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# GRANDFATHER CLAUSE IN THE TRADE SECTOR AS A SECURITY IN INVESTMENT AFTER JOB CREATION ACT

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**Abstract:** This study discusses the application of the Grandfather Clause, especially in the trade sector, as a form of certainty in investment law after the issuance of the Job Creation Act. The main issues discussed in this study are how to apply the Grandfather Clause to ensure legal certainty for investors and business actors in the trade sector pre-Job Creation Act. And whether the Grandfather Clause can be a form of legal certainty for investors and business actors in the trade sector that engaged in the post-Job Creation Act. Of course, the aim is to analyze the application of the Grandfather Clause, especially in the trade sector, as a means of legal certainty for investors or business actors engaged in the trading sector. The research method used is a normative research method with a statute approach. The research results show that implementing the Grandfather Clause after changes of the Negative Investment List (DNI) from year to year can provide legal certainty for investors and business actors. In addition, it is also known that the actual implementation of the Grandfather Clause can be adjusted according to the preferences of investors and business actors. In this case, the Grandfather Clause may not be applied if it is felt that the provisions and licensing requirements in the existing regulations are considered more profitable.

**Keywords:** Grandfather Clause; Investment; Business Actors.

**Abstrak:** Penelitian ini membahas mengenai penerapan Grandfather Clause terutama pada sektor perdagangan sebagai bentuk kepastian dalam hukum penanaman modal pasca diterbitkannya Undang-Undang Cipta Kerja. Adapun pokok permasalahan yang dibahas dalam penelitian ini adalah bagaimana penerapan Grandfather Clause dalam upayanya menjamin kepastian hukum bagi investor dan pelaku usaha pada sektor perdagangan pra-cipta kerja dan apakah Grandfather Clause dapat menjadi bentuk kepastian hukum terhadap persoalan investor dan pelaku usaha yang bergerak pada sektor usaha perdagangan pasca cipta kerja. Tujuannya adalah tentu untuk menganalisis penerapan Grandfather Clause terutama pada sektor perdagangan sebagai alat kepastian hukum bagi penanam modal atau investor maupun pelaku usaha yang bergerak pada sektor perdagangan. Metode penelitian yang digunakan yaitu metode penelitian normative dengan pendekatan perundang-undangan (statute ap-

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proach). Dari hasil penelitian, dapat dilihat bahwa penerapan Grandfather Clause pasca berubahnya DNI dari tahun ke tahun dapat memberikan kepastian hukum bagi penanam modal atau investor dan pelaku usaha. Selain itu, diketahui pula bahwa sebenarnya penerapan Grandfather Clause ini dapat disesuaikan dengan preferensi dari penanam modal atau investor dan pelaku usaha. Dalam hal ini, Grandfather Clause dapat untuk tidak diterapkan apabila dirasa ketentuan serta persyaratan perizinan pada peraturan existing dianggap lebih menguntungkan.

**Kata Kunci**: Grandfather Clause; Penanaman Modal; Pelaku Usaha

## Introduction

For more than 50 years since the enactment of the Investment Law for both foreign and domestic investors, the Investment Law has undergone many developments. The climax was when merging the two Investment Laws into one form of regulation through the promulgation of Law No. 25/2007 concerning Investment or as we called the UUPM. The implementation of the Investment Law provides many conveniences for investors, mainly by providing special incentives for investors to increase their existing investment orientation. Some of the incentives provided include incentives for employment, incentives for technology transfer; task incentives; tax incentives; land incentives; and immigration incentives.[1]

The incentive provided by the government is one of the patterns to attract investors to invest in Indonesia.[2] In addition, with the enactment of this law, it is hoped that legal certainty for investors will be more substantial. So, with this certainty, equity and efficiency in investment go hand in hand and protect investors.[3]

However, it should be noted that apart from the incentives provided by the government, the political and legal stability of the investment recipient country or host state also has the main reason for the creation of an advanced and healthy investment climate.[4] However, it should also be confirmed that the main obstacle for the country in developing an advanced and healthy investment climate is the inconsistency of regulations. The factors can then be due to the continuous issuance of new regulations, the emergence of contradictions between the old regulations and the new ones, and the overlapping of existing regulations.[5] These factors, of course, create a bad image from a legal perspective because it has the potential to cause legal discretion[6] and uncertainty for business actors and investors who will or are currently taking care of their licensing process. So, for this matter, it is necessary to have an alternative in the form of simplifica-

1 "Law No 25 of 2007 on Investment (UUPM)" (2007).

2 Ahmad Yulianto, "Peranan Multilateral Investment Guarantee Agency (MIGA) Dalam Kegiatan Investasi," *Jurnal Hukum Bisnis* 22, no. 5 (2003): 39.

3 Catherine Vania Suardhana, "Perlindungan Hukum Terhadap Penanaman Modal Asing Pada Sektor Perkebunan Di Indonesia," *Jurnal Hukum Prasada* 6, no. 1 (2019): 1–14, https://ejournal.warmadewa.ac.id/index.php/prasada/article/view/1007.

4 Ratna Fitri dan Hernawan Santosa Furry Dhismayana Masa Ganta Anjani, "Pengaruh Hukum Dan Politik Terhadap Perkembangan Investasi Asing Di Indonesia," *Serambi Hukum* 10, no. 02 (2017): 69–90. p.75.

5 Venti Eka Satya, "Upaya Penciptaan Iklim Investasi Yang Kondusif," *Info Singkat* 11, no. 6 (2019): 6, http://berkas.dpr.go.id/puslit/files/info_singkat/Info Singkat-XI-6-II-P3DI-Maret-2019-249.pdf. p.20.

6 Rianda Dirkareshza, Ismail Koto, and Ikhsan Lubis, "Omnibus Law Sebagai Percepatan Perekonomian Bangsa Di Sektor Pasar Modal Omnibus Law as The Acceleration of The Nation's Economy in the Capital Market Sector" 5, no. 2 (2021): 264–78. p.4.

tion of regulations to attract investment and increase the ease of doing business following the direction of the World Bank through the indicators contained in the EODB list.[7] Thus, changes to the investment sector need to be made again by using the omnibus law concept to cut the licensing bureaucracy. This concept later became one of the solutions because it can be a solution to simplify business licensing, create jobs, and empower MSMEs under the direction of an investment policy.[8]

So, the implementation of this change can be found in the provisions of Law Number 11 of 2020 concerning Job Creation or, as we know it, the Omnibus Law. In this Job Creation Act, the simplification of regulations regarding investment has occurred in the fifth section, which amends the provisions in Law Number 25 of 2007. Especially in Article 12, which states: "*All business fields are open to capital investment activities, except for business fields which are declared closed for investment or activities that the Central Government can only carry out.*"[9]

In the issuance of the Job Creation Act, investors can see the changes made to Article 2, Article 12, Article 13, Article 18, and Article 25. These changes were not carried out entirely by the government, but the derivative regulations, which later became the technical implementers of the Job Creation Act. The work underwent many changes considering that this implementing regulation was made under the government's mission to simplify licensing on investment for all entities. Therefore, it is necessary to re-examine the implementation of the Grandfather Clause after the issuance of the Job Creation Act, especially its effect on the trade sector.

Although there is no standard translation of what the 'Grandfather Clause' is, in short, the Grandfather Clause can interpret as an exception for entities (In order a Person or a Group) from the old regulations that apply to situations or cases that had arisen when a new regulation has enacted.[10] This case means that for business entities that have invested in Indonesia prior to the issuance of the Job Creation Law, the regulations prior to the Job Creation Law still apply.

One of the sectors that can then be used as an investment promotion event for investors is the trade sector. The trade sector in Indonesia is the foundation of the country's economic sustainability. Reporting from the Central Statistics Agency or BPS data, the trade sector is even listed as the second-largest contributor to gross domestic product (GDP) after manufacturing. In addition, according to the SAKERNAS (National Labor Force Survey) survey released in February 2020, the trade sector was recorded as a contributor to employment with a percentage of 18.91%, occupying the second position after the agricultural sector. Thus, compared to other dominant sectors that Indonesia has, for example, in agriculture or manufacturing, it can be said that this sector has achieved rapid growth. So, it certainly looks promising for investors.[11]

In this case, research on the Grandfather Clause has been recorded on the master thesis entitled "The Application of the Grandfa-

[7] Wicipto Setiadi, "SIMPLIFIKASI PERATURAN PERUNDANG-UNDANGAN DALAM RANGKA MENDUKUNG KEMUDAHAN BERUSAHA," *Jurnal RechtsVinding: Media Pembinaan Hukum Nasional* 7, no. 3 (2018): 321–34. p.333.

[8] Muhammad Insa Ansari, "Omnibus Law Untuk Menata Regulasi Penanaman Modal," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 9, no. 1 (2020): 71, https://doi.org/10.33331/-rechtsvinding.v9i1.378.

[9] Article 77 "Law Number 11 of 2020 on Job Creation Act (Omnibus Law)" (2020).

[10] Lidia Hayati, "KEBERLAKUAN DAFTAR NEGATIF INVESTASI (DNI) TERHADAP PORTFOLIO INVESTMENT" (Universitas Indonesia, 2009).

[11] Badan Pusat Statistik Republik Indonesia, *Profil Perdagangan Indonesia 2019* (Jakarta: BPS RI, 2019). Pp.3-4.

ther Clause in Law No. 25 of 2007 concerning Investment in Foreign Investment Divestment in Indonesia".[12] In addition to the research conducted by Rifani, there are two relevant studies that discuss the implementation of the Grandfather Clause in Indonesia. Tentiana Rusbandi and Thalita Azka Ramadhania conducted the second and third research with the title "Grandfather Clause as Guarantee of Legal Certainty for Investment in Indonesia"[13] and "Juridical Analysis of Application of Grandfather Clause as a Form of Protection for Investors in the Context of Foreign Investment in Indonesia (Case Study: Field Construction Services Business)."[14]

The following sentence will describe the difference between the previous research content and this study. First, the subject of this research is intent on the trade sector only. In previous studies, the subject of the research was in the mineral and coal sector and construction. Second, in this study, the focus of the research raised is on the post-job creation act period. In contrast, previous research only focused on implementing the Grandfather Clause after the UUPM period.

In addition, in the results of previous studies, the implementation of the Grandfather Clause is based on the application of the Presidential Regulation on the Negative Investment List only. Concurrently, this study intends to implement the Grandfather Clause. Moreover, it will be analyzed when the Presidential Regulation on DNI is bona fide and after the Presidential Regulation on Positive Investment List is enacted. So, with differences, as the author has mentioned, there is something new that confer in this scientific work.

So as explained above, there are two problems that the author will try to discuss in this scientific paper: **First**, how to apply the Grandfather Clause to ensure legal certainty for investors and business actors in the pre-employment trade sector. **Second**, whether the Grandfather Clause can be a form of legal certainty for the problems of investors and business actors engaged in the post-job trading business sector.

Therefore, the research method used in this scientific work is a normative legal research method. Then the approach used is the statutory approach (*statute approach*). The use of the normative legal research method is because there is a need for legal studies that are conceptualized as norms and even rules in society with the existing reality regarding the proposed title.[15] In addition, the authors consider that research material in normative research methods can be sourced from primary, secondary, or tertiary legal materials. In this case, the legal material obtained will analyze in a descriptive qualitative way to complement these central issues.[16]

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[12] Adisty Miskofa Rifani, "Penerapan Grandfather Clause Dalam UU No 25 Tahun 2007 Tentang Penanaman Modal Pada Divestasi Penanaman Modal Asing Di Indonesia" (Universitas Pelita Harapan, 2019).

[13] Tentiana Rusbandi, "Grandfather Clause Sebagai Jaminan Kepastian Hukum Penanaman Modal Di Indonesia" (Universitas Indonesia, 2016).

[14] Talitha Azka Ramadhania, "Analisis Yuridis Penerapan Grandfather Clause Sebagai Bentuk Perlindungan Terhadap Investor Dalam Rangka Penanaman Modal Asing Di Indonesia ( Studi Kasus : Bidang Usaha Jasa Konstruksi )" (Universitas Indonesia, 2017).

[15] Zulfadli Barus, "Analisis Filosofis Tentang Peta Konseptual Penelitian Hukum Normatif Dan Penelitian Hukum Sosiologis," *Jurnal Dinamika Hukum* 13, no. 2 (2013): 307–18, http://10.13.-241.244/index.php/buletinpsikologi/article/view/26772.

[16] Ishaq, *Metode Penelitian Hukum Dan Penulisan Skripsi, Tesis, Serta Disertasi*, *ALFABETA, Cv*, 2017. p.28.

## Application of the Grandfather Clause in its Efforts to Ensure Legal Certainty for Investors and Business Actors in the Trade Sector Pre-Job Creation Act

As mandated in the provisions of Article 3 paragraph (1) in conjunction with Article 14 UUPM, all investors or investors have the right to receive legal certainty from the state as the host state. With legal certainty, investment, in this case, is certainly expected to go hand in hand and protect investors.[17]

Legal certainty in the field of investment is indeed very much needed. Because with the certainty of the law, the confidence of investors and business actors will sustain. In more detail, Soerjono Soekanto then wrote that legal certainty could not separate from the existence of rules or regulations from the host state or investment recipient countries that apply to both foreign and domestic investors. Which then must provide legal protection for invested capital and business activities carried out by investors.[18] So, legal certainty is accurate as long as there are regulations that can regulate investment activities and business activities, whether issued by the central or regional governments.

Sudikno Mertokusumo's view on legal certainty can also adapt as a reference in investment. According to Sudikno, legal certainty is related to the law's guarantee. Whereas then, investors and business actors are then legally entitled to obtain their rights and obtain certainty through the implementation of court decisions in the event of a dispute.[19] In this case, although certainty will be closely related to the nature of justice, the law itself is not identical to justice. The law, in this case, is general, binding on everyone is equal.[20]

In essence, the development of legal regulations, both in the form of legislation and other regulations related to investment, cannot be avoided because adjustments continue to occur with the country's changing economic conditions. So that legal certainty in the investment sector can at least accomplish by investors or investors and business actors implementing the Grandfather Clause concept.

Literature on the Grandfather Clause or 'predecessor clause' is rarely identified in the civil law legal system. This is because the Grandfather Clause comes from the law in the common law system. As Christopher Leman points out in his journal, it is said that initially, this practice of applying the 'predecessor clause' was adopted by states in the southern part of America in the late 19th century with discriminatory purposes such as excluding black people from voting. Individual voting rights are limited by applying restrictive requirements governing the right to vote for black people, such as the need for land ownership and literacy skills to be on the voter list. However, despite restrictive restrictions placed on blacks, whites were exempted by these restrictions by adopting this predecessor clause or the 'Grandfather Clause,' which in this case allowed a person to cast his vote and vote on condition that his father or grandmother had chosen before 1867.[21]

Although later the predecessor clause or "Grandfather Clause" was derived from racially discriminatory practices, at this time, its meaning has shifted so much that it does not contain any bad connotations at all. This clause has been used in various domains

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[17] Suardhana, "Perlindungan Hukum Terhadap Penanaman Modal Asing Pada Sektor Perkebunan Di Indonesia."

[18] Soerjono Soekanto dan Sri Mahmudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Raja Grafindo Persada, 1994). p.56.

[19] R A S Hernawati and J T Suroso, "Kepastian Hukum Dalam Hukum Investasi Di Indonesia Melalui Omnibus Law," *Jurnal Ilmiah MEA (Manajemen, Ekonomi, Dan Akuntansi)* 4, no. 1 (2020): 392–408, http://journal.stiemb.ac.id/-index.php/mea/article/view/557. p.396.

[20] Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar* (Yogyakarta: Universitas Atma Jaya Yogyakarta, 2007). p. 170.

[21] Christopher Leman, "How to Get There from Here: The Grandfather Effect and Public Policy," *Policy Analysis* 6, no. Winter (1980): 99–116.

and policies in America, such as taxation policies, emission control, and land use regulations. This was later corroborated by the views of Jesse Russel and Ronald Cohn in the book with the same title, namely the Grandfather Clause. Where this clause is considered, a legal term used to describe a situation where the old regulations can continue to be used for several existing situations, even when new rules will be put in place for future situations.[22]

The application of the Grandfather Clause principle has been in place for a long time, long before the enactment of UUPM and the Job Creation Act. As is well known, investment was made for the first time in 1967 with the promulgation of the Foreign Investment Law, which later made it the first law to regulate investment. This was followed one year later by the promulgation of the Domestic Investment Law, which took effect in the mid-1968s. These two laws signify the first half of the licensing process for investors in Indonesia.

In the first half of this, trading business licenses, especially for companies established after the FDI and DDI Law, must be adjusted to the Ministry of Internal Affairs and the Instructions of the Minister of Trade on SKB that issued within the stipulated timeframe. The regulation regarding this trade permit can then be seen in the SKB or the Joint Decree between the Ministry of Home Affairs and the Ministry of Trade with SKB Number 56/th/71 dated 19 May 1971 concerning Provisions on Authority to Grant Business Place Permits and Trading Business Permits. In this Joint Decree, the application of the Grandfather Clause principle is based on the *Hinderordonnantie* or the Disruption Act and the 1934 *Bedrijfsroglomentering Ordonantie* or the 1934 Company Ordinance. Based on the two ordinances that state that entrepreneurs in the trade sector already have a Business Place Permit and a Trading Business Permit following with the spirit of nuisance laws are not required to have the same Permit from the local government. This Permit means that, as long as business actors in the trading sector carry out business activities under the mandate of the *Bedrijfsroglomentering Ordonantie* 1934 and HO, the grandfather clause principle will still apply.[23]

Then in the second half, namely after the enactment of Law Number 25 of 2007 concerning Investment, which revoked the FDI Law and the DDI Law, all regulations Investment were transferred to the enforcement of Law 25 of 2007. In Law 25 of 2007, the regulations regarding FDI and DDI combine, so it is expected that this law's enactment will reduce the discrimination under the mandate of TRIMs (Trade-Related Investment Measures).[24]

In the second half of this, the discussion about the Grandfather Clause can be identified in several Presidential Regulations which regulate the Open and Closed Business Fields in the Investment Sector. Because the provisions of this Presidential Regulation have changed following existing investment demands, successively the implementation of the provisions of this Grandfather Clause can be seen in:

1) Article 5, as stated in PR No. 111/2007, business entities that have obtained approval for specific business fields and proven by an investment approval letter can be excluded from the enforcement of this Presidential Regulation.[25]
2) After promulgation of PR No. 111/2007 was replaced by PR 36/2010 or Perpres

[22] Jesse dan Ronald Cohn Russel, *Grandfather Clause* (United Kingdom: Bookvika Publishing, 2012). p.1.

[23] Article 3, "Joint Decree between the Ministry of Home Affairs and the Ministry of Trade Number 56/Th/71 (SKB No. 56/Th/71)" (Jakarta, 1971).

[24] Sentosa Sembiring, *Hukum Investasi* (Bandung: Nuasa Aulia, 2007). hlm.105.

[25] Article 5, "Presidential Regulation Number 111 of 2007 Concerning Amendment To Regulation Of President Of The Republic Of Indonesia Number: 77 Of 2007 Concerning The List Of Businesses Closed And List Of Businesses Opened With Reservation In The Investment Sector" (2007).

DNI 2010, the concept of the Grandfather Clause can still be found in Article 8, which states the same thing as stated in Article 5 of the last 2007 DNI Presidential Regulation.[26]

3) Article 9 of Presidential Regulation No. 39 of 2014 consistently states the same thing, namely exceptions for business entities that have obtained investment approval before this 2014 Presidential Regulation is enacted.[27]

4) Article 13 in Presidential Regulation Number 44 of 2016 slightly changes the contents of the previous regulation. In the 2016 DNI Presidential Regulation, the Grandfather Clause is not the primary option. In this Presidential Regulation, the government can stick to the old regulations or switch to new ones if the new regulations are considered more profitable.[28]

Several derivative regulations concerned the closed and open business fields as technical implementers in the investment sector. Consistently, the 'predecessor clause' or 'Grandfather Clause' is still included. Although later in the last regulation before implementing the Job Creation Law, the government gave investors the option to use or not use this clause. As long as new regulations for specific business fields are considered more profitable according to investors or business actors, investors can make transitions based on the provisions of the new regulations.

In this second round, the implementation of the Grandfather Clause is very much needed, especially in the trade sector. Because in some cases, the business fields that have been listed in the previous KBLI are not necessarily listed in the revised KBLI, and vice versa. Many KBLIs have replaced the previous version of KBLI numbers, and many new KBLIs have sprung up. The shifting matrix of business sector regulation in the trade sector can be reviewed in the past four PR, which previously existed for pre-job creation act.

In the comparison matrix of business field arrangements in the pre-job creation act, it can be seen that there is a change in the composition of foreign share ownership investment in the trading sector and changes in the requirements and KBLI numbers.

For example, in Direct Selling through a marketing network developed by business partners (Direct Selling) with KBLI 00000, foreign share ownership in the 2014 DNI Presidential Regulation is at the maximum threshold of 95%. However, in the 2016 DNI Presidential Regulation, there are no special provisions for foreign share ownership. This means that foreign investment can be applied 100% in the Direct Selling business field. This transition must then be watched out for because the position of domestic stocks will be increasingly threatened. So, in this case, the Grandfather Clause could be established to protect domestic investors. However, as mandated by Article 13 of the 2016 DNI Presidential Regulation, this Grandfather Clause may not be applied if the provisions and licensing requirements of the 2016 DNI Presidential Regulation are deemed more profitable.

Like KBLI 00000, KBLI Number 52101 is included in warehousing trading also changing. In the 2014 KBLI, the warehousing KBLI only has a foreign capital ownership percentage of 33%.

[26] Article 8, "Presidential Regulation Number 36 of 2010 Concerning List Of Business Fields Closed To Investment And Business Fields Open, With Conditions, To Investment" (2010).

[27] Article 9, "Presidential Regulation Number 39 of 2014 Concerning List Of Business Fields Closed To Investment And Business Fields Open, With Conditions, To Investment" (2014).

[28] Article 13, "Presidential Regulation Number 44 of 2016 Concerning Lists Of Business Fields That Are Closed To And Business Fields That Are Open With Conditions To Investment" (2016).

**Table 1. Matrix of Comparison of Business Sector Arrangements in the Trade Sector in 2014 DNI Presidential Regulations and 2016 DNI Presidential Regulations**

| No. | Business Field | KBLI | PR No 39/2014 | PR No 44/2016 |
|---|---|---|---|---|
| 1 | Direct selling through marketing networks developed by business partners (Direct Selling) | 00000 | Max 95% | Unspecified |
| 2 | **Retail Trading:** | | | |
| | Minimarket with a sales floor area of less than 400 m² including Convenience Store and Community Store | 47111 | - Domestic Investment 100%<br>- Previously, only the sales floor area was determined, but in the 2014 DNI Presidential Regulation, the Convenience Store and Community Store were combined with 100% Domestic Investment. | Domestic Investment 100% |
| | *Departement Store* with a sales floor area of less than 2,000 m² | 47191 | Domestic Investment 100% | a. FDI Max 67%; &<br>b. Special Permission from the Ministry of Trade |
| | Retail Trade on footwear | 47152 | Domestic Investment 100% | - Change of KBLI Number to 47712<br>- Domestic Investment 100% |
| 3 | **Survey Service** | | | |
| | Community surveys/polls and market research | 73200 | Domestic Investment 100% | a. Domestic Investment 100%<br>b. FDI Max 70% for investors from ASEAN Countries. |
| 4 | **Trading Services:** | | | |
| | - Distributor | 00000 | FDI Max 33% | Unspecified |
| | - Warehousing | 52101 | FDI Max 33% | FDI Max 67% |
| | - Cold Storage | 52102 | - **FDI Max 33**% in Sumatra, Java, and Bali<br>- **FDI Max 67**% in Kalimantan, Sulawesi, Nusa Tenggara, Maluku, and Papua regions | Unspecified |
| 5 | Trade of Unaffiliated Distributor with Production | 00000 | Unregulated | FDI Max 67% |

(Source: *PR No. 39/2014 & PR No. 44/2016)*

However, at the 2016 KBLI, the warehousing business sector seemed to increase the share of foreign capital ownership to 67%, a double increase from the previous KBLI. In this case, we can then examine that for business actors and

investors who had carried out warehousing businesses before the 2016 DNI Presidential Regulation enactment. These business actors can maintain the percentage of foreign share ownership at 33% without changing it to 67%.

Then in the field of Cold Storage business with KBLI 52102, as stated in KBLI 2014 that there is a percentage of foreign capital with regional distribution, namely:

- Max 33% FDI in Sumatra, Java, and Bali and
- Max 67% FDI in Kalimantan, Sulawesi, Nusa Tenggara, Maluku and Papua

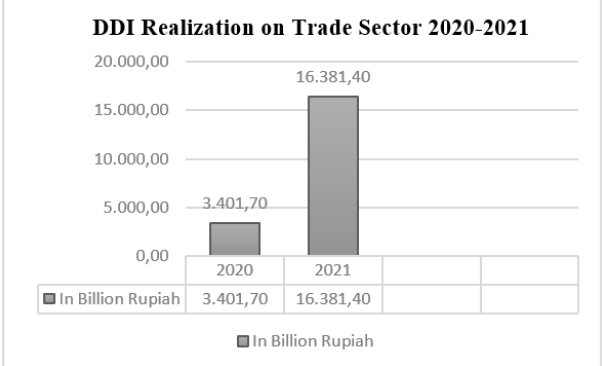
In this case, business actors and investors in the cold storage business sector can also maintain the composition of their shares with domestic shares or change them under existing regulations. However, if, in this case, investors and business actors can jointly agree on a change in foreign share ownership in the company so that it becomes 67%. Then based on Law Number 40 of 2007 concerning Limited Liability Companies, if there is a change in the percentage of capital, it is also necessary there is a change in the company's articles of association.[29]

With the implementation of the Grandfather Clause, domestic investment companies and national private companies that have obtained investment approval prior to the enactment of the 2016 DNI Presidential Regulation, in this case, can maintain their capital ownership based on the old DNI Presidential Regulation.

## Implementation of the Grandfather Clause as A Form of Legal Certainty on Investors and Business Trading Actors' Issues in the Post-Job Creation Act

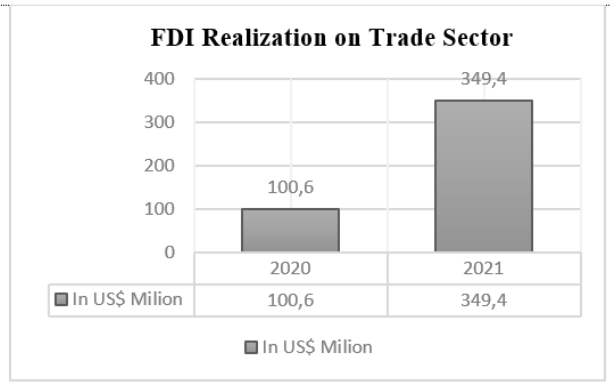
After enacting the Job Creation Law, the realization of investment in Indonesia in the January-September 2021 period increased by 7.8% from what was targeted, in the trade sector itself, investment realization based on the BKPM quarterly report, especially in the fourth quarter of 2020 to September 2021, has increased.

**Figure 1**[30]




Based on data from the Quarterly Reports issued by the Ministry of Investment-/BKPM, the realization of domestic investment in the trade sector for the fourth quarter of 2020 to September 2021 recorded a significant increase. The increase even reached four times from last year's realization. In the fourth quarter of 2020, the total realization achieved was 3,401.7 billion out of 16,424 projects. The realization of investment for the January-September 2021 period, a total investment of 16,381.4 billion, was obtained from 44,123 projects. Meanwhile, for the realization of foreign investment, the total realization of investment is:

**Figure 2**[31]




In realizing FDI towards investment in the trade and repair sector itself, the increase reached 3.5 times compared to the fourth quarter of 2020. The total realization in the

[29] "Law Number 40 of 2007 Concerning Limited Liability Companies" (2007).

[30] Kementerian Investasi/BKPM, "REALISASI INVESTASI PMA & PMDN," bkpm.go.id, 2021.

[31] Ibid.

fourth quarter of 2020 was US$ 100.6 million from a total of 4,113 projects. Meanwhile, in the January-September 2021 period, a total realization of US$ 349.4 million was obtained from a total of 6,901 projects. So based on the realization above, it can be seen and felt that the acceleration of licensing due to the issuance of the Job Creation Act had a good impact on FDI and DDI.

Based on the data above, we can see that the trade sector has a significant role in the real economy of the Indonesian people. So, in this case, investors and business actors need to get legal certainty as a reciprocal from the state for investments made to advance the economy. The author sees that although the Job Creation Act was created to cut existing permits, derivative regulations related to investment have created a new mess. So, it is necessary to apply the Grandfather Clause.

Although the validity of the Grandfather Clause can be interpreted as retroactively enforceable, the meaning of 'retroactive' cannot be equated with the retroactive principle. In the perspective of criminal law, the retroactive principle is a deviation from the principle of legality. Considering that criminal law expressly and clearly states that according to Article 1 paragraph (1) of the Criminal Code, no criminal act can be punished unless there is a precise legal regulation regulating it. However, this deviation can be applied in some instances to avoid legal impunity, for example, in cases of human rights or criminal acts of corruption where retroactive enforcement was considered to bring legal certainty so that the principle of legality, in this case, can be violated.[32]

In applying this retroactive principle, it is clear that the function to be achieved is to prevent impunity for severe crimes with legal subjects that include individuals and legal entities. In addition, this principle emphasizes that for criminal acts involving human rights and corruption, retroactive provisions are not applied restrictively to cases that occur in a specific year. This case means that for old criminal cases that occurred (especially human rights and corruption cases) before enacting the regulation, it is still possible to try and decide on criminal cases after the formation of the regulations governing them.

However, in the perspective of investment, the meaning of 'retroactive' in the Grandfather Clause is not the same as the meaning of retroactively applied as applied in applying the retroactive principle. The application of the Grandfather Clause, in this case, is strictly enforced against certain entities under the existing regulations. For example, in the Presidential Regulation, which regulates business fields that can be open or closed to the public where this 'retroactive' nature can be found in the contents of the article which contains the phrase 'this provision does not apply to investments that were approved before this regulation was enacted.' Then we can see that the 'retroactive' nature in this Grandfather Clause only binds investors and business actors who had carried out investment activities before the new regulations were stipulated.

If the investor or business actor then expands their business, for example, by adding capital or adding a type of business that requires a new registration in the system. Then the provisions of the Grandfather Clause cannot be applied even though the business was established long before the new regulations stipulated. Investors who register with the system after the new regulation must automatically follow the provisions of the new regulation.

Another situation where the provisions of the Grandfather Clause cannot be applied is when the investment approval or the principal permit for implementation granted by

[32] Bachtiar, "Pemberlakuan Asas Retroaktif Dalam Optik Hukum Tata Negara," *Jurnal Surya Kencana Dua: Dinamika Masalah Hukum Dan Keadilan* 2, no. 2 (2015): 67–93.

the government to the investors expires. This Grandfather Clause provision only applies until the investment approval and the principal permit for implementation. So, in this case, business actors and investors need to renew the investment approval and implementation permit consistently.

This restrictive 'applicability' of nature can then interpret as an effort to guarantee legal certainty due to inconsistencies in regulations in the investment sector, especially for the business fields listed in the attachment to the Presidential Regulation concerning business fields that are open or closed to the public. So, with this restrictive provision, business actors and investors were expected to be able to maintain their business structure amidst regulatory inconsistencies and to be able to obtain absolute legal certainty through the principle of legality based on the provisions in the newly enacted regulation.

After enacting Law No. 11 of 2020 concerning Job Creation, applying the Grandfather Clause principle plays a significant role in providing legal certainty for investors, especially in the trade sector. The Job Creation Law or the Omnibus Law does not change much of what is already in the Investment Law. The changes can then be seen in Article 2, Article 12, Article 13, Article 18, and Article 25. This change was not carried out entirely by the government in the Job Creation Law so that in this case, the 'Grandfather Clause' was actively applied.

The concerns of investors or business actors in the trading sector, especially after the promulgation of Law 11/2020 regarding job creation, are very reasonable. Furthermore, the discussion regarding the implementation of the Grandfather Clause as a solution to investors' problems in the trading business sector is more due to the implementation of 100% foreign capital receipts as stated in Attachment II of Presidential Regulation 49 of 2021. In Appendix II of PR 49/2021, most business sectors in the trading sector are opened without conditions and can be entered by 100% foreign shares. This certainly raises concerns for investors who have been involved in the trading sector for a long time because their share positions can be threatened, especially for domestic shareholders. In addition, the changing status of the company to a completely foreign company will also be possible with the possibility of the entry of FDI by 100%.

Attachment II of Presidential Regulation Number 49/2021 also stipulates a list of business fields allocated or in the form of partnerships with cooperatives and MSMEs. In Attachment II, the business sector, which was previously open to both foreign and domestic investment, has now shifted the pattern to be allocated to MSMEs or in the form of a In the comparison matrix of business sector arrangements in the trade sector in the 2016 Presidential Regulation and 2021 Presidential Regulation, it can be seen that there has been a change in the capital structure and form of business. For example, in KBLI 47111, the capital structure, which was initially 100% DDI, turned into a business form with allocations to cooper-atives and MSMEs.

In addition, for example, in KBLI 47191, the foreign capital structure, which was initially limited to 67%, is now open to 100%. If the business actors in the Department Store trading sec-tor with a sales floor area of fewer than 2,000 m2 have carried out their business before the 2021 Presidential Regulation is enacted, then the previous provisions can still apply. In this case, the shareholders between FDI and DDI before enacting the 2021 Presidential Regulation can main-tain as long as they have a special permit issued by the Ministry of Trade. In this case, the application of the Grandfather Clause can protect domestic share ownership from foreign takeovers. Then in the comparison matrix between the 2016 KBLI and the 2020 KBLI, there is a new pat-tern that has emerged, namely the allocation pattern for

**Table 2. Matrix of Comparison of Business Sector Arrangements in the Trade Sector in the 2016 DNI Presidential Regulation and 2021 Presidential Regulation**

| No | Business Field | KBLI | PR No.44 of 2016 | PR No.49 of 2021 |
|---|---|---|---|---|
| **1** | **Retail Trading:** | | | |
| | Minimarket with a sales floor area of less than 400 m² including Convenience Store and Community Store | 47111 | Domestic Investment 100% | Allocated for cooperatives and SMEs |
| | *Departement Store* with a sales floor area of less than 2,000 m² | 47191 | a. FDI Max 67%; &<br>b. Special Permission from the Ministry of Trade:<br>1. Located in a mall and not standalone<br>2. Addition of outlet stores based on export performance (pay performance). | Unspecified |
| | Retail trade not in department stores/department stores | 47192 | Domestic Investment 100% | Allocated for cooperatives and SMEs |
| | Footwear Retail Trade | 47712 | Domestic Investment 100% | Allocated for cooperatives and SMEs |
| **2** | **Other Activities Services:** | | | |
| | Laundry Service | 96200 | Domestic Investment 100% | Allocated for cooperatives and SMEs |
| | Haircut | 96111 | Domestic Investment 100% | Allocated for cooperatives and SMEs |
| | Beauty salon | 96112 | Domestic Investment 100% | Allocated for cooperatives and SMEs |
| | Photocopying services, document preparation and other special office support services | 82190 | Domestic Investment 100% | Allocated for cooperatives and SMEs |
| | Clothing Vermak | 95291 | Unregulated | Allocated for cooperatives and SMEs |
| **3** | **Leasing and leasing activities without option rights:** | | | |
| | - Land transportation (rent without operator) | 77311 | Unregulated | Form of partnership |
| | - Agricultural machinery and equipment | 77392 | Domestic Investment 100% | Form of partnership |
| | - Office machines and equipment | 77394 | Domestic Investment 100% | Form of partnership |
| | - Other machinery and equipment not elsewhere classified (power generation, textile, metal/wood processing-/working, printing, and electric welding) | 77399 | Domestic Investment 100% | Form of partnership |

*Source: PR 44/2016 & PR 49/2021*

Cooperatives and MSMEs and the Partnership with MSMEs. At the KBLI, with provisions for allocations for cooperatives and MSMEs, specific regulatory arrangements must then be based on Law 20 of 2008 on MSMEs.

According to the provisions of Article 1 point 13, it is stated that the partnership is a form of cooperation with certain principles, which then involves MSME actors. Then based on Article 1 point 13, investors and business actors in the trade sector may cooperate with MSMEs. In the manner specified in Article 11 paragraph (2) of Government Regulation Number 17 of 2013 with several scheme options, such as plasma core, franchise, joint venture, general trading, or even other forms of partnership.

In the comparison matrix of business sector arrangements in the trade sector in the 2016 Presidential Regulation and 2021 Presidential Regulation, it can be seen that there has been a change in the capital structure and form of business. For example, in KBLI 47111, the capital structure, which was initially 100% DDI, turned into a business form with allocations to cooperatives and MSMEs.

According to the provisions of Article 1 point 13, it is stated that the partnership is a form of cooperation with certain principles, which then involves MSME actors.[33] Then based on Article 1 point 13, investors and business actors in the trade sector may cooperate with MSMEs. In the manner specified in Article 11 paragraph (2) of Government Regulation Number 17 of 2013 with several scheme options, such as plasma core, franchise, joint venture, general trading, or even other forms of partnership.[34]

The business actors can then also adjust the requirements and partnership patterns of each, which in writing will be detailed in more detail in the provisions of the following Article in the same PP. Then regarding the form of Cooperation with MSMEs as regulated in the MSME Law Article 12 paragraph (1) letter b, it is stated that licensing fees will be waived for MSMEs, and there is a reduction in licensing fees Small Businesses.

2021 Presidential Regulation obtains Positive Investment List, opened the opportunity to change the form of business by allocating it with a cooperation scheme with Cooperatives and MSMEs, or shifting the form of business to a partnership scheme with MSMEs. Nevertheless, investors and business actors who have done business and have obtained a permit before this PR will still be allowed to carry out their business activities under the existing permit.

Furthermore, the Presidential Regulation on Positive Investment List 2021 includes business allocation with Cooperatives. As regulated in Law Number 17 of 2012 concerning Cooperatives, particularly in Article 66 paragraph (2) letter b, business actors and investors can enter into partnerships with cooperatives through equity participation schemes.[35]

After the Job Creation Act stipulated, the changes to the KBLI also structurally changed the provisions of business activities based on risk factors. In the new KBLI and Risk-Based OSS (OSS RBA System), changes to the KBLI will automatically change the provisions of Article 3 of the Articles of Association/Budgets (AD/ART) of Limited Liability Company. This is due to changes in the capital structure and type of company. As mandated in the provisions of Article 21 paragraph (2), if there is a change in the company's articles of association, the change must be approved by the Minister through

[33] Article 1 Point 13, "Law Number 20 of 2008 Concerning Micro, Small, and Medium Enterprises" (2008).

[34] Article 11 Section (2) "Government Regulation Number 17 of 2013 Concerning the Implementation of Law Number 20 of 2008 Concerning Micro, Small and Medium Enterprises" (2013).

[35] Article 66 Section (2) point b "Law Number 17 of 2012 Concerning Cooperatives" (2012).

an appropriate notification mechanism and recorded in a notary deed.[36]

Furthermore, this change can fulfill the minimum investment value following Article 6 paragraph (3) of the BKPM Regulation number 5/2019 *jo.* On the Article 6 paragraph (2) letter b of the BKPM Regulation Number 1 of 2020, it is stated that for Foreign Investment Limited Liability Company or PT PMA, unless stipulated otherwise by the regulation, total investment and capital value must be more significant than Rp. 10 billion per five KBLI digits excluding land and buildings. Then from the Rp10 billion, Rp2.5 billion must be paid-up capital, and the rest must be in the form of shares with a minimum cumulative value of Rp10 million/shareholder.[37]

This provision for total investment per KBLI will undoubtedly be very burdensome for business actors. It was coupled with the phrase: "per 5 digits per project location," which can then be interpreted with an accumulative value in each branch of business in different locations. So that it will be of great value if entrepreneurs or business actors must fulfill it.

In the trade sector, following the enactment of the BKPM Regulation Number 1 of 2021, it is stated that especially in large trading business activities, more significant than Rp. 10 billion excluding land and buildings, the total value of the investment made is per the initial two digits of the KBLI and must be fulfilled by the company in a maximum period of 1 year from the date the company obtains a business license.[38]

For investors and business actors outside the large trading sector, this very large nominal will undoubtedly be considered by investors before investing in the trading sector, especially in the large trading sector. For this reason, the application of the Grandfather Clause principle will greatly help fortify investors from the demands of a tremendous total investment value with a relatively narrow time interval. The author sees that implementing the Grandfather Clause in Presidential Regulation 49 of 2021 Article 6 paragraph (4) letters a and b then, in this case, must be immediately implemented by the government through BKPM as policymakers and investors as business actors.

In terms of legal interpretation, all legal products must be given clarity so that these rules can be applied concretely in a problem. This legal interpretation must then carefully expand or narrow the meaning so that there is no ambiguity of norms. This includes interpreting Article 6 Paragraph (4) of Presidential Regulation 49/2021. Thus, based on the interpretation of the existing law, the real intentions and objectives are found to satisfy all parties.[39]

In the provisions of Article 6 Paragraph (4) letters a and b, it clearly stated that the limits on foreign capital ownership as required by the requirements do not apply to:

a. Investors who have received approval prior to this Presidential Regulation, evidenced by the existence of a business license. Investors can then exclude themselves from applying the Grandfather Clause if this regulation is deemed more profitable.
b. Investors get special rights because of a diplomatic agreement with the investor's country. Investors, in this case, can then be explicitly excluded from the enforcement of this Presidential Regulation. However, investors could use this regulation effectively since its promulgation if this regulation are more profitable.[40]

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[36] Article 21 Section (2), Law Number 40 of 2007 concerning Limited Liability Companies.

[37] Article 6 Section (2) Point a "BKPM Regulation No. 1 of 2020 on Guidelines on the Provision of Integrated Electronic Business Licensing Services" (2020).

[38] Article 6 Section (3) and Section (5), ibid.

[39] Andi Hamzah, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Cipta, 2008). p.107.

[40] Article 6 Section (4), "Presidential Regulation Number 49 of 2021 Concerning Amendments to

In the provisions of Article 6 Paragraph (4), it has been explicitly stated that every investment activity approved in specific business fields (including trading) and whose permits have been approved can be declared to continue to be valid. This cancellation provision can also be seen in the final phase where it is stated that: "*in business licensing unless the provisions in this Presidential Regulation are more favorable for investment*" can cancel the validity of this Grandfather Clause.

Then, administrative discussion regarding licensing after the Job Creation Act can also be found in the BKPM Regulation Number 4 of 2021 concerning Guidelines and Procedures for Risk-Free Business Licensing Services and Investment Facilities. In the provisions of Article 97 paragraph (1), it is stated that a business license that has been granted owned by business actors before this regulation stipulated can continue to be used, and the permit is still considered valid.[41]

However, it should also be noted; if business actors who already have a NIB and have fulfilled a business license based on a commitment, but the NIB and the permit have not been declared active, then under the provisions of Article 95 paragraph (1) of the BKPM Regulation No. 4 of 2021, are required to re-confirm in the RBA OSS system to update the data further and adapt to changes so that the provisions of the Grandfather Clause cannot be applied.[42]

Although in this case, it is undeniable that there will be a conflict of law due to the implementation of the Grandfather Clause, especially in the scheme of changing capital and administration.[43] However, as mandated in the 1947 GATT Protocol of Provisional Application, this Grandfather Clause can still be applied to GATT participating countries even though it is not in line with the GATT regulations.[44]

## Conclusion

Based on the studies that the authors have done, the authors can conclude:

1) Basically, the application of the Grandfather Clause principle has been in place for a long time, long before enacting the Job Creation Act. In the first half, the business license was based on the Hinderordonnantie and Bedrijfsroglomentering Ordonantie 1934 or the 1934 Company Ordinance. Then in the second half, after the enactment of the Investment Law, the provisions of GR, Presidential Regulation, and the BKPM Regulation regulated the business licensing or the list of closed business fields and open to requirements in the field of investment.
2) Furthermore, regarding applying the Grandfather Clause principle as a solution for investors and business actors in the trading sector, we can see in the provisions of Presidential Regulation 49 of 2021 Article 6 paragraph (4) letters a and b. In the provisions of Article 6 Paragraph (4), it has been explicitly stated that every investment activity approved in specific business fields (including trading) and whose permits have been approved can be declared to continue to be valid. This cancellation provision can also be seen in the final phase where it is stated that: "in business licensing unless

Presidential Regulation Number 10 of 2021 Concerning the Planting Business Sector" (2021).

41 Article 97 Section (1), "BKPM Regulation Number 4 of 2021 Concerning Guidelines and Procedures for Risk-Free Business Licensing Services and Investment Facilities" (2021).

42 Article 95 Section (1), ibid.

43 Rusbandi, "Grandfather Clause Sebagai Jaminan Kepastian Hukum Penanaman Modal Di Indonesia." p.8.

44 WTO, "Provisional Application of the General Agreement," 1947.

the provisions in this Presidential Regulation are more favorable for investment" can cancel the application of this Grandfather Clause principle. This means that investors and business actors can not apply the Grandfather Clause principle and continue their business with existing and applicable regulations.

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