

CHAPTER IV

CONCLUSION AND RECOMMENDATION

A. Conclusion.

1. The application of national treatment principle.

The application of national treatment principle requires two legal test to prove. The first most important legal test is the factual circumstances to which national treatment applies. Practices show that there are two main conditions. First, where the aliens and the nationals are both in the “like circumstances” and second, where they are in a “like circumstances to the specified economic activities.” The definition of each condition are also varies, but at least it must consider on the surrounding facts that “an important element of the surrounding facts will be the character of the measure under challenge.” The second other important legal test to implement national treatment is the “form of treatment standard” provided by the host country. Customary had shown two major standard: “same” or “as favourable as” standard; and “no less favourable” standard. Those legal test may apply in the pre and post entry stage; or in the post entry only depend on the clause mentioned in the IIAs. Furthermore, those legal test shall apply within the *de jure* and *de facto* treatment. Without prejudice to the national treatment principle, IIAs allow several exceptions in applying national treatment.

2. The significance of national treatment applies in Indonesia

The significance of national treatment is to attract foreign investor to invest in Indonesia by providing foreign investment protection. In Indonesia, FDI is important as: a private external finance; the transfer of technology; the gaining of employee training which supporting the human capital development; and the gaining of profits from contribution of corporate tax revenues. Thus, in order to promote FDI, the government of Indonesia needs to offer certain attractive conditions to foreign investors, such as national treatment. This will gives core protection towards aliens. Subsequently, the principle may affect the national interest of Indonesia.

B. Suggestion.

1. In drafting the treaty such as BITs and FIPAs, the government shall pay attention on the national treatment clause. The clause might rise further legal consequence to Indonesia. The legal test of national treatment has no clear standard as it varied in a case by case analysis, therefore government should fully aware on the arrangement of the national treatment clause in IIAs.
2. The government of Indonesia should take a careful concern in determining the laws and regulation. Indeed that FDI beneficial to Indonesia however government should also concerns to the national interest, such as for those

business sector reserved for micro, small, medium enterprises. The government shall establish the negative list which also consider the national interest without prejudice to its obligation under national treatment.

