IMPLEMENTATION OF ARTICLE 33 OF THE 1945 CONSTITUTION BY STRENGTHENING THE STATE-OWNED ENTERPRISES (SOE) IN THE PERSPECTIVE OF FOREIGN INVESTMENT AND INTERNATIONAL PRIVATE LAW

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Abstract

Associated with one of the objectives of the law, which is to provide benefits to many people, so with the enactment of Law No. 1 of 1967 concerning Foreign Investment, it also provides great benefits for the host country in providing employment opportunities for the community, doubling the power in the local economy, providing residue in both equipment and technology transfer, providing a way or marketing path that can be traced by local entrepreneurs for exported products while still contributing instant foreign exchange and taxes to the country, more resistant to fluctuations in interest and foreign exchange, and providing protection regional politics and security because if the investors come from strong countries, security assistance will also be provided. Liberalization in the investment sector, especially foreign investment, basically existed long before the enactment of the Law No. 25 of 2007 concerning Investment, it also appeared implicitly in several laws and regulations in Indonesia, include Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, Law No. 22 of 2001 concerning Oil and Natural Gas, and Law No. 30 of 2009 concerning Electricity. The many liberal laws and regulations described above indicate that the right to control by the state concerning the livelihoods of the people as amended by the 1945 Constitution is "castrated" by laws that are not in harmony with it. In fact, Law No. 25 of 2007 concerning Investment was issued in the framework of implementing the mandate of Article 33 of the 1945 Constitution. Thus, the opening of foreign investment in production sectors that dominate the livelihoods of many people is certainly contrary to the concept of the right to control by the state as stipulated in Article 33 of the 1945 Constitution.

Keywords : *State-Owned Enterprises, Constitution, Foreign Investment*

A. INTRODUCTION

The existence of foreign investment in Indonesia is not a new phenomenon, considering the foreign capital has been present in Indonesia

since the colonial era. But of course, the presence of foreign investment in the colonial period was different from the period after the independence, because the purpose of foreign investment in the colonial period was dedicated to the interests of the colonizers and not to the welfare of the Indonesian people.[1]

The history of foreign investment in Indonesia is inseparable from the beginning of international trade in Indonesia around 1511, where at that time, European traders, especially the Portuguese, began to control Malacca in the trade of spices which had strategic value at that time. The international trade activity continued to be a colonialist activity in the territory of Indonesia, not only by the Portuguese, but also by other nations, like the Netherlands (1596 - 1795, 1816 - 1942), France (1795-1811), England (1811 - 1816) and Japan (Year 1942 - 1945).2 The existence of foreign investment not only stopped in the colonial era but continued in the new order era until the reform era. Of course, the spirit of foreign investment during the colonial era, the new order era, and the reform era were different. Foreign investment during the colonial era had exploitative characteristics of the nation's assets and ignored the people's welfare, this was certainly different from the character of foreign investment in the New Order era, and the reform era. The basic character of foreign investment in the new order era was reflected in the issuance of Law No. 1 of 1967 concerning Foreign Investment, in which the Government of the Republic of Indonesia was very concerned about the importance of economic development. It is because in the period after the independence of the Republic of Indonesia until 1966, there were various turmoils that caused national development to be neglected. Therefore, to realize the national goals as aspired by the founding fathers, the development is needed comprehensively in the sense that not only physical development but also non-physical.[2]

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1 David Kairupan, *Legal Aspects of Foreign Investment in Indonesia*, 1st Print, (Jakarta: Kencana Prenada Media Group, 2013) p. 1.
2 *Ibid,* p. 1-2.

But the implementation of the development required a lot of funds. It would not be enough to on domestic capital, so that was why they sought capital from abroad as an alternative to overcome the problem of funding needs in implementing the development by inviting foreign investors.[3] In relation to one of the objectives of the law, the purpose of the law is only to create the benefit or the happiness of the society. Bentham argued that state and law exist solely for the true benefit, which is the happiness of the majority of the people. That is why Jeremy Bentham was later famous for his motto, which the purpose of the law is to realize the greatest happiness of the greatest number.[4] Associated with one of the objectives of the law, which is to provide benefits to many people, so with the enactment of Law No. 1 of 1967 concerning Foreign Investment, it also provides great benefits for the host country, which are:

a. providing employment opportunities for the community;
b. doubling the power in the local economy;
c. providing residue in both equipment and technology transfer;
d. providing a way or marketing path that can be traced by local entrepreneurs for exported products while still contributing instant foreign exchange and taxes to the country;
e. more resistant to fluctuations in interest and foreign exchange;
f. providing protection regional politics and security because if the investors come from strong countries, security assistance will also be provided.

Jane P. Mallor's stated that before an American company decides to establish a company engaged in abroad manufacturing, then there are representatives who have to look for various legal issues. Some deeds are conducted to protect patents and trademarks. Overseas employment law may differ from American law and may impose long-term obligations on employers, for example the habit of Japanese people to pay their employees to a very long productive age, whereas in the Netherlands employers before terminating

[3] Sentosa Sembiring, *Investment Law*, 1st Print, (Bandung: Nuansa Aulia, 2007), p. 122.
[4] *Ibid,* p. 123.

employment must obtain prior approval from the Government.[5] To ensure the sustainability of foreign investment in Indonesia which is based more on legal certainty and guarantees of investor interests, then in 2007, the Indonesian Government issued Law No. 25 of 2007 concerning Investment. Law Number 25 of 2007 concerning Investment is the unification of legislation in the field of investment which was originally divided into 2 (two): Law No. 1 of 1967 concerning Foreign Investment and Law No. 6 of 1968 concerning Domestic Investment. With the issuance of Law No. 25 of 2007 concerning Investment, it can be concluded that between investors who have Foreign Investment status and those with Domestic Investment status receive equal treatment, unlike the case before the enactment of the Law No. 25 of 2007 concerning Investment, before the Law, the Foreign investors and Domestic investors get different treatment because each other refers to different laws and regulations. And because of the existence of Law No. 25 of 2007 concerning Investment cannot be separated from the various interests that underlie for the issuance of the law, there is even a tendency for the spirit of Law No. 25 of 2007 concerning Investment to investment liberalization. Reflection on liberalization of Law No. 25 of 2007 concerning Investment is expressed in the form of facilities provided by the Government of the Republic of Indonesia to investors, namely in Article 18 paragraph (4), Article 21, Article 22, and Article 23. Article 18 paragraph (4) states:

> "The forms of facilities granted to investment as referred to in paragraphs (2) and (3) may be in the form:
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> a. Income tax through deductions of net income up to a certain extent from the amount of investment made within a certain time;
> b. Exemption or relief of import duty for the imported capital goods, machinery, or equipment for production purposes which heve not been produced domestically;

[5] *Ibid,* p. 24.

c. Exemption or relief of import duties for raw materials or auxiliary materials for production purposes for certain periods and with certain requirements;
d. Exemption or suspension of Value Added Tax on the import of capital goods or machinery or equipment for production purposes that have not been produced domestically for a certain period of time;
e. Accelerated depreciation or amortization; and
f. Land and Building Tax Relief, especially for certain business sectors, in certain regions or areas."

In addition to the facilities referred to in Article 18 of Law No. 25 of 2007 on Capital Investment, the Government provides services and/or permits the investor companies to obtain : a.) Land rights; b.) Immigration service facilities; and c.) Import licensing facility.

Liberalization in the investment sector, especially foreign investment, basically existed long before the enactment of the Law No. 25 of 2007 concerning Investment, it also appeared implicitly in several laws and regulations in Indonesia. The laws include Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, Law No. 22 of 2001 concerning Oil and Natural Gas, Law No. 7 of 2004 concerning Water Resources, and Law No. 30 of 2009 concerning Electricity. The many liberal laws and regulations described above indicate that the right to control by the state concerning the livelihoods of the people as amended by the 1945 Constitution is "castrated" by laws that are not in harmony with it. In fact, Law No. 25 of 2007 concerning Investment was issued in the framework of implementing the mandate of Article 33 of the 1945 Constitution ("UUD 1945"). The spirit of the Law No 25 of 2007 on Investment is the embodiment of Article 33 of the 1945 Constitution contained in the considering section, among others are :

a. That to realize a just and prosperous society that is based on Pancasila and the 1945 Constitution of the State of the Republic of Indonesia, it is necessary to make sustainable national economic development founded on economic democracy in pursuit of the state's goals.
b. that to deal with global economic changes and Indonesia's participation in diverse international cooperation, it is necessary to create investment

climate to be conducive, promoting, giving legal certainty, justice and efficiency with due regard to the interest of national economy.

Furthermore Article 33 of the 1945 Constitution states as follows :

1. The economy shall be organized as a common endeavour based upon the principles of the family system;
2. Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State;
3. The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people; and
4. The organisation of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy.
5. Further provisions relating to the implementation of this article shall be regulated by law.

To relate between the provisions in the consideration of Law No. 25 of 2007 concerning Investment and its explanation as described above with the provisions of Article 33 of the 1945 Constitution, actually Law No. 25 of 2007 concerning Investment looks like it implements the mandate of Article 33 of the 1945 Constitution, but after understanding the articles of Law No. 25 of 2007 concerning Investment, it provides a very liberal opportunity for foreign investors to enter Indonesia in the management of production sectors that control the livelihoods of many people. The existence of the provision of opportunities by the Government of the Republic of Indonesia to foreign investors is reflected in Article 12 of Law No. 25 of 2007 concerning Investment stating as follows:

1. All business sectors or business types shall be open to investment activities, except for business sectors or business types that are declared to be closed and open with requirements.
2. Business sectors that are closed for foreign investors shall be:
   a. production of weapons, ammunition, explosive devices, and armaments, and

b. business sectors that are explicitly declared to be closed by law.

3. The Government by virtue of Regulation of the President shall establish business sectors closed to investments, both to foreign investments and domestic investments, based on the following criteria: soundness, morals, culture, the environment, national defense and security, as well as other national interests.
4. Criteria and requirements of business sectors that are closed and open with requirements as well as a list of business sectors that are closed and open with requirements shall be regulated by Regulation of the President, respectively.
5. The Government shall establish business sectors that are open with requirements based on the national interest criteria, to wit protection of natural resources, protection and enhancement of micro, small and medium enterprises, and cooperatives, supervision of production and distribution, increase of technology capacity, domestic capital participation, as well as cooperation with business entities named by the Government.

With the opportunity provided by the Government to foreign investors as stipulated in Article 12 of Law No. 25 of 2007 concerning Investment plus the existence of Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, Law No. 22 of 2001 concerning Oil and Natural Gas, Law No. 7 of 2004 concerning Water Resources, and Law No. 30 of 2009 concerning Electricity, foreign investments relating to sectors that control the livelihoods of many people increasingly exist. in Indonesia, for example, the number of foreign oil companies in Indonesia including Petronas from Malaysia, Total E&P Indonesia from France, Exxon from Indonesia, the presence of mineral exploration companies from other countries such as PT Freeport Indonesia from America, PT Newmont Nusa Tenggara from America, and PT Nusa Halmahera Mineral from Australia. In this case, the management of the production sectors that control the livelihoods of many people should involve the role of state-owned enterprises.

Based on the above background, the issues in this article are :

1. What is the role of SOE in the perspective of direct investment?

2. Does the SOE legally have a strategic role in carrying out the mandate of Article 33 of the 1945 Constitution related to the existence of foreign investment?

B. RESEARCH METHODS

In the case of the legal theory used in this study, the writers argue that the legal theory of sovereignty is closely related to the understanding of the law of positivism because this understanding of the law of positivism addresses this issue a lot. Therefore, it is not surprising that the issue of sovereignty is widely discussed in books written by positivism lawyers, such as those written by John Austin, HLA Hart, Hans Kelsen, Friedman, and Lon Fuller.[6] What is meant by sovereignty? it is the highest and absolute power, and no other institution can equalize or control it, it can regulate citizens and regulate the goals of a country and various aspects of government, and do various deeds in a country, including but not limited to the power to make laws, implement and enforce laws, punish people, collect taxes, create peace and declare war, sign and enforce treaties, and so on. Apart from that, there is also a general theory in the law which assumes that in every society there is a law, there is always something called as a "sovereign person". This legal assumption is fundamental in every legal system.[7] The theories put forward by the law of investment experts is David K. Eiteman who presented his opinion about foreign investment. There are 3 (three) motives that underlie Foreign Investment, there are:

a. Strategy motives;
b. Behavioral motives; and
c. Economic motives.

Behavioral motives are a stimulus of the external environment and others of the organization based on individual and group needs and commitments.

[6] Munir Fuady, *Grand Theory in Law*, (Jakarta: Prenadamedia Group, 2014), p. 14.
[7] *Ibid,* p. 91-92.

Economic motives are a motive to seek profit by maximizing long- term profits and the company's stock market price.[8]

C. DISCUSSION

1. History And Existence Of Foreign Investments In Indonesia

In general, foreign investment activities in a country are limited by the regulations of the country of origin of the foreign investor (governance by the home nation), and also by the related international law (governance by multi nation-organizations and international law).[9] Regulations including restrictions on foreign investment by the host country are essentially the authority of the host country derived from its sovereignity. State sovereignty associated with foreign investment can not be separated from the history of foreign investment in Indonesia. Historically, the existence of foreign investment in Indonesia is not a new phenomenon, considering the foreign capital has been present in Indonesia since the colonial era. But of course, the presence of foreign investment in the colonial period was different from the period after the independence, because the purpose of foreign investment in the colonial period was dedicated to the interests of the colonizers and not to the welfare of the Indonesian people.[10] The history of foreign investment in Indonesia is inseparable from the beginning of international trade in Indonesia around 1511, where at that time, European traders, especially the Portuguese, began to control Malacca in the trade of spices which had strategic value at that time. These international trade activities continued to become colonialist activities in the Indonesian Territory, not only by the Portuguese, but also by other nations, such as the Netherlands, France, England, and Japan. At the beginning of Dutch colonialism, the presence of multinational companies such as Verenigde Oost

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8 Salim HS and Budi Sutrisno, *Investment Law in Indonesia*, (Jakarta: Rajawali Pers, 2014), p. 163.
9 Ralp H. Folsom, Michael W. Gordon & John A. Spanogle, Jr, *Principles of International Business Transactions, Trade & Economic Relations*, (Thomson/West, 2005), p. 557.
10 David Kairupan, *Op.Cit*, p. 1.

Indische Compagnie (VOC) in spice trading activities in Indonesia also had a very important role, especially in representing the interests of the Kingdom of the Netherlands. Furthermore, foreign investment activities in the era of colonialism had also grown aggressively since the promulgation of Agrarische Wet in 1870 by the Dutch colonial government, which was marked by the development of large plantation businesses in the Indonesian territory.

After national independence, the existence of foreign capital in Indonesia also continued, with its various dynamics, since the beginning of the independence (1945-1949), the old order (1949-1967), the New Order period (1967-1968), and the reform period until now (since 1998). During these times, foreign investment in Indonesia is something that is inevitable and has a very important and strategic role in supporting national development. This is due to Indonesia's national development that required huge funding to support the economic growth. In principle, the existence of foreign investment must be in line with the objectives and direction of national development, which is to realize a just and prosperous society, this just and prosperous society will be realized through development in various fields, including economics. Economic development is identical to the development of the economic sector in our country, such as the agriculture, forestry, fisheries, livestock, mining, industry, trade and services sectors.

At the beginning of 1966, on 11 March 1966, there had been a transition of power from the old order regime under the leardship of President Soekarno to the new order under the leadership of President Soeharto as the bearer of the Order of Eleventh March ("Supersemar") which inherited the slumped political and economic situation from the previous government. Therefore, the new order tried to convince foreign investors that investing in Indonesia had the legal certainty which was set forth in Law No. 1 of 1967 on Foreign Investment,

even in the new order through Muhammad Sadli,[11] who was one of the economic advisers of the New Order Government of the 1960s, asserted that the presence of foreign companies investing in Indonesia would have a catalytic effect on the subsequent growth of the national economy. The accusations that were often heard in the former colonial economy that foreign investment companies could hinder the growth of indigenous companies will be avoided. Furthermore, he argued that the process of economic development will ultimately lead to industrialization, in which industrialization is the result of development, not the other way around.

Along with the journey of Indonesian political dynamics, then in 1998, the new order had been replaced by the order of reform. This reform order turned out to have shifted various systems, one of them was the legal system for investment in new order products. Foreign investment in the new order as set forth in Law No. 1 or 1967 concerning Foreign Investment after entering the regime of reform, the law is revoked and renewed by Law No. 25 of 2007 concerning Investment. Law No. 25 of 2007 concerning Investment has substantially stamped on the issue of foreign and domestic investment. Therefore, the legal jurisdiction between foreign investment and domestic investment is not contained in the different products of laws and regulations (unlike the laws and regulations of the new order which governed the foreign and domestic investment with different laws). Law No. 25 of 2007 concerning Investment has a legal spirit from the Law No. 1 of 2007 concerning Foreign Investment which is a new order law product. Law No. 25 of 2007 concerning Capital Investment certainly has a policy direction in the development of investments in Indonesia, both foreign investment and domestic investment.

[11] Muhammad Sadli, *Indonesian Economic Development*, *Conference Board Record*, Volume 6, November 1969, p. 40.

2. State Owned Enterprise (SOEs) And The Concept Of The Right To Control By The State

Talking about foreign investment, it cannot be separated from the issue of state sovereignty. State sovereignty has the concept of being:

> *"In jurisprudence as the full right and power of a governing body to govern it self without any interference from outside resources of bodies. In political term is a substantive term designating supreme autonomy over soul polity. State whose subjects or citizens are in habit obedience to which and which are not themselves subject to any other (or paramount) state in any respect That is of independence upon all other states as far as their own territory and citizens not living abroad are concerned.*[12]

Sovereignty is the full power and right of a regulatory body that can regulate itself without interference from outside resources the body. In political terminology, it is as substantive terminology aimed at the highest autonomy transcends the state in every aspect. Countries that subjugate or demand the obedience behavior from the citizens and they are not subject to other supreme powers. This is what is called as the independence beyond other countries that address their territory and their citizens who live abroad in which it is defined as the state's sovereign rights in the full power of the state. State sovereignty is usually associated with the legal principle of self-determination as stated by Liechtenstein:

> *"Sovereignty, and Self Determination addresses issues of boundaries, identity, variants of autonomy, governance, self-determination, self determination's potensial devolutive and state-shattering capabilities, and emerging version of self-determination as "defening one's own destiny." Self-determination and definition of the "self" obtains new relevance in a world of global real-time interpendence and the heightened role of non-state actor".*

Sovereignty and self-determination refer to issues of identity borders, multiple autonomies, government self- determination, a potential for a delusion of self-determination and divisiveness and an emerging version of self-determination as "defining its own destiny." Self-determination and the

[12] Henry Campbell Black, *Black's Law Dictionary*, (St. Paul Minn: West Publishing, 1996), p. 140.

definition of "self" gained new relevance in the global world and the real-time with the high role of non-state actors.

The concept of the right to control by the state is actually born from Article 33 of the 1945 Constitution in which it states:

1. The economy shall be organized as a common endeavour based upon the principles of the family system;
2. Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State;
3. The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people; and
4. The organisation of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy.
5. Further provisions relating to the implementation of this article shall be regulated by law.

Basically between sovereignty and the right to control by the state is something that can not be separated. Sovereignty as the full power and right of a regulatory body to regulate itself without the interference of outside resources of the body, while the right to control by the state is the power of the state for the control of certain fields because of its sovereignty. Nevertheless, even if the state has sovereignty and the right to control, the state can not conduct its right of ownership immediately. The state still has to have a legal entity, both public and private, to carry out its rights. In the context of the implementation of the right to control by the state as mandated by Article 33 of the 1945 Constitution, which states as the:

a. Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State;
b. The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people;

then the state controls the sectors of production that are important for the state and which affect the livelihoods of the people, it is also associated with the earth, water, and natural resources contained within that are controlled by the state according to Moh. Hatta, in principle, does not question whether the state's control is realized in the form of the direct participating in organizing production sectors that are important for the state and affect the livelihoods of many people, or only in the form of making legislation that oversees the running of the economy. If this is deemed necessary and can determine the welfare of the community, then there is no harm in the state participating in managing or organizing these production sectors through the establishment of state enterprises. Along with the development of the regimes, the position of state-owned enterprise which is an extension of the government in the private sector has gained a very strategic place in the eyes of the law. This is evident from the existence of Law No. 19 of 2003 concerning State-Owned Enterprises (hereinafter referred to as the "SOE Law"), in which the legal spirit of the SOE Law can be reflected in the considering section which states:

a. that State-Owned Entities are one of the economic actors in national economy that is founded on economic democracy;
b. that State-Owned Entities play an important role in the establishment of national economy for the realization of the public welfare;
c. that the role of State-Owned Entities to realize the public welfare innational economy has not been optimal.

The point in the considering section stating that SEOs are one of the actors of economic activities in the national economy based on economic democracy proves that SEOs are an important pillar in the part of the management of production sectors that are important for the state and control the livelihoods of many people.

3. State Owned Enterprise (SOEs) And The Concept Of The Right To Control By The State

Based on Article 1 no. (3) of Law No. 25 of 2007 concerning Investment, it is stated that what is meant by foreign investment is an investment activity to conduct business in the territory of the Republic of Indonesia by foreign investors, both those who use foreign capital fully and those who partner with domestic investors. Kamus Besar Bahasa Indonesia (KBBI) defined investment means First, the investment of money or capital in a company or project for the purpose of obtaining profit, and second, the amount of money or capital invested.[13] Therefore, foreign investment activities are linked to this matter as a profit-seeking business, and one form of legal entity in Indonesia that is profit-oriented is Limited Liability Company, which is regulated in Law No. 40 of 2007 About Limited Liability Company (hereinafter called a "Company Law"). In the legal construction of a Limited Liability Company, seeking profit is the target or orientation of the shareholders of a Limited Liability Company. Of course this cannot be separated from the basic character of the stock which is a proof of ownership or part of capital of a Limited Liability Company that can be traded.[14] In the context of a Limited Liability Company, the stock also grants the owner the right to: a.) Attend and vote at the General Meeting of Shareholders; b.) Receive dividend payments and the remaining liquidated assets; and c.) Carry out other rights under this law.

Referring to the character of the shares in the Limited Liability Company, it can be drawn a common thread, that foreign investment whose business entity is in the form of a Limited Liability Company will be profit-oriented which will be given to its shareholders, the foreign investors. Thus, the motive of foreign investors getting profits in the host country cannot be denied anymore, so that there can be no other motives from foreign investors, except the motive of making a profit. The existence of the Company Law does give a liability to a

[13] Sentosa Sembiring, Op. Cit., p. 57.
[14] Binoto Nadapdap, *Limited Liability Company Law*, (Jakarta: Jala Permata Aksara, 2009), p. 50.

Limited Liability Company without being restricted in status, whether the Limited Liability Company is in the form of a State- Owned Enterprise, Domestic Investment or Foreign Investment, to contribute to social and environmental responsibility, which is regulated in Article 74 of the Company Law which states as follows:

(1) The Company having its business activities in the field of and/or related to natural resources, shall be obliged to perform its Social and Environmental Responsibility.
(2) Social and Environmental Responsibility as referred to in paragraph (1) shall constitutes the obligation of the Company which is budgeted and calculated as the cost of the Company, implementation of which shall be performed with due observance to the appropriateness and fairness.
(3) The Company which fails to perform its obligation as referred to in paragraph (1) shall be imposed with sanction in accordance with the provision of regulation.
(4) Provision regarding Social and Environmental Responsibility shall be further regulated with a Government Regulation.

Based on the legal aspects of the corporation, several problems and legal challenges have been identified, among others :

1. It is proven that the law is powerless in regulating corporate behavior in an era where corporate influence and power are increasingly widespread;[15]
2. The law is too slow and only reactive to the development of corporate progress, in which it is contrasted with the dynamics and development of transnational policies towards corporations;
3. Special legal regimes designed to overcome various corporate behaviors were not able to eliminate structural legal limitations, although there are some improvements;
4. In the era of the global economy and the reduction of trade and investment barriers, the laws are incapable of controlling the corporate behaviors;
5. Corporations tend to apply (low) legal standards from host-country, despite the efforts of home country to punish corporations that operate illegally in other countries.[16]

[15] Muchliski, *Multinational Enterprise and the Law*, (Blackwell, 1995), p. 9.
[16] Christopher Stone, *Where the Laws Ends, The Social Control of Corporate Behaviour*, (Harper & Row, 1975), p. 95.

This is in line with what is stated in David K. Eiteman's Theory, which should be left untreated, the freedom granted by the Government of the Republic of Indonesia in the case of oil and gas minerals exploration and exploitation will have an adverse effect on Indonesia as the host country and consequently, foreign investments will not provide any benefit to the host country in which as stated in Dependency Theory.

4. The Strategic Role Of State-Owned Enterprises In The Era Of Fair Business Competition And The Convenience For Foreign Investment By The Optimization Of Production Sharing Contract

Globalization of international trade and investment, whose roots were placed in the Bretton Wood agreement, known as the Bretton Wood system, has become an international order that continues to this day. Various international institutions such as the International Bank for Reconstruction and Development/IBRD (World Bank), International Monetary Fund (IMF), General Agreement on Tariffs and Trade/GATT, World Trade Organization (WTO), World Intellectual Property Organization (WIPO), Organization of Economic Cooperation and Development (OECD), and UNCTC are the main actors in the Bretton Wood System. A series of international arrangements have been produced covering :

a. *GATT/WTO Agreements* along with the descriptions;
b. Agreement on the establishment of *Multilateral Investment Guarantee Agency (MIGA)*; and
c. International agreements in the field of protection for *Intellectual Property Rights*.

Many parties consider that globalization is something that cannot be avoided, and they support the definition of globalization as:

> *"... it is an irresistible and desirable force, sweeping away frontiers, overturning despotic governments, undermining taxation, liberating individuals and enriching all it touches...."*[17]

[17] Martin Wolf, *Why Globalization Work,* (London: Yale University Press, 2004), p.13.

The above definition means that globalization is considered as a necessary and irresistible force, transcends regional boundaries, overcomes despotic government, suppresses taxes, frees individuals and enriches the things they touch/is related to the business. Another definition of globalization is:

> *"…. free movement of good, services, labour and capital, thereby creating a single market in inputs and outputs; and full national treatment for foreign investors (and nationals working abroad) so that, economically speaking, there are no foreigners."*[18]

Another view of the concept of globalization above means that globalization is defined as the free movement of goods and services, labor, capital and therefore creates a single market, both in terms of inputs and outputs, equal treatment of investors, so as to economically, there is no difference between a foreigner and a citizen. However, there are other views that defined globalization in 3 (three) different perspectives, which are :

a. First, globalization to describe economic phenomena about increasing market integration goes beyond national boundaries;
b. Second, globalization to describe a narrow political phenomenon from the removal of national barriers to the flow of goods, services and capital;
c. Third, to describe the broader political phenomenon of global dissemination of market-oriented policies, both nationally and internationally.[19]

The essence of trade globalization, basically, is that the investment and finance are to eliminate various forms of barriers in trade and investment activities that are not only considered detrimental to the business world but also the interests of the consumers (end-users). These obstacles are caused by unnecessary regulations and obstacles in bureaucratic and protection from the state. Therefore globalization requires steps from the host country such as deregulation, debureaucratization, and liberalization. The spirit of globalization also encourages competition to produce affordable prices with good quality.

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[18] David Henderson, *"The MAI Affair: A Story and its Lessons"*, (London : Royal Institute of International Affairs, 1999), p. 14.
[19] Brink Lindsey, Against the Dead Hand: : The Uncertain Struggle for Global Capitalism, New York: John Wiley & Sons, 2001), p. 275.

Globalization also encourages the role of corporations/private sectors to take over the government's role and therefore always encourage deregulation, in the view of those who support it, the smaller the role of the government, the greater happiness can be achieved. Globalization in Indonesia is marked by the enactment of Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. The law is an important instrument in promoting economic efficiency and creating a climate of equal opportunity for all business actors, in other words, Law No. 5 of 1999 concerning Prohibition of Monopoly Practice ensures that the freedom to compete in the economy unhindered. Globalization in Indonesia with the support of these legal instruments is expected to achieve efficient economic growth, including in the process of industrialization. Globalization is characterized by fair business competition, in which the character of unfair business competition is in the form of anti-monopoly. Anti-monopoly in the perspective of development is also a pillar of the conducive investment climate especially foreign investment, it means that in the perspective of business competition, Indonesia can no longer provide more protection to SOEs as business entities, but it does not completely release the SOE in order to manage the sectors of production concerning the livelihoods of many people. Therefore, it is necessary to have a normative strategy where the state-owned enterprises can still be the "extension" of the government in controlling the production sectors concerning the livelihoods of the people, on the other hand, state-owned enterprises in running the state's mandate do not create monopolistic business atmosphere and tends to inhibit foreign investment.

Of course, to accommodate those 2 (two) strategic issues, it is necessary to have a legal instrument that can accommodate them. The instrument is the joint ventures between foreign and domestic capital. The regulation governing the existence of the joint ventures has been in existence since 1994 through

Government Regulation No. 20 of 1994 and Presidential Decree No. 32, 33 and 34 of 1992, in which it has regulated the form of cooperation by means of a "joint ventures". The regulation on joint venture cooperation between foreign investors and national parties is intended by the government to provide protection and participation of national private parties in the implementation of foreign investment in Indonesia. National private parties, in this case, can also be interpreted as having the participation in SOEs. In addition, joint ventures also provide opportunities to small-scale national private companies as well as cooperative ventures to participate through share ownership of business conducted in Indonesia with the foreign investors. Thus, it is expected that there will be a balance of foreign and domestic investment capital. Todung Mulya Lubis expressed his opinion regarding joint ventures that the balance in joint ventures would eliminate a domestic countervailing power so that the cooperation between foreign and domestic investments is considered to have no bargaining position between one party and another.[20]

The form of business cooperation through a joint ventures pattern that provides a balance between the two parties in the context of investment must certainly be formulated concretely so that in the practice, neither the host country or investor is in an inferior position. In the context of the form of joint ventures, Friedman distinguished 2 (two) forms of joint ventures, the first form is not carrying out a combination of capital, so that the cooperation is limited to the know-how brought into joint ventures. Know-how in this regard includes technical service agreements, franchise and brand use agreements, construction and other job performance contracts, management contracts, and rental agreements. Regarding the first form of joint ventures, Friedman argued that the incorporation of know-how into joint ventures is usually a permanent stage,

[20] Todung Mulya Lubis, *Economic Law*, (Jakarta: Sinar Harapan, 1992), p. 23.

which in time will shift to cooperation based on a capital merger.[21] The second joint ventures are characterized by capital participation. To distinguish the first and second types, Friedman used the term joint ventures for the first, and equity joint ventures for the second type of cooperation. This definition given by Friedman is not suitable in the practice, in which the use of the term joint ventures is defined as a collaboration carried out jointly, and is a new company that is jointly established by two or more parties by combining business potential including know-how and capital.[22] In practice, joint ventures are translated into several forms of cooperation, including management contracts, Build, Operate, and Transfer (BOT), Contract of Work, Production Sharing Contracts. Related to the forms of joint ventures, the writers only examines the forms of contracts that are only related to the involvement of foreign or domestic investors in the management of production sectors related to the livelihoods of many people, which are the Contract of Work or production sharing contract. Production sharing contract and consession are forms of foreign investment cooperation, outside the provisions of Law No. 1 of 1967 concerning Foreign Investment, because these contracts are regulated by *lex specialis* legislation. Contract of Work concept according to Ismail Sunny is :

> "Foreign capital cooperation in the form of a Contract of Work that occurs if foreign investment forms an Indonesian legal entity and this legal entity cooperates with another legal entity that uses national capital."[23]

In addition to the Contract of Work defined by Ismail Sunny, there is also Production Sharing Contract (PSC) in business practices, but this PSC is different from the contract of work in the practice. Contract of work is designated for general mining business that includes activities of general investigation, exploration, exploitation, processing and refining, transportation and the sale of

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21 B. Napitupulu, *Joint Ventures in Indonesia*, (Jakarta: Erlangga, 1986), p. 24.
22 B. Napitupulu, *Ibid*
23 Ismail Sunny and Rudiono Rachmat, *Review and Amendment of Foreign Investment and Foreign Credit Laws*, (Jakarta: Pradnya Paramita, 1958), p. 38-42.

excavated materials, while PSC is given in developing hydrocarbon reserves in certain areas before the commercial production. Both Contract of Work and PSC in principle are the same, which is a legal instrument for the government or SOEs to engage in investments related to the management of production sectors that concern the livelihoods of many people. The existence of legal instruments of Contract of Work and PSC provides space for SEOs to be actively involved in the management of production sectors that concern the livelihoods of many people without negating the role of investors, especially foreign investors, it also does not ignore the spirit of healthy business competition which is one of the pillars of investment in Indonesia. Of course, the existence of a Contract of Work and PSC by placing SEO as a party with a larger portion of rights and authority, then the management of production sectors that concern the livelihoods of many people will be in harmony with the spirit of the constitution. The involvement of foreign investors in the management of production sectors that concern the livelihoods of many people in principle is not a problem, it will instead provide a transfer of technology to the SOEs as the business partners, this is in line with what was conveyed by the Head of the Department of PT. PAL Indonesia (Persero) and its staff in a Focus Group Discussion (FGD) forum as long as the contribution of foreign investors does not erode the sovereign values of the nation.

D. CONCLUSION

Related to the discussions above, the following conclusions can be drawn that basically, foreign investment in Indonesia has existed since the colonial regime, and subsequently legitimized by the existence of Law Number 1 of 1967 concerning Foreign Investment and subsequently renewed by Law No. 25 of 2007 concerning Investment. However, the problem is that many foreign investors are now managing the production sectors that concern the livelihoods of many people, which according to the constitution, it is the state's domain.

Therefore, it is necessary to have the role of SEOs to be actively involved in the management of production sectors that concern the livelihoods of many people.

In order to anticipate the dominance of foreign investors in the management of production sectors concerning the livelihoods of the people, it is necessary to strengthen the role of SOEs in contracts with foreign investors in the management of production sectors that concern the livelihoods of the people, such as Contract of Work or Production Sharing Contract (PSC).

So that in the future there will be no conflict between the norms of legislation governing the production sectors that concern the livelihoods of many people with the constitution, then the legislation should emphasize the dominant position of the SEO's role to foreign investors for this regard.

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