invested in Indonesia, unless otherwise stipulated by provisions of laws and regulations."

¹¹ Louis F. Del Duca and Alain A. Levasseur, 'Impact of Legal Culture and Legal Transplants on the Evolution of the U.S Legal System', *The American Journal of Comparative Law*, 58 (2010), 1.

¹² Daniel Berkowitz; Katharina Pistor and Jean Francois Richard, 'The Transplant Effect', *The American Journal of Comparative Law*, 51 (2003), 188.

¹³ Yuun Opusunggu, 'Arti Penting Hukum Antar Tata Hukum Untuk Indonesia', *Jurnal Rechtsvinding*, 7.2 (2018), 163.

¹⁴ Undang-Undang Nomor 25 Tahun 2007 Tentang Penanaman Modal.

The phrase does not differentiate treatment of investors who have invested in Indonesia indicating that this equality of treatment only applies to investors who have invested in Indonesia. Thus, it means that Indonesia adheres to the implementation of the National Treatment post-establishment principle, namely after the investment is made in Indonesia, this same treatment is given. In addition, from the language used in Article 4 paragraph (2) "with due regard to this national interest" in which the criteria for national interest are regulated in Article 12 paragraph 5 of Law 25/2007 which includes protection of natural resources, protection, business development micro, small, medium and cooperatives, supervision of production and distribution, technological capacity building, participation of domestic capital, and cooperation with government-appointed business entities. Thus, the rules in the Article contain 2 variables that must be fully understood, namely the obligation to provide equal treatment and refer to national interests. This means that equal treatment cannot be separated from national interests. This means that under certain conditions this treatment may not be applied to foreign investors.¹⁵

The National Treatment principle in Indonesia has been challenged, especially based on the opinion circulating that with the enactment of the respective principle then an obligation on providing equal treatment between foreign investors and domestic investors as well as to open up opportunities for foreign investors to invest in all possible business fields thereby violating the constitutional mandate regarding national economic management. This lawsuit was contained in 2 (two) Judicial Review cases filed by non-governmental organizations namely Case Number 21/PUU-VI/2008 and Case Number 22/PUU-VI/2008.

The Constitutional Court in its consideration explained that the principle of National Treatment included in Law 25/2007 is to provide equal treatment between foreign investors and domestic investors with the following restrictions¹⁶:

1. Equal treatment between foreign investors and domestic investors;
2. This equality of treatment does not apply in its entirety with regard to state control in terms of national interests.

The legal transplantation of the principle of National Treatment was followed by a change in meaning which was initially very pro-foreign to a principle that provides equal services to foreign investors and domestic investors. This change in meaning also makes legal transplants on the principle of National Treatment

¹⁵ Badan Pembinaan Hukum Nasional, *Laporan Akhir Analisis Dan Evaluasi Hukum Mengenai Mekanisme Perizinan Dalam Rangka Mendukung Kemudahan Berinvestasi Di Indonesia* (Jakarta: Badan Pembinaan Hukum Nasional, 2016).

¹⁶ *Putusan Mahkamah Konstitusi Republik Indonesia Nomor 21-22/PUU-V/2007*, p. 82.

acceptable in Indonesia because they are deemed not to violate the provisions of Article 33 of the 1945 Constitution¹⁷ as decided by the Constitutional Court.¹⁸

Further, as foreign direct investment shows an interest toward doing retail trading in Indonesia, they will need to find definition of the business activity to ensure that they are allowed to do retail trading. The first thing that needs to be consulted is the definition of retail trade activities in the Standard Classification of Indonesian Business Fields¹⁹ which are defined as:

"RETAIL TRADE, NOT CARS AND MOTORCYCLES

Goods sold in this basic class are limited to goods that are usually related to consumer goods or retail goods. Therefore, goods that normally do not enter retail trade, such as ore, industrial machinery and others, are excluded from this main group. This division also includes units primarily engaged in the sale to the general public of merchandise exhibited, products such as personal computers, stationery, paintings or frames, even though sales herein may not be for personal or household use. Some processing of goods may be covered, but only certain times of sale, e.g. selection and repackaging of goods, installation of household appliances and so on. This division also includes retail sales by commission agents and retail auction house activities. The selling of agricultural products by farmers, the manufacture and sale of goods thereof, which are generally classified as industry in division 10-32, trading of automobiles, motorcycles and their parts, grains, crude oil, chemical industry, industrial machinery and equipment and steel, trade in food and beverages for local consumption and take away, rental of personal and household goods for the general public."

Furthermore, Permendag 24/2021 defines the Indirect Goods Distribution chain, namely:²⁰



Figure 1. Indirect Goods Distribution Chain

Problems will arise when a group of foreign investment companies already has a large trading legal entity with distributor activities, because based on PP 29/2021 and Permendag 24/2021, foreign investment companies carrying out

¹⁷ Undang-Undang Dasar 1945.

¹⁸ Desky Setiawan, "Transplantasi Hukum Atas Prinsip National Treatment Dalam UU No. 25 Tahun 2007 Tentang Penanaman Modal" (Universitas Indonesia, 2021).

¹⁹ Peraturan Badan Pusat Statistik Nomor 2 Tahun 2020 Tentang Klasifikasi Baku Lapangan Usaha Indonesia.

²⁰ Peraturan Pemerintah Nomor 29 Tahun 2021 Tentang Penyelenggaraan Bidang Perdagangan.

distribution activities must appoint domestic investment trading companies as registered agent, sole agent, distributor, or sole distributor (as an intermediary). The appointed domestic investment trading company will then sell its products to retailers in Indonesia. When translated into images it will be described as follows²¹:

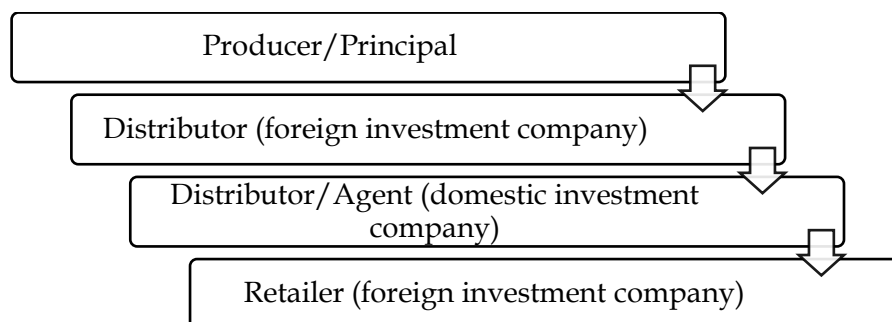


Figure 2. Indirect Goods Distribution Chain involving Distributors with foreign investment company status and Retailers with foreign direct investment company status

For the record, there are no similar restrictions on domestic investment business actors, as seen from the following figure:

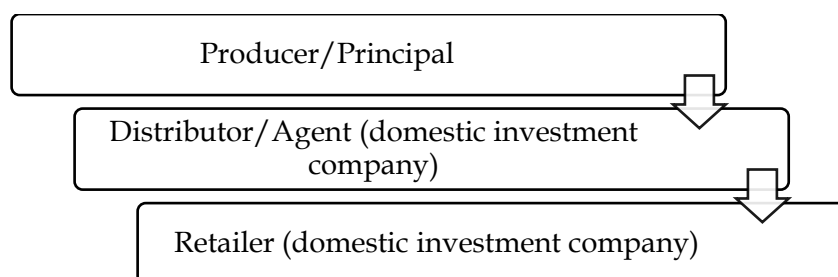


Figure 3. Indirect Goods Distribution Chain involving Distributors with domestic investment company status and Retailers with domestic investment company status

This of course results in an increase in the length of the goods distribution chain which in turn results in an increase in prices in the hands of consumers and/or industry and/or services, regardless of the commodity being sold. This is also detrimental to foreign business actors and reduces the interest of foreign investors to invest in Indonesia, even though these investors already have the status of Indonesian legal entities. The question that arises is whether the

²¹ Peraturan Menteri Perdagangan Nomor 24 Tahun 2021 Tentang Perikatan Untuk Pendistribusian Barang Oleh Distributor Atau Agen.

differential treatment between domestic business actors and foreign business actors in the form of foreign direct investment is justified based on the exceptions in the National Treatment Principle. The most common approach to exceptions is to apply national standards with exceptions to the needs of relevant countries. The most frequently used exception classifications are:

1. General Exceptions, namely based on health, order, general morals and national security. Included in this classification is the closure of a new alcohol industry business sector.
2. Exceptions based on subject (subject specific exceptions), namely those relating to taxation, intellectual property rights guaranteed under conventions on international intellectual property rights. Included in this classification is the closure of the batik industry business sector.
3. Industry specific exceptions, namely parties bound to international investment agreements may limit the right to treat either foreign investors or local investors differently in certain fields of activity or industry based on national economic and social policies.
4. Reciprocal National Treatment clauses, which depend on reciprocal commitments from other parties.

The Organization for Economic Co-operation and Development/OECD concludes that where there are equal treatment provisions for foreign investors from host countries that depend on the same treatment given to companies from the host country to the country of origin of the foreign investor which is an exception from National Treatment if this results in the foreign investor being treated unfairly same with similar local company.²²

In addition to the above exceptions, there are also exceptions based on development considerations. National Treatment is an important principle for foreign investors, but this can create difficulties for the host country, because the principle can result in the difficulty of developing domestic companies. This often happens in developing countries because their domestic companies are vulnerable to dealing with transnational corporations. Host countries often have policies and programs that provide advantages and privileges to domestic firms to stimulate growth and competitiveness. If the National Treatment clause in an international investment agreement obliges the host country to provide the same privileges and benefits to foreign investors, then the host country will strengthen foreign investors to compete with local companies. To overcome this, developing countries often qualify or limit the application of national treatment by submitting "development clauses" in the form of "development exceptions" which also reflect the principles of developing countries due to their weaker economic position and the need for development. must receive special and

²² Central European Free Trade Agreement, 'National Treatment Restrictions and Review of Bilateral Investment Treaties', *CEFTA Issues Paper*, 2011, p. 7.

differentiated treatment – namely by fulfilling the objective of gaining flexibility in making policies and at the same time maintaining commitment to the basic principles. For developing countries, the need to have flexibility to promote growth and development is important, including when applying the National Treatment principle.²³

The Indonesian Government's decision to open retail trading business activities for foreign direct investment but with provisions that violate the National Treatment principle actually endangers Indonesia's position in the WTO because it is not consistent with the provisions of article 3 paragraph 4 of the GATT:

"4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable 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 transportation and not on the nationality of the product. "

As this inconsistency is not included in the exception to the principle of National Treatment as mentioned above and can be classified as De Facto Discrimination, namely discrimination that is often experienced by foreign investors in the host country in the form of a rule which, although looks neutral, is very burdensome for foreign investors in practice²⁴, especially occurs in the post-entry establishment.

It is strongly recommended to return to the provision pre-Perpres 49/2021 approach by completely closing retail trading business activities for foreign direct investment can be included in the National Treatment principle exceptions, especially exceptions based on development considerations and also in accordance with the National Interest as stated in Law 25/2007 article 3 paragraph (2) letter a. Throughout Indonesia's economic development, foreign direct investment has played an important role in rehabilitating Indonesia's economy. However, the Government should not market the incentive and the openness of business activities as the only viewpoints of attracting foreign direct investment. The attraction lies on the promise of a stable business environment as well as political and economic stabilization. This stable condition should also

²³ United Nations Conference on Trade and Development, *National Treatment UNCTAD Series on Issues in International Investment Agreement* (Geneva: United Nations Conference on Trade and Development, 1999).

²⁴ Andrew D. Mitchell; et.al., *Non Discrimination and The Role of Regulatory Purpose In International Trade and Investment Law* (Massachusetts: Edward Elgar, 2016).

reflected from the seriousness of the government to comply with WTO rules. Then, along with good governance, building a better legal framework and eliminating corruption in bureaucratic institutions²⁵, the foreign investor shall be attracted by the full potential and in the end will also complement local effort in accelerating Indonesia's development.

4. Conclusion

Transplantation of the principle of National Treatment has been carried out properly within the framework of Law 25/2007. The application of the principle of National Treatment as stipulated in Law 25/2007 applies after an investment establishes a business entity in Indonesia. However, with the passing of Law 11/2020 along with the changes to the concept of a negative investment list to a positive investment list and opening the retail trade business sector to foreign investors, there has been an inconsistency in the transplantation of the principle of National treatment because the implementing regulations for the retail trade business sector resulting in different treatment between the foreign and domestic investors without further violating the National Treatment in the form of a De Facto Discrimination.

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²⁵ Gandy Setiawan, 'The Impact Of Foreign Direct Investment On Indonesia's Economic Growth' (Yeongi-gun, Korea, 2002).

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