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Law and Development under Globalization:
The Introduction and Implementation of Competition Law in Indonesia

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Introduction

Every state requires a legal system for the normal operation of its society. There is no state that does not have a legal system. However, depending on the progress of economic development, the legal systems of states can be distinguished into two types: namely, the legal system prevailing in the developed countries and the legal system prevailing in developing countries.

The legal system prevailing in a developed country can be characterized as a legal system that supports industrial society, as developed countries have long been industrialized. Meanwhile a developing country's legal system is characterized as a legal system that is undergoing transformation. This transformation is intended to change a legal system that supports traditional agrarian society into a legal system that supports a would-be industrial society. Clearly, this is a consequence of developing countries pursuing their national development objectives of becoming industrial states.

Since the end of 1980s, the transformation of the legal systems in developing countries has coincided with what is referred to as "globalization." Globalization has indeed become one of the primary driving factors in developing countries' efforts to transform their legal systems.

This article intends to analyze the influence of globalization in the transformation of developing countries' legal systems. For such purpose, this article will focus on Indonesia as one of those developing countries seeking to transform its current legal system. Despite the comprehensive nature of this reform in all fields of law this article will restrict its analysis to Competition Law as part of economic law.

The article will start by discussing how globalization has affected the national legal systems of developing countries. Here, it will be argued that globalization in the field of economic law is practically a process of Westernization of developing countries' legal systems.

The article will then analyze and discuss Indonesian competition issues by first examining the type of monopoly practices occurring in Indonesia. Next, the article will make an assessment of Indonesia's Competition Law and look closely at how it was implemented in a court case referred to as the "Indomobil" case.

Finally, the article will conclude with some remarks on the effects of globalization on Indonesia's legal system.

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Globalization and Its Effect on Legal System of Developing Countries

In the legal field, globalization has resulted in harmonization of national legal systems. Globalization has forced countries who wish to become members of the globalized international community to have similar set of laws. This has been especially evident in areas such as banking law, competition law, bankruptcy law, copyright law, patent law, and arbitration law, among others.

Although Westernizing developing countries' legal systems has been frequently opposed or resisted from part of the society, but such process appears to have become an almost unavoidable process.[1] There are, at least, two reasons why Westernization is unavoidable. First, the developing countries are aspiring to be industrial states similar to those of the West. To become industrial states, policy makers within the developing countries feel that there is a prerequisite to have a legal system that supports such society before they can truly claim to be industrialized or Westernized. The legal system of agrarian society would not be suitable for industrial society.

For a developing country to have a legal system that supports the 'would-be' industrial society does not require the invention of a new legal system. This differs from the Western countries when they first became industrial societies for which they needed to invent new laws to address new legal needs. The developing countries have been adopting Western countries' legal systems, and some are practically copying what Western countries have. This process is known as a legal transplant.

The second reason why Westernization is unavoidable is the result of the continuing economic globalization of the international community. Economic globalization has moved the multiple markets of the world into a single market from the perspective of firms and businesses of Western countries.[2] Western countries in the last three decades have been aggressively exploiting the market potential residing in developing countries, in particular Asia. However, businesses and firms of Western countries have learned, quite often the hard way, that developing countries legal systems are lacking.

In the last 20 years or so, under the banner of globalization, developed countries that have European traditions, such as the United States (US) and Australia, have had a great influence on developing countries' legal systems. One and foremost reasons in advocating the influence is a sufficient and sound legal system is the most important considerations for Western businesses and firms when investing in developing countries.

Westernizing the legal system of a developing country can be carried out in various ways. When the government of a certain developing country wants to pass certain legislation, it may ask their scholars to produce the draft. These scholars are mainly trained in Western countries, such as the US, United Kingdom (UK), and France and have acquired knowledge of Western legal concepts. In addition, when drafting economic legislation drafters have used Western countries' legislation as reference.

Westernizing of a legal system also occurs when a developing country receives assistance from

Western countries. Western countries have been providing assistance to developing countries in their pursuit of national development. The assistance includes legal assistance by the dispatch of experts.[3] These experts give advice and are involved in the process of producing draft legislation. The advice given and drafts produced have their origins in the legal system of the Western countries, as this is where the expertise of the experts rests.

Indonesia is one of those developing countries that have experienced the varying methods of Westernizing its legal system.

To begin with, Indonesia like many developing countries was the recipient of European influence on its legal system, wanted or not, from its former European ruler, the Dutch. Soon after its independence in 1945, the constitution provided that the previous Dutch laws initially become the law of Indonesia. Even today, many Dutch colonial laws and regulations still prevail, including in the area of economic law.

The attempt to replace the now antiquated Dutch laws of the colonial period has been pursued by seeking assistance from legal scholars. On many occasions, law professors have served as the chairman or members of the drafting committees tasked with developing this new law. Most of the professors involved undertook their postgraduate education and training in Western countries,[4] or if they are trained in Indonesia, they follow strictly Dutch and Roman legal principles. In addition, the drafting team often uses Western countries' law as an initial reference point. For instance, the Company Law when drafted had relied heavily on US Corporation Law and Dutch Company Law as its primary references.

Efforts to reform some of the Indonesian economic law have been carried out under the guidance of foreign experts.[5] In some instances, foreign experts have been required to go as far as producing the actual drafts of legislation.

Indonesia has also had considerable experience in reforming its laws to meet international standards. Originally many of these reforms were due to external pressures from other countries demanding Indonesia conform to acceptable international standards. Indonesia's economic dependency has made it easier for donor countries and international financial institutions to request certain laws to be amended or introduced. For example under the IMF loan conditions of late 1997 Indonesia had to amend its Bankruptcy Law.[6] The same happened again in early 1998 when the IMF requested that Indonesia introduce a Competition Law.[7]

Indonesia's Competition Law and Globalization

One important law that deals with wider access to the market is Competition Law. The Competition Law was enacted in March 1999.[8] The Law was the first of its kind in Indonesia and passed as Law No. 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Competition (hereinafter referred to as "Law 5").

Globalization has often been quoted as one of the reasons behind the introduction of the Law. The General Elucidation of Law 5 describes as follows:

> Even though much progress has been achieved during the First Long Term Development Phase as shown by high economic growth, nevertheless there are still challenges and problems (to be encountered), in particular with the issues of economic development, amid the trend of economic globalization, and the dynamic and development of the private sector since the beginning of the 1990s.

Clearly this evidences an intent by the drafters that the Indonesian law should be one that would allow it to participate in the international community. Therefore the Competition Law cannot be different to those of developed countries. A one-size fits all approach was used rather than addressing local anti-competitive behavior. In addition the drafters were also hesitant when drafting provisions that would be markedly different from the international standard of Competition Law.

The substance of Law 5 is similar to the substance of competition laws as adopted by Western countries. First, in general, Law 5 does not prohibit monopoly based on market structure or market share.[9] However, Law 5 does prohibit practices of and by firms that unfairly restrict competition.

The prohibitions under Law 5 are similar to those found in Western countries or model laws on competition designed by Western experts. There are three kinds of prohibited practice.

The first prohibition concerns agreements. Firms are prohibited from entering into agreements that have the purpose or effect of unfair competition; namely, oligopoly, price fixing, dividing territory, boycotting, cartel, trust, oligopsony, vertical integration, or exclusive dealing, as well as contracts with foreign parties that may result in monopolistic practices or unfair business competition.[10] This prohibition is similar to the UNCTAD Model Law on Competition under Article 3 (I).[11]

Second, firms are prohibited from carrying out activities that can result in unfair competition. The prohibited activities are monopoly, monopsony, market dominance, and conspiracy.[12] Unlike prohibited contracts, prohibited activities can apply to a single firm.

Lastly, firms are prohibited from abusing a dominant position. The prohibition against the abuse of dominant position centers on interlocking directorates, share ownership, and corporate actions of mergers, acquisitions, and dissolutions.[13]

Law 5 provides exemptions from its scope. The exemptions are (a) contracts implementing pre-existing law; (b) contracts concerning intellectual property rights, trade secrets, and franchises; (c) contracts on technical standardization that do not restrict competition; (d) contracts that do not require resale or redistribution at a subsequently lower price; (e) research contracts designed to promote or improve the general welfare of citizens; (f) government-ratified international agreements; (g) export contracts that do not affect domestic markets; (h) small businesses; and (i) cooperatives that exclusively serve members.[14]

There are, however, Indonesia-specific exemptions. The exemption on small businesses and

cooperatives can be considered as Indonesia-specific. The reason for such exemptions is the government at the time Law 5 was debated, had an economic policy that centered on an economy driven by the business activities of the common people and referred to as *ekonomi kerakyatan* (people's economy). The people's economy required that the government protect and promote small businesses and cooperatives.

Law 5 also establishes an enforcement agency similar to the US Fair Trade Commission, referred to as *Komisi Pengawas Persaingan Usaha* or the Business Competition Supervisory Commission (hereinafter abbreviated as "KPPU").[15]

Looking at the substantive provisions of Law 5, it can be concluded that Law 5 has generally met with the standard of developed countries' Competition Law.

Having law that meets the international standard in developing countries does not mean the behavior of the society will instantly change in accordance with the enactment of such law. Indonesia has been encountering problems with its legal transplants, including Competition Law. There are, at least four, major problems regularly encountered with respect to implementation.

Firstly, legislation is drafted not for the right reason; namely, not to address social issues faced by society. Law is written for other purposes, such as for the sake of wanting to have a legal system like the developed countries or meeting demands from international pressure.

Second, the problem owes to the fact that when drafting legislation the drafter sometimes lacks understanding of the intricacies of the issues. Understanding the intricacies is important since at the implementation stage the law enforcement agencies will rely mostly on what is written in the provisions.

In addition, the problem of inaccuracy has been added to by another problem; namely, legal drafters in Indonesia have the habit of translating, instead of making reference to, other countries' legislation. Translating provisions, although that will result in the legislation, neglects to take into account the local conditions.

Third, drafting legislation to meet the international standard often neglects the supporting legal infrastructure that is paramount for the legislation to be smoothly implemented and enforced. To write a provision on the establishment of the KPPU, for example, is easy. The challenge, however, lies in its implementation, such as how will the institution be financed, how will the members be recruited, what is the relationship with other governmental agencies, to name but a few of the issues. Drafters of Law 5 seem to have not given thorough consideration to these issues.

Fourth, having legislation that meets the international standard has been considered as resulting in an abrupt changing of society's values. The legislation may be seen as unfit for the local society as the society is not familiar with or does not have a good understanding of the new values embedded in the legislation.[16] In addition, law enforcement can be lenient and compromise due to the law enforcer's sympathy toward this gap issue.

Types of Monopoly Practice in Indonesia

The nature of monopoly practices in Indonesia is different from those of developed countries. Most monopolies in Indonesia have not been the result of unfair competition between firms, which is referred to as industrial monopoly. Rather, they have been the result of the Government's intervention in the market.

The first type of monopoly practice has been for the Government to grant economic privileges to firms that have close ties with high-ranking Government officials. The second type resulted from State owned enterprises (SOEs) monopolizing various lines of business based on Article 33 of the Constitution.[17] The third type of monopoly practice is that firms engaged in a sort of 'price fixing' under the blessing of the government as the government frequently asked their association to give input on tariffs. The recommendation from the association most of the time is accommodated as government policy without any public debate.

The most pervasive type of monopoly practice has been Government-sanctioned monopolies. This is carried out when individuals occupying high Government position issue legislation or decrees sanctioning firms to monopolize certain businesses. The legislation and decrees gave firms their privileged positions. The owners of the firms were members of families and the cronies of the high-ranking Government officials with the responsibility for such business fields.

This phenomenon was pervasive, not only at the central government level, but also at much lower levels of government. Such anti-competitive behavior by the Government has prevented other firms from entering markets.

As a result, the market practically had been closed to most Indonesians who did not enjoy close ties with high-ranking Government officials. Access to the market, at that time, meant having an 'acquaintance' with a high-ranking Government official or entering relationships with firms who had special connections.

It should be noted, however, that the term 'closed access market' here should not be associated with the term 'closed access market' under the discussion of international trade. The term closed access market under international trade has the connotation that a country is protecting its domestic businesses with the result that foreign firms have difficulty in penetrating the market of their goods and services. Meanwhile, the term closed Indonesian market, as said earlier, meant access to the market is closed to those, foreign or local firms, who do not have ties with high-ranking Government officials.

In sum, monopoly practices in Indonesia have been the result of Government-sanctioned monopolies. To end this anti-competitive behavior, Indonesia needed to have a Competition Law that provided sufficient provisions to address Indonesia's specific monopolies. Unfortunately, Indonesia was more concerned with having a Competition Law that met the perceived international standard and

not one that met Indonesian needs.

The domestic force to enact Law 5 was public demand to end Government-sanctioned monopolies. Although the Law was enacted for that purpose, unfortunately, substantively Law 5 did not deal with public expectations. This is most evident in the fact that there are only two Articles that deal with Government-sanctioned monopolies.

The first is Article 51,[18] which in short provides that monopolies granted by the Government to SOEs or firms must be based on legislation in the form of a Law.[19] This recognizes the fact that in the past monopolies could be granted by legislation issued by the President, Minister, Governor, or others and this will provide an opportunity for public debate as Parliament is involved in the passage of the Law. The second Article is Article 35(e) concerning the KPPU's task of providing recommendations and comments on Government policy that has a bearing on monopoly practice and unfair competition.[20]

In addition, there is an Article that deals with anti-competitive behavior in the form of bid rigging as stipulated under Article 22. This Article has been frequently employed by KPPU when examining and deciding a case.

If the public demand to end Government-sanctioned monopolies is the enactment policy, Law 5 should have stipulated a larger number of provisions that expressly addressed this issue. The two Articles alone are noticeably insufficient. Law 5 should have accommodated provisions such as, what to do with past legislation granting monopolies, how to deal with firms that had Government-sanctioned monopolies, what are the exit provisions of firms that were previously granted monopolies, should the KPPU be given the responsibility of reviewing past legislation granting monopolies, how to end monopolies granted by local governments and how to anticipate their re-occurrence, and what happens if recommendations by the KPPU are not followed by Government.

The external influence for enacting Law 5 came from the IMF. The government had no choice but to pass the Law or face the consequences of not receiving the promised loan disbursements.[21] A delay in loan disbursements would have had serious effects on the economy and foreign investors' confidence in doing business in Indonesia. All of these would undoubtedly have resulted in a further deterioration of Indonesia's economy.

The question is why was the IMF so keen to push Indonesia to adopt a Competition Law? Was it because they wanted to see Indonesia's economy efficient and growing again?

Increasing the efficiency of the Indonesian economy may have been an underlying theme of the IMF push towards a Competition Law however that was not the only purpose.[22] There are other purposes, which unfortunately are not so open. One possibility would be Indonesia is seen as a potential market for foreign firms. However, as discussed earlier, the market is closed. The most obvious way of opening up the Indonesian market to foreign influence is to introduce a Competition Law.

Assuming such a possibility is true, the market may still not be as open as the IMF would have liked as ultimately the substance of Law 5 is insufficient in dealing with Indonesia's monopoly practices. The IMF may not be aware of this as its only concern is with the Competition Law in its generic form being passed. It may not realize the real causes of Indonesia's closed market.

In sum, the enactment policies behind Law 5 have missed addressing monopoly practices in Indonesia. This has been confirmed by one study that found Law 5 was not designed for eradicating monopoly practices as generally found in Indonesia.[23]

Although the Competition Law was passed on 5 March 1999, it only became effective one year after the enactment date.[24] This supposedly allowed time for Law 5 to become publicly and generally known. In addition, the Law gave firms an additional six months after its effectiveness to review their past actions.[25] Thus, in real terms, the Law was enforceable as of September 2000.

Even though there was sufficient time when the law being enacted and coming into force, however, the Government had not shown its commitment on the implementation of the Law. The members of the KPPU, for example, were appointed only 3 months after the Law became effective.[26] The KPPU's supporting infrastructure, such as office space, staff and budget, were not readily available even after the members were appointed.

There are several reasons why the Government was not ready to implement Law 5. First, there was a change of Government from the Habibie administration to the Wahid administration. Time was needed as new officials had to acquaint themselves with the then-pressing issues. Second, the issues of human rights, economic recovery and separatist movement had confronted the government and became a pressing issues to deal with. As a result, those issues have overshadowed the monopoly issue. Third, similar to the other laws made under pressure from the IMF, they were passed for the purpose of meeting a specific set of conditions, but evidently lacked the political will to implement.[27] The Government's commitment to implement did not last beyond the disbursement of the IMF loan. Lastly, the public had shifted its focus from monopoly to other issues resulting in the absence of public pressure to the Government.

Even today, the government has been unsupportive on the monopoly issue. In its annual report for 2002 the KPPU stated that curbing unfair business practices is difficult due to a lack of Government support.[28]

Implementation is an important part of the legislative process. Introducing Law 5 was relatively easy, but the real challenge lies in its implementation. It is a myth for many developing countries that the passing of a piece of legislation will ensure that the problems faced by the society will be solved instantly and comprehensively.

Implementation of Law 5 has been difficult, as individuals occupying positions in enforcement agencies have not understood the competition concept well. Enforcement agencies, except the KPPU, were unfamiliar with Competition Law. Although training has been carried out, nevertheless there is

still considerable difficulty among some of the main stakeholders with respect to comprehension of the Law and its affect. This has resulted in the reluctance of enforcement agencies to deal with substance when confronted with a competition issue. Most cases have been decided on their lack of compliance with procedural matters.

Moreover, since Law 5 was seen to have been promoted by the IMF to guarantee loan disbursements, the public has been generally suspicious of the intent of the Law and its implementation. This is due to the public's negative view of the IMF. Many believe the IMF has been at the forefront of an international conspiracy directed at Indonesia. This conspiracy essentially is one that wants to open Indonesian market to foreign firms rather than ensuring that the Indonesian economy gets back on its feet for the benefit of Indonesians. In recent times, at the societal level, globalization has been perceived as foreign colonolization in the economic field.

Judges deciding a case may be influenced by the negative view of IMF and have nationalistic feelings and, thus would not be favorable to the KPPU's decisions.

Another problem when implementing the Law is that the provisions are, as discussed before, not clear enough making them difficult to be understood by individual law enforcers. As a result, the provisions have created confusion. This confusion is evidenced in the misuse of Law 5 when endeavoring to resolve issues.

In addition, some individual law enforcers have taken advantage of the vagueness of Law 5's provisions. It has become a means to acquire 'compromise' bribe money.

Furthermore, Law 5 has imposed an unrealistic time restriction for a case to be decided. For example, a decision has to be issued within 30 days by the KPPU after the investigation period expires. The time restriction was intended by the drafters to be a solution for the uncertainties of time when a case is handled by the judiciary. It is also a means to ensure that there is never a backlog of cases as each case must be concluded within the 30-day period. However, it was not a solution but has created further problems, in particular when the KPPU or the Court has to examine complicated cases.

In addition, Law 5 has introduced a different kind of rules of procedure, which has created further confusion. For example, whether the KPPU is to be acknowledged as a semi-judicial agency, whether the objection to a decision is considered a challenge or an appeal (as the two have different consequences under Indonesian law), and whether the KPPU becomes a party in a dispute when a challenge is made to its decision. Once a case goes to the court, the respondent's lawyer will attack on the basis of the rules of procedure knowing that there is a vast array of loopholes. To cope with the problem, the Supreme Court in August 2003 issued a Decree that provides detailed rules of procedure for handling Competition Law cases.

Although criticisms have been made against the effectiveness of the KPPU, however due to its relatively short existence and the fact that Law 5 substantively lacks the provisions to address

Indonesian monopoly practices, it is only fair to say that KPPU has carried out its duties as expected under the Law.

The real challenge for the implementation of Law 5 rests within the judiciary. To begin with, judges played a limited role in the development of Law 5. Second, since its enactment have not been provided with any training with respect to the law's provisions of application, judges are not familiar with the Law and the embedded concepts contained within it. When a case is brought to court, the decision of the court emphasizes the written provisions of Law 5 even though the provisions were poorly drafted. In addition, competition cases have been decided based on procedural matters rather than substance. Another challenge faced by the judiciary is weak law enforcement due to rampant corruption and bribery.[29]

The Indomobil Case

Indomobil is short for PT. Indomobil Sukses Internasional Tbk., one of the largest automotive-related companies in Indonesia. Although the case is referred to as the Indomobil case it is important to note that Indomobil was not a party in the case; rather the case was concerned with a share transaction of Indomobil as a company. Indomobil was once majority-owned by the Salim Group, which is chaired by tycoon Sudono Salim. Sudono Salim was a close friend of Soeharto and as a result of this friendship Salim enjoyed various Government-sanctioned monopolies. The Salim Group had to surrender its shares to the Indonesian Banking Restructuring Agency (IBRA)[30] as part payment of its debts when BCA Bank, also owned by the Salim Group, was hit by the 1997 financial crisis. To administer the acquired assets of the Salim Group, IBRA established a company known as PT. Holdiko Perkasa (Holdiko).

The Indomobil case started when IBRA decided to dispose of its assets in Indomobil. The assets consisted of IBRA's shares in Indomobil totaling 723,779,854 convertible bonds (CB) issued by Holdiko at a nominal value of IDR 337,382,000,000, and CB issued by IBRA at a nominal value of IDR 312,902,186,671. Holdiko was given responsibility by IBRA for the asset disposal. In turn, Holdiko appointed PT. Deloitte Touches & FAS (DTT) as its financial advisor who also acted as the point of contact between Holdiko and potential investors.

Holdiko invited 135 potential investors to bid for the assets to be disposed. However, only 3 companies showed interest. The companies were PT. Cipta Sarana Duta Perkasa (Cipta), PT. Bhakti Asset Management (Bhakti) and PT. Alpha Sekuritas Indonesia (Alpha). It should be noted that Cipta was actually a special purpose vehicle (SPV) company used by PT. Trimegah Securities Tbk. (Trimegah). Furthermore, it should be noted that the owner of Cipta is Jimmy Masrin who has a family relationship with Pranata Hajadi. Pranata Hajadi is the owner of Alpha.

On 5 December 2002, Cipta was announced as the winner out of the 3 bidders. Cipta paid IDR 625 billion for the assets. However, the transaction invited public suspicion for two reasons. First, the

selling price was very cheap compared to Indomobil's market value when it was transferred to IBRA in 1998.[31] Second, the transaction seemed to be carried out in a hurry. The suspicion was linked to the Salim Group who might have solicited Trimegah to acquire the disposed assets.[32]

On its own initiative, the KPPU investigated and examined the transaction. The investigation and examination centered on whether the transaction had been conducted based on bid rigging and, thus, in violation of Article 22 of Law 5.[33]

On 27 May 2002 the KPPU issued its ruling.[34] The ruling found that the transaction had violated Article 22 of Law 5. The KPPU further ruled that Holdiko, DTT, Trimegah, Cipta, Bhakti, Alpha, Pranata Hajadi and Jimmy Masrin were guilty of violations. In the ruling, the KPPU confirmed that the transaction price was too cheap. The KPPU also confirmed that the bidding process was made in a hurry. The KPPU, however, did not nullify the transaction since the funds had already been transferred to the State treasury. Nullification of the transaction would have had implications for the State budget. Moreover, the transaction was not nullified as the KPPU felt that a new bidding process would not likely result in a much higher price.

The KPPU's decision also penalized those found guilty. Cipta, Trimegah and DTT are prohibited from participating in future IBRA transactions. In addition, Cipta received a fine of IDR 5 billion and has to pay compensation to the State of IDR 228 billion.[35] Trimegah had to pay a fine of IDR10.5 billon. DTT had to pay a fine of IDR 10 billion. Furthermore, Holdiko was also penalized and had to pay a fine of IDR 5 billion. Pranata Hajadi and Jimmy Masrin had to, collectively, pay a fine of IDR 10.5 billion. Alpha received a fine of IDR 1.5 billion and Bhakti must pay a fine of IDR 1 billion.

In response to the decision of the KPPU, all parties found guilty challenged the decision in the courts.[36] These challenges were filed in three District Courts in Jakarta as Law 5 did not mention that a challenge to a decision of the KPPU should be made to the District Court where KPPU has its registered office.[37] DTT and Bhakti submitted their challenges to the Central Jakarta District Court. Jimmy Masrin, Alpha, Holdiko, Trimegah and Cipta all filed challenges to the South Jakarta District Court. Lastly, Pranata Hajadi filed his challenge to the West Jakarta District Court.

While the challenges were being filed, Trimegah filed a new case in the Jakarta Administrative Court. It should be noted that the Administrative Court is a court responsible for handling cases in which one of the parties is a government agency. The issue on which relief was requested was whether the KPPU has the right to issue a summons to Trimegah. Bringing the KPPU to the Administrative Court meant that the Administrative Court had to first decide whether the KPPU is a Government agency or semi-judicial institution. If it is considered as a Government agency, the court will have jurisdiction. However, if it is considered as the latter, the court will lack jurisdiction. In its preliminary decision the court found that the KPPU is a government agency and, thus, allowed itself to proceed with the case. The final decision of the Jakarta Administrative Court was that the KPPU has neither the right nor a legal basis for issuing a summons to Trimegah.

Furthermore, Cipta and Trimegah brought a fresh case against the KPPU in the Central Jakarta District Court, this time, on the ground of tort. The tort was claimed to have resulted from the KPPU's lack of authority in examining and deciding the Indomobil case. The KPPU's action had created injury to Cipta and Trimegah. The court in its decision agreed with Cipta and Trimegah and found KPPU to have acted without any authority when examining the Indomobil transaction. The KPPU was ordered to pay compensation to Cipta and Trimegah in the amount of IDR 2 billion. The KPPU then appealed this decision to the High Court.[38]

As to the challenges to the KPPU's decision, all the District Courts overturned the KPPU's decision with, surprisingly, similar reasoning.[39] The courts overturned it not based on examination of the substance of the case. They rather had concerned themselves with whether the KPPU had applied the provisions correctly on the case in question.[40] All the courts had found the KPPU was wrong in interpreting Article 22 with respect to the Indomobil case, and consequently those found guilty by the KPPU were acquitted. In addition, the courts ruled that procedurally the KPPU had no right and lacked a legal basis to use the words "In the Name of Justice, based on the belief of One Supreme God" (referred to as *irah-irah* in Indonesian language) in the heading of its decision.[41]

All the decisions by the District Courts were challenged by the KPPU in the Supreme Court. The Supreme Court examined the challenges against the eight parties in separate cases, however with the same panel of judges.

On 2 January 2003, the Supreme Court made its ruling on all the challenges. In the decision, the Supreme Court overturned the decisions made by the District Courts.[42] The legal ground was the District Courts should have taken into consideration the formalities, which include the form of the challenges and the form of the KPPU decision. According to the Supreme Court, the KPPU is not a legal entity that may stand before courts in a civil suit. In addition, the KPPU had acted beyond its authority by using the *irah-irah* in its decision as the KPPU is not considered to be a judicial body.[43] While overturning the District Courts decisions, at the same time, the Supreme Court decided that the decision of the KPPU should be nullified due to the use of *irah-irah*. In real terms, this meant the KPPU decision had no legal effect and was unenforceable.

The nullification, however, has not discouraged KPPU to continue its function. It has become a learning experience for KPPU. In the post-Indomobil case, KPPU's decision has not used the *irah-irah*.

Concluding Remarks

Globalization has made countries around the world to adopt more or less the same standard of substantive economic law. The benchmark for the standard came from the Western countries which are European or those countries that have European traditions. History has shown of this fact and will continue for some time.

Having a standard substantive law, however, does not necessarily reflected in the society which

such law is adopted. Indonesia's experience showed this fact. For Indonesia, although globalization has a great influence in standardizing its economic law with those of Western countries, however, it has only symbolic meaning. Indonesia's Competition Law serves as a good example.

Law 5 has not been able to address the issue faced by Indonesian economy. The Law was deficient from the start since the drafting stage. The most important point to note is it was not drafted to address the real issues behind monopoly practices in Indonesia. This resulted in the Law being insufficient when implemented and, therefore, has not had the effect that the public might have expected. The Indomobil case exemplifies the predicament of enforcing Law 5.

Notes

1 The negative connotation of Westernization is due to the perception that Western countries are trying to control the world or seeking to dominate developing countries.

2 Ashcroft pointed out that, "Globalism has most often been invoked to demonstrate the process of supranational movements of capital, transnational corporate power and the diffusion of the global economy." *See* Bill Ashcroft, Post-Colonial Transformation, (London: Routledge, 2001), 213.

3 Yasuda points out that "Legal Technical Assistance has become the most profitable and attractive business in world aid communities, which includes not only governments and law businesses but also academics." *See* Nobuyuki Yasuda, "How Can Law Interact with Society?: A Note on Recent Law Reform Movements in Asia," in: Naoyuki Sakumoto, et al., Law, Development and Socio-Economic Changes in Asia, (Japan: Institute of Developing Economies (IDE)-Jetro, 2003), 3.

4 Previously many Indonesian legal scholars studied in the Netherlands. However, since the 1960's most scholars went to the US for their postgraduate studies. In this sense, the US and its common law system has greatly influenced the Indonesian legal system.

5 Foreign experts are dispatched based on Official Development Assistance. The US, Germany, Australia and Japan have dispatched their legal experts to various government agencies. In addition, IMF, WB and ADB have funded foreign legal experts and dispatched them to Indonesia.

6 Letter of Intent of the Government of Indonesia to the International Monetary Fund (October 1, 1997), *available at* http://www.imf.org/external/np/loi/103197.HTM (last visited August 2, 2003).

7 Letter of Intent and Memorandum of Economic and Financial Policies of the Government of Indonesia to the International Monetary Fund (July 29, 1998), *available at* http://www.imf.org/external/np/loi/072998.htm (last visited Sep. 19, 2003).

8 Undang-undang Republik Indonesia Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli Dan Persaingen Tidak Sehat [Law of the Republic of Indonesia, No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition], 33 LEMBARAN NAGARA [STATE GAZETTE] (1999). A version in English is available at http://english.pbc.or.id/data/uu_monopoli_%28english%29.pdf (last visited Apr. 4, 2002) and a version in Bahasa Indonesia is available at http://www.geocities.com/Athens/Ithaca1955/

unfair/ iuu599.html (last visited Mar. 5, 2002); For a general reading of Law 5, *see* Hikmahanto Juwana, "An Overview of Indonesia's Antimonopoly Law," 1 Washington University Global Studies Law Review, 1 & 2 (Winter/Summer, 2002): 185-202, also *available at* http://law.wustl.edu/Publications/WUGSLR/Issue%20Archive/Volume_1/Document_Files/p185%20Juwana.pdf (last visited Sep. 23, 2003).

9 Article 4(2), 13(2) and 17(2)(c) of Law 5 may appear to base prohibitions on the ground of market structure and shares. If read carefully, however, the market share percentages serve only as a triggering event for the presumption that business actors may be violating Law No. 5. The provisions in Law No. 5 that incorporates market share percentages likely reflect a compromise between the Government and the Indonesian Parliament.

10 *Id.* Art. 4 to 16.

11 The Article stated that, "Prohibition of the following agreements between rival or potentially rival firms, regardless of whether such agreements are written or oral, formal or informal: (a) Agreements fixing prices or other terms of sale, including in international trade; (b) Collusive tendering; (c) Market or customer allocation; (d) Restraints on production or sale, including by quota; (e) Concerted refusals to purchase; (f) Concerted refusal to supply; (g) Collective denial of access to an arrangement, or association, which is crucial to competition." *See* UNCTAD Model Law on Competition.

12 Law 5 Art. 17 to 24.

13 *Id.* Art. 25 to 29.

14 *Id.* Art. 50.

15 *Id.* Art. 30 to 37. Also Presidential Decree 75 of 1999 on the Establishment of the KPPU.

16 Yasuda noted the novelty of Competition Law in East Asian society in which he said, "..., competition law is new in these countries, and there is no cultural basis supporting this kind of legislation. In contrast, there is firmly rooted culture that regards "harmony" as more important value at all levels of East Asian Society. This naturally tends to avoid competition, because it may cause conflicts among people, which is against the fundamental value of harmony." *See* Nobuyuki Yasuda, "How Can Law Interact with Society?: A Note on Recent Law Reform Movements in Asia," 20.

17 The Article prior to its 2002 amendment stated that, "(1) The economy shall be organized as a common endeavor based upon the principles of the kinship system. (2) Sectors of production that are important for the country and affect the life of the people shall be controlled by the state. (3) The land, the waters and the natural riches contained therein shall be controlled by the State and exploited to the greatest benefit of the people."

18 Law 5 Art. 51 provides, "Monopoly and/or the centralization of activities related to the production and/or marketing of goods and/or services which control the needs of people in general and production branches vital to the state shall be regulated under a Law and shall be performed by the State-Owned Companies and/or entities or institutions established or appointed by the Government."

19 The form of legislation as provided under People's Consultative Assembly (MPR) Decree No. III of 2000 are

the Constitution, MPR Decrees, Law (issued by the President and the Parliament), Government Regulations in lieu of Law (issued by the President), Government Regulations (issued by the President), Presidential Decrees (issued by the President) and Provincial Government Regulations.

20 Law 5 Art. 35(e).

21 The target date for the issuance of Competition Law was the end of December 1998. *See* Letter of Intent and Memorandum of Economic and Financial Policies of the Government of Indonesia to the International Monetary Fund (July 29, 1998).

22 The international financial institutions and donor countries urge Indonesia to have the Competition Law so that Indonesia's economy becomes efficient. Competition Law is to preserve and promote competition as a means of ensuring the efficient allocation of resources in an economy.

23 The study has the following to say, "After the competition law was enacted in March of 1999, there have been expectations from the public that the law would correct what the public perceived to be anticompetitive conduct by various parties. ... Many also hope that the law will inhibit KKN (the Indonesian abbreviation for collusion, corruption, and nepotism). *The law is not designed for such purposes*, though it could reduce KKN indirectly to the extent that it reduces opportunities for rent-seeking that fuel KKN. (emphasis added)" Colleen Loughlin, et. al, Report on Competition Policy in Indonesia, November 1999, A study funded by ELIPS Project, USAID-Government of Indonesia *available at http://www.monash.edu.au/casestudies/attachments/44.pdf* (last visited Sep. 23, 2003).

24 Law 5 Art. 53.

25 *Id.* Art. 52(2).

26 Members of the KPPU were appointed based on Presidential Decree issued on June 7, 2000, passing the deadline when the Law became effective on March 5, 2000.

27 Another Law is the Bankruptcy Law.

28 The KPPU 2002 annual report. A version in Bahasa Indonesia is available at http://www.pbc.or.id/data/141_laporan2002.pdf (last visited Sept. 21, 2003).

29 In the Indomobil case, the KPPU had asked the Public Officials' Wealth Audit Commission (KPKPN) to examine judges handling of the case on the ground of bribery after they overturned the KPPU's decision. *See* "KPPU Minta KPKPN Teliti Hakim PN Jakpus Soal Indomobil (KPPU requested KPKPN to examine Judges at Central Jakarta District Court on Indomobil case)," Kompas (Indo. Daily Newspaper), July 26, 2002.

30 IBRA was established by the government as an ad hoc institution under Presidential Decree 27 of 1998. IBRA's main task is to restructure ailing banks, to deal with assets acquired as collateral and to recover State's fund loaned to banks hit by the 1997 crisis.

31 At the time, Indomobil was valued around IDR 2.14 trillion.

32 It should be noted that in Holdiko's invitation letter to potential investors, it was made clear that the Salim Group was barred from participating, directly or indirectly, in the bid.

33 The Article states as follows, "A business actor is prohibited from conspiring with other business actors to

arrange and/or determine the winner of a bid that causes unfair competition." *See* Law 5 Art. 22.

34 Decision No. 03/KPPU-I/2002 of May 27, 2002. A summary of the decision in English is *available at* http://english.pbc.or.id/data/ep-pr-summary_indomobil.doc (last visited Aug. 24, 2003).

35 Under Indonesian law, paying a fine is different from paying compensation. Paying a fine is a form of penalty while paying compensation is based on tort.

36 The term 'challenge' is intentionally used as Law 5 provides the term 'challenge' and not 'appeal.' This became a source of debate when the case was brought to the court.

37 *See* Law 5 Art. 44(2).

38 The appeal was submitted to the High Court, which did not follow the rules of procedure provided under Law 5 because a lawsuit based on tort is not considered as a competition issue.

39 The Central Jakarta District Court in the appeal of DTT and Bhakti overturned the decision by the KPPU. The two challenges were registered as two separate cases, but with the same panel of judges and the panel decided on the same day. The South Jakarta District Court in its decision also overturned the KPPU decision in the appeal of Jimmy Masrin, Alpha, Holdiko and Trimegah. In the appeal at the South Jakarta District Court, there were two panels of judges, but all had decided on the same day. The first panel examined the appeal from Alpha, Holdiko and Cipta. The other panel of judges examined the appeal from Jimmy Masrin and Trimegah. The West Jakarta District Court in its decision also overturned the KPPU decision in the appeal of Pranata Hajadi.

40 In this respect, the District Courts were acting like the Supreme Court when a case is appealed.

41 Under Indonesian Law, a decision by a Court has to have an '*irah-irah*' in the heading. Not all institutions may use this *irah-irah* unless it is provided under a particular legal provision.

42 The appeal against DTT, Supreme Court Decision No. 01K/KPPU/2002; The appeal against Bhakti, Supreme Court Decision No. 02K/KPPU/2002; The appeal against Jimmy Masrin, Supreme Court Decision No. 03K/KPPU/2002; The appeal against Pranata Hajadi, Supreme Court Decision No. 04K/KPPU/2002; The appeal against Cipta, Supreme Court Decision No. 05K/KPPU/2002; The appeal against Holdiko, Supreme Court Decision No. 06K/KPPU/2002; The appeal against Trimegah, Supreme Court Decision No. 07K/KPPU/2002; The appeal against Alpha, Supreme Court Decision No. 08K/KPPU/2002.

43 The Supreme Court was referring to Law 5 of 1999 which does not mention the *irah-irah* and concluded that the KPPU is not a judicial body or even quasi-judicial body.