

COMPETITION LAW AND POLICY IN INDONESIA

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INTRODUCTION.....	1
PART I BACKGROUND OF COMPETITION LAW.....	2
A. CULTURAL AND HISTORICAL ASPECT OF COMPETITION LAW.....	2
1. Trapped in Harmony.....	2
2. Understanding the cultural dynamics of Indonesian business competition.....	3
a. The structural-historic approach.....	3
1. Pre - colonial era.....	3
2. Colonial period.....	4
3. Post – colonial era.....	6
3. Power, structure and culture.....	8
B. COMPETITION LAW AND OTHER ECONOMICS LAW...	9
1. Competition Law in Indonesia.....	9
2. Business Competition Problems in Indonesia.....	10
3. How Government Policies Affects Business Competition, a Study on a Number of Industries as examples.....	15
a. Cement.....	16
b. Flat Glass Industry.....	18
c. BULOG Monopoly.....	19
4. Consumer Protection & Competition Policy.....	22
5. Recent Reform.....	23
C. HISTORICAL DEVELOPMENT OF COMPETITION LAW..	25
1. Introduction.....	25
2. Fragmented Regulating.....	25
3. Business Competition Problems Presented before the Court of Law.....	29
4. Interesting issue on the drafting process of the Law.....	29
D. GLOBAL COMPETITION AND OPEN ECONOMY : THE INDONESIA STORY.....	30
I. Global Competition and the liberalization of Indonesian Economy.....	30
II. Indonesia’s involvement in AFTA (ASEAN Free Trade Area).....	32
III. Asia Pacific Economic Cooperation.....	33
1. Current Status.....	34
2. Individual Actions.....	34
IV. World Trade Organization.....	37
V. Other Institutions.....	40
PART II GENERAL OUTLINE OF LAW No. 5 YEAR 1999.....	41

A. BACKGROUND OF BUSINESS COMPETITION LAWS IN INDONESIA.....	41
B. ESSENTIAL CONTENTS OF THE BUSINESS COMPETITION LAW.....	43
C. GENERAL CONTENT MATTER OF THE LAW.....	44
D. PROHIBITED AGREEMENTS.....	45
1. Concept of Agreement According to Law No. 5 of 1999.....	46
2. Types of agreements prohibited by Law No. 5 of 1999.....	47
E. EXEMPTED AGREEMENTS.....	48
1. Exemption From All Provisions of Law No. 5/1999.....	48
F. PROHIBITED ACTIVITIES.....	49
1. Merger Prohibitions.....	49
2. Monopoly.....	49
3. Monopsony.....	50
4. Market Share Control.....	50
5. Selling Below Cost.....	50
6. Conspiracies.....	51
G. EXEMPTIONS IN LAW NO. 5 OF 1999.....	52
1. Franchise.....	52
2. Patent.....	52
REFERENCES.....	66

COUNTRY REPORT

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Introduction

The adoption of Law No. 5 of 1999 concerning the Prohibition of Antimonopoly and Unfair Business Practices and the establishment of the Supervisory Commission for Business Competition (KPPU) as the Indonesian Antimonopoly Authority have marked serious efforts of Indonesian government to conduct structural reform towards competition regime in Indonesia.

To date, the government i.e. the Commission still conducts continuous consolidation to establish competition guidelines and has initiated efforts to examine public complaints. The author believes that this is a good start to the future Indonesian competition law regime.

This paper explains briefly about the profile of business competition in Indonesia. The discussion will begin from the cultural and historical aspect in order to explain the competition law concept in the mind of many Indonesian, and later move forward to the discussion about the business competition itself, including its relationship with other legal regime. Due to the data constrain, most of discussion in this paper will mainly use data prior year 1998, and discussion will be limited mainly into manufacturing sector that more likely suffer from anti-competitive conduct. This paper will also take a glance to the current development of competition law and policy in Indonesia as well as its impact to the market. Further, it will also try to discuss the role of international agency to the development of competition policy in Indonesia.

PART I

BACKGROUND OF COMPETITION LAW

A. CULTURAL AND HISTORICAL ASPECT OF COMPETITION LAW

1. Trapped in harmony

“The people of Indonesia are well known for the underpinning of the value of togetherness and harmony in their culture. Mutuality, co-operation, and willingness to share are highly valued. Therefore, the word competition became an uncommon and regarded as the contraposition of togetherness. Competition is seen as an act oriented to benefiting oneself solely, that a competing individual would pursue any possible opportunity, disregarding its ethical value, to increase one’s own personal welfare and personal satisfaction.”

The argument of conflicting value, between the value of competition and the value of togetherness and harmony, are widely used in many writings that trying to describe the cultural background of the business competition analysis in Indonesia. The high value of tight relationships between the components within the community, bring them to an assumption that one should suppress the value of competition and nurture the value of togetherness and harmony to sustain its existence in equilibrium. Does it provide the root cause for the low appreciation towards competition in the way Indonesian business society conducts its business activity? Does this binary opposition model provide reliable explanation why the value of competition is not a guiding principle in Indonesian business culture and ethics? If this method of analysis is used in finding the assumptions for the solution, then turning things around could simply solve the problem that is initiation of changes for a social and cultural transformation from the communitarian oriented to individualist oriented society. Unfortunately, the empirical facts do not support this argument. Urban-Industrialist economy should have had a higher level of competition than rural-agricultural economy. Nevertheless, empirical studies showed that Indonesian manufacturing industry heavily concentrated towards oligopolistic structure.

The author believes that the binary opposition of values to evaluate culture is far too simplistic to model a culture. Culture is not a static, and linear concept. It is a dynamic

system of values that works as the mode of human decisions and behavior both individually and socially. These values do not live in an empty space. Their dynamics are products of adaptation to human needs and wants, interactions and communications, social and other environmental structure, and human's moral, emotional, and cognitive capacity.

2. Understanding the cultural dynamics of Indonesian business competition.

a. The structural-historic approach.

The relationship between social structure and values is similar to the cycle between meanings and reality. The two variables are interrelated in inter-causalities. Meanings are constructed for the abstraction of the experienced reality; therefore reality is the source of meaning. On the other hand, individuals produce reality through behavior that is based on their value judgment. In the study of philosophy this refer to the hermeneutic cycle.

The analog implies to the interrelation between structure and value. Obviously, social and other human generated institutions are an abstraction of patterns from patterns of individual actions. Therefore, every human generated systems, or structure founded on a system of value. In turn, the needs, and the living fields of the individual play a role in the way they judge values. This interrelationship is a dynamic concept, as its components are actively and adaptively changes. Thus it would be worthwhile to take a glance at the history of the interrelations between socio-economic structure of Indonesia and the guiding principles in its business and economic environment.

1. Pre-colonial era.

Historians categorize the typology of Indonesian pre-colonial empires into the maritime empires and agricultural empires, based on its main economic activity and geographical location. In the maritime empires, trading was the center of its economy. Known as spices producers, a highly prized product at that time, they were part of intercontinental trading network. Merchants became the commanding class in economic activity. As

trader they maximize profit by maximizing exports and minimizing imports. The royals live from the tax of the trade. With the monolithic structure, the royal family owned a monopoly of political power over the ports and the area where the products came from. They gave concessions for certain merchants for the extraction of certain products, docking activities, trading fleet, and later on the concession for plantation activities. The acquired money was then being invested in the expansion of marine territory. The greater nautical territory would benefit the concessionaire, since all of the transport of traded goods aboard the sea carrier. This pattern of power-capital mutual relation is the archaic trace of patron-client relationship in Indonesian economy. This is widely known as mercantilism, often portrayed as the archaic capitalism.

In the agricultural empires existed a slightly different variant of patron-client relationship. With feudalistic hierarchy, the king had his royal kin as subordinates, controlling the area as well as the production activities. They are the trace of the earlier form of capitalist- bureaucrats in Indonesian history. In this economy, the merchants served the official in the trading of mining and agricultural product. Compared with maritime empires their alliance were tighter, with the merchants obtain less political power. The merchants occupied a subordinate position to the royals. The economic structure under this variant of mercantilism may vary, but the patronism and monopolization remained the same.

2. Colonial period

The early arrival of western trading companies did not bring substantial changes. But they came not only with the pursuit of economic profit, but also with the pursuit of glory and conquest. They did not share the respect and political subordination to the king like their local partners. Once they had the access to the local producers, royal tax cut to much of their profits. These big national trading companies then forced the local royalties to share the political and economic power under a strategic alliance. Whereas the local ruler did not bow down to their demand, they would start local dispute and use military solution. But the economic rule of the game did not change. Only there was a big new player around.

The new century marked the fading of trading regime, and the birth of liberal capitalism. The substantial changes occurred in 1800's when VOC as the Dutch sole trading company and moneymaker went broke, due to high level of corruption, and the change of power in the home country. As a sub system institution to the state VOC closed its operation when Netherlands occupied by French. Afterwards, the ports and trading activities formerly monopolized by VOC were opened for free trade. Vast area of land were put under leasing agreements to private enterprises and converted to plantations. In 1811, The Dutch colonial government in Netherlands Indies surrendered under the attack from the English. The English, then, took over. Controlling many areas under its colony, they did not need plantation crops as the Dutch did. Therefore, they imposed land tax scheme to get incoming cash. When the French was defeated in 1814, the English needed an alliance to prevent the birth of new strong empire. Therefore, they arranged the reinstatement of pre-Napoleon regime on the thrown of power. In 1818, the Nederland Indies was reinstated under Dutch Colonial regime. In 1823, the new ruling authority abolished land-leasing system, which was the main source of income for the local royalties. In 1830, the colonial authority produces the policy of *cultuurstelsel*. Plantations with new crops are opened, hence, the state once again obtain the monopoly.

Having seen the impoverishment of local living condition under *cultuurstelsel*, by the end of 1860s, liberalistic arguments succeeded in pushing their agenda to open business activity to private corporations. The access to invest and make a business was open widely, including for local and Chinese business players. Under the liberal orientation in business activity, the local and the Chinese business players were benefited from the opening of the possibility to get into business. Distribution and batik Industry were the rising business in that era. This era was indicated by a fierce competition resulting from high number of business players. They often conducted unfair practices, such as the use of terror as tool to compete with each other. This tends to show the predatory competition behaviour.

These changes, however, did not elevate mot of the people from the exploitation and life impoverishment. The development of humanitarian and socialistic thoughts in the last years of the 19th century built pressure to cease the deprivation of colonized people, not by changing the economic regime, but with the implementation of ethical politics, such

as education, immigration, and irrigation. This policy did not change the highly competitive business as the product of liberalistic economy. In this era, we could see traces of the modern concerted business activities. The local batik producer and distributor have to compete with the Chinese and the Arabs trader, having the control and dominant position in the distribution of imported cloth. In 1914, Islamic trading union were founded and becoming one of the first formal cartel in history of Indonesian business.

The Ideology of liberalism was put under scrutiny with the growth of socialism after Bolsheviks revolution in 1917. The global economic crash in 1930s created a breeding ground for socialism. Numerous labour unions were founded. Its revolutionist approach the new ideology played an important role in the development of contra-colonialism movements. In the 1920s, the effort to strengthen the economy of local people was done with cooperatives scheme as an economic movement.

3. Post-colonial era

Having learned from the liberal-capitalistic economy, predatory competition and high exploitation were viewed as the cause of deprivation and poverty. Therefore, as the guiding principle in economic structure and economic management, Indonesian founding fathers put the value of harmony as the moral of Indonesian economy. “To gain common benefit, not individual benefit, Indonesian Economy is managed under the principle on harmony. Cooperatives are the main mode of Indonesian economy.”

Paradoxically, business was still under the power of few big companies, back from the old colonial days. Moreover, the newly born state needed big source of income to support the struggle against allied military action trying to reinstate the Dutch back to power. The money was acquired from smuggling activities of gold and opium. This is done by certain business players that have close relationships with the man in power.

In 1951, the government produced an Urgent Economic Plan, that contains list of projects to be done to restructure the post colonial economy. Industrialization based on agriculture sector was placed as the focus. However, the business structure was still concentrated on the old few big companies. Furthermore, the government gave several

business players concessions of trading activities to cater government needs. Besides, the argument of restructuring, the clientle businesspersons worked as the moneymaker for the patron, for financing the military operation to put down the military separatist movements.

In 1955 the government produced another 5 years economic plan. Shortly afterward, as the political structure changed into a centralization of power, the prudent approach in administering the budget was long way neglected. In 1957, the nationalism arguments drove the government to take over the ownership of foreign companies, and distributed the equity among its cronies. This was all done under the centralistic-Leninism approach to socialism, due to the closeness of the political regime with the eastern communist countries.

The 1960s economic crisis of Indonesia soon followed by political unrest, and the new regime was in power. Dealing with the economic hardship, the new government seek for aid from IMF and non-communist creditors. The new government dismantled the preference given by the old regime with the abolition of import licensing system. Foreign investments entered Indonesia, following the flows of foreign aid in terms of grants and debts. Once again, the patron client network between the power holder and their closely related partners was established in the end of 1960s. It is due to regulations that oblige the foreign investors to have a local partner in doing their business in Indonesia.

This scheme seemed to work, as the inflation was well under control and the economy began to grow. In 1973, the oil price increased and provided the government a huge windfall profit, which lasted for 10 years. During this period of prosperity, the nationalistic argument once again commands the direction of industrialization process. Import substitution arguments were used by the government to promote the growth of local manufacturing industry and protecting it from foreign competitors. Yet again, the very few closely related to political power business actors gain the most of this industrialization policy. Several high scale and capital intensive manufacturing industry, including oil processing industry and petrochemical manufacturing were introduced in this period.

In 1984, oil price decreased sharply, marking the end of the black gold era. The government made the adjustment in its industrialization strategy with export orientation. The liberalization process reshaped the whole face of Indonesian economy in its pursue towards efficiency and growth. The liberalization not only changed the real sector; tax and tariff structure, export and import procedure, investment procedure, trade regulations, and procurement scheme; but also the monetary sector.

Current studies in manufacturing industry showed that the liberalization policy regime in the 80s created a concentrated oligopolistic structure. The Industrial policy, with infant industry argument, protected local manufacturing industry, expecting that it would be able to compete internationally in the long run. The non-existing clear implementation schedule became the disincentive for the protected industry to gain economic of scale efficiency as expected in the policy's blueprint. The protection was received in the form of special treatments on the imports of their inputs and the placement of import barrier on their competing products. In early 1990s, these companies had grown into mega companies. Most of their products are marketed in domestic markets. The export level did not get to the expected measures. These products also depended on the imports for their inputs. These policy failures drove Indonesia to high macroeconomic inefficiency, concentrated market, and high disparity level of Income. The existence of patron-client social relationship made things worse to a rent seeking society, particularly the owner of political power and the people with access to the policy makers and the decision makers.

3. Power, structure and culture

Throughout the history of Indonesian economy we have seen the sustainable resurrection of patron-client relationship, between the possessor of political power with the economic lords through the network of crony and family. We have seen how this relationship evolves through time. It changes, adapting to its current objective conditions.

The dynamics of cultural system, as it consist of sets of modes and values hidden beneath the surface day-to-day appearances, evolves in a lot slower rate than the dynamics of the social and economic system. Hence, we would be able to comprehend the recurrence of patron-client-relationship in Indonesian history. The absolute conception of power in the patrimonial system could be suspected as the survival mode

of patronism in Indonesia. Absolutism will create a monolithic structure with centralized power allocation. Inequalities on resource allocation due to this unbalanced structure, is the necessary motives for the existence on clientage relationship.

In the management of power, including its maintenance and extension, the patron will need to capitalize its power-originated resources. Most of the big scale businesses are the extension of the patron's power management financing activity. The personal relationship with the patron will gain access to the clients to be 'promoted' to be the patron's business agents. Under this relationship scheme, the ability to adjust personal attire to meet the personal needs of the patron is the necessary qualification to gain access to economic resources rather than its professional capacity and performance.

Eventually, the patron's business agents grow into giants, under the nourishment and protection of the patron. This system heavily emphasized on favoritism, and not on merit would be replicated within the monolithical social structure, creating layers of patron-client relationships on political and economic activity. Once this pattern institutionalized in the social system, the favoritism will encourage the individuals to nourish the subordinative value to gain access to economic resource. There will be a disincentive for maintaining and fostering the value based on the working ethics and the value of fair competition. This institutionalized value able to sustain its existence through all of the changes of the surface structure. The patron clientage based social structure and all of its underlying assumptions as the super system of the business ethics needs to be deconstructed in order to create a breeding ground and the necessary condition to engineer the creation of incentives to business culture based on competitive ethics.

B. COMPETITION LAW AND OTHER ECONOMICS LAW

1. Competition Law in Indonesia

Prior to the enactment of Law No. 5 of 1999 concerning the Prohibition on Monopolistic Practice and Unfair Business Competition ("Anti Monopoly Law"), the government did not give much attention to the development of competition legal regime. In 1980's internal discussions on competition and consumer protection were conducted several times among officials within the Department of Industry including a bill of legislation

and regulation on competition and consumer protection. Yet, there was no comprehensive legal regime adopted. It is an undoubted fact that the government's policies in conducting its usual affairs, especially in the process of managing the country's economy, have brought many significant effects into the aspect of business competition.

Analyzing competition policies prior to the enactment of the Anti Monopoly Law, we have to classify the policies into two major categories. *First*, policies that form a comprehensive Anti Monopoly Law. However, since such law did not exist at that time, laws which falls within the category of framework policy are legislations that incorporate analysis certain aspect of business competition, such as Law No. 5 of 1984 on Industry, Law No. 1 of 1995 on Limited Liability Companies¹.

The second category is any government policy that has an impact, whether directly or indirectly, on sectoral policies without necessarily laying down a legal framework. This type of policy may directly or indirectly contain regulations regarding business competition norms in its articles. In this category the policies are usually in the form of government policies on trade and industry, e.g. an imposition of tariffs and non tariffs on imported products or other government policies that aiming to grant exclusive licenses to business persons and to restrict the entry of other business persons into a particular industry in order to provide an opportunity for such industry to grow without any competition which may hinder its development, and also through state monopolies by reason of the strategic significance of such industry. In addition, technical competition policies may be used, such as market allocation and price fixing by the government.

2. Business Competition Problems in Indonesia

Shauki (1999)² identified three kinds of anti-competitive actions that occur most in Indonesia. The first are anti-competitive actions conducted by businesspersons as a strategy to destroy its competitors, such as vertical integration, resale price maintenance, and market allocation. The second are anti-competitive actions conducted by

¹ Regulations which governs Business Competition will be discussed in the next chapter on Historical Development of Competition Law.

² Shauki, Ahmad, Competition Problem in Indonesia, paper, unpublished, p. 2 and his other publications.

businesspersons with the consent of the government, including cartel like conducts through associations, and monopoly rights granted to individual persons. The last kind of anti-competitive acts are those that are conducted in providing of governmental needs, and state owned enterprises (BUMN) supplies through collusion³.

Shaiki further states that anti-competitive act which most often prevails in business competition in Indonesia results from the second and third category from the above classification. In his opinion most of the anti-competitive actions undertaken by the private sector are made possible by the consent of the government, for instance by granting monopoly rights to members of families and cronies, or government support in price fixing or market allocation.

This can be better illustrated if the analysis also pays close attention to the government's management pattern in the previous administration. The government has positioned itself as the center for every form of decision-making including those related to economic activities. Seen from the viewpoint of business competition, the role played by the government is not limited to determine the policies and priorities of macro economic development but also the mechanics of market operation through sectoral competition policies.

Ideally, every policy containing sectoral competition policy has to be formulated according to the guideline of competition law framework that serve as a reference for policies adopted. The framework functions by providing references on the consequences which may arise as a result of such policy. The reason is that sectoral competition policies are policies which affects market mechanics, and if they are not carefully implemented, such policies will have the potential of creating distortions in the market, which will eliminate the original objective of the government's involvement.

The implementation of a competition law framework itself has serious problems, namely the absence of a regulation that can comprehensively represent it, such regulation would practically be unable to serve as a guideline which can provide criterion to decision makers as reference to component of competition.

³ For more comprehensive discussion about sources of uncompetitive behavior see also, Prayoga et.al. *Persaingan Usaha dan Hukum yang mengaturnya di Indonesia*, ELIPS Project, 2000.

It contains materials that are too general in nature, thus eliminating the probability of their application by economic policy makers. An example is Law No. 5 of 1984 concerning Industry which only lays the basic principles of fair competition, such as for promoting fair and just competition and preventing dishonest competition, and preventing the centralization or control of industries, which implementation is not further regulated. Another example is the regulation concerning Mergers, Acquisitions and Consolidations in Law No. 1 of 1995 concerning Limited Liability Companies.

Having mentioned the laws above, it is not surprising that the competition problems which occurs in Indonesia is practically dominated by the high level of market concentration with a history of government intervention⁴. The imbalance in the basic framework of competition has caused most of the government's intervention to be uncontrolled and applied inconsistently which results in the deviation from the original objective of such intervention. The protections and exclusive concessions given to certain industries has resulted more in the creation of new conglomerates than developing a competitive industry. Shauki (1999) has mapped the source of business competition problems in industries which were selected by extraction from a list developed by Fane and Condon (1996).

Table 1
Several Sources of Competition Problems on Selected Manufacture Industries

ISIC	Industry	Government		Private
		Import Protection	Industrial Policy	Anti competitive conducts
31121	Powdered, condensed and preserved milk	Yes	Yes	-
31122	Milk	Yes	Yes	-
31159	Cooking oil and fat made of vegetables and animal	-	Yes	-
33111	Sawmills	-	Yes	Yes
33113	Plywood	Yes	Yes	Yes
38431	Motor vehicles	Yes	Yes	-
38441	Motor cycle and motorized tricycles	-	Yes	-

⁴ Shauki, on Brazier, et. Al. Ed. "*Undang-Undang Antimonopoli Indonesia & Dampaknya terhadap Usaha Kecil dan Menengah*" The Asia Foundation, 1999.

38490	Other transport equipments n.e.c	Yes	Yes	-
36310	Cement	-	Yes	Yes
38131	Fabricated metal products	Yes	Yes	-
35121	Natural fertilizer / non synthetic	-	-	-
37101	Iron and steel basic industries	Yes	yes	-
35600	Plastic wares	Yes	-	-
31168	Wheat flour	Yes	Yes	-
31171	Macaroni, spaghetti, and noodle	Yes	-	Yes
31420	Clove cigarettes	Yes	Yes	-
35511	Tire and inner tubes	Yes	-	-

Source: Shauki, the Role of the Commission for Fair Competition in the Anti Monopoly Law & Its Impact on Small and Medium Scale Enterprises, Brazier, et.al. The Asia Foundation, 1999.

Table one shows that prior to 1998 there is a correlation between business competition and the government's role in the market. It can further be seen the existence of an dependency of the anti-competitive acts taken by the private bodies on the variables issued by the government. There are no anti-competitive acts taken by business persons that are not being complemented by government intervention in the relevant market. This fact strengthens the argument that the government is the major contributor to market distortion in Indonesia.

In general, the form of government intervention in the area of industry can be categorized into several forms⁵:

1. Competition restrictions in certain industries by creating entry obstacles for domestic companies. Included in this category are policies which reserves a portion of or the whole market for small businesses, cooperatives, BUMN, or other groups. This includes open and disguised restrictions on domestic investment: although an industry is listed as a negative industry, it may be difficult or it may be extremely expensive to obtain BKPM approval for a project.
2. The government's effort the protect domestic industries from competition brought on by foreign companies through the introduction of tariffs and non tariff obstacles for imported products, and also by hampering foreign investment.

⁵ Shauki, *op.cit.* p.42

3. Taxes and price control on various goods have also hindered competition. For example, in the clove cigarette industry, companies of different sizes have to pay different amounts of duties, which in turn will cause different prices to be set.⁶

Having measured the concentration in industries with 5 digits ISIC levels, it is apparent that there has been fluctuations in the concentration level of such markets. In 1980, the average CR4 ratio is 63%, but in 1985 the level of concentration fell to 32% and bounced up to 54% in 1995. A more deeper examination shows that the number of industries with concentration ratios of more than 90% have increased from 13% in 1985 to 56% in 1985.

An analysis on the manufacturing sector in Indonesia indicates that the concentration ratio for capital and durable consumer goods are high. The level of concentration level for ISIC 37 and 38 industries such as metals, electrical goods, and transportation are all above 60%. Concentration ratio is also high for input goods between technologies with dense capital such as chemicals, and fossil oils⁷.

Table 2
Concentration Level, government protection, and competition problems in Industries having problems in Market Concentration Levels

ISIC	INDUSTRY	CR4 - 1985	CR4-1995	ERP '87	ERP '95	Competition problem <'98
31131	Canned fruits and Vegetables	35.37	88.56	-30	-21	
31159	Cooking oil and fat made of vegetables and animal	96.8	100.00	-15	7	Vertical integration
31191	Chocolate powder	28.36	79.58	112	7	
31420	Clove cigarettes	51.90	81.08	600	123	entry regulated
32140	Carpets and rugs	82.55	81.14	12	-7	
33230	Other furniture and fixture n.e.c	99.86	87.99	Na	Na	
35295	Matches	100.00	76.54	15	2	
35511	Tire and inner tubes	76.62	85.36	600	600	
36211	Glass products for household purpose	84.92	61.18	111	5	
37101	Iron and steel basic industries	65.26	94.95	7	6	Distribution control
38112	Hand tools and cutlery	87.37	82.62	93	68	

⁶ The existence of this policy is the main reason that explain on why the clove cigarette in consumer level cannot induce the clove monopoly.

⁷ Shauki. *Op.cit.* p.41

ISIC	INDUSTRY	CR4 - 1985	CR4-1995	ERP '87	ERP '95	Competition problem <'98
38199	Products of metal n.e.c	38.70	68.14	19	36	
38321	Radio, television, and consumer electronics	40.26	65.75	70	51	
38392	Dry cell batteries	56.83	92.62	600	3	
38443	Bicycle and tricycles	98.03	77.08	86	27	
38113	Kitchen ware made of aluminum	49.50	58.33	93	68	
39021	Traditional musical instruments	99.85	100.00	108	77	
39030	Sporting and athletics goods	63.79	70.60	56	-3	
35231	Soap and cleaning preparations	57.48	68.95	88	386	
31241	Soya sauce	60.91	58.27	-45	25	
31410	Tobacco and processed tobacco	30.28	80.68	14	8	
31111	Slaughtering	100.00	99.87	49	195	
31112	Processing and preserving of meat	72.23	65.88	600	-1	
31121	Powdered, condensed and preserved milk	79.20	68.53	600	99	Local content
31122	Milk	78.48	100.00	600	99	Local content
31168	Wheat flour	100	99.98	600	-47	entry restriction, monopoly
31171	Macaroni, spaghetti, and noodle	69.75	96.10	34	143	Vertical integration
31222	Processed coffee	35.34	77.11	144	-1	
31242	Tempe	85.34	100.00	-45	25	BULOG monopoly of soybean
31261	Prepared food spices	90.58	77.21	43	21	
31310	Liquors	92.52	88.57	90	74	
31320	Wines and its similar products	98.08	92.80	90	74	
31330	Malt	80.68	98.00	90	74	
31430	White cigarettes	99.28	93.35	600	123	entry restricted
31490	Other tobacco	48.57	93.33	14	8	
32123	Gunny bags	74.09	84.12	na	na	
32151	Rope, twine	59.35	67.61	12	-6	
34112	Cultural papers	53.45	69.83	516	18	
34113	Industrial papers	36.87	90.12	516	18	
35110	Basic chemical except fertilizer	85.22	73.21	-5	11	
35121	Natural fertilizer / non syntethic	49.70	74.83	56	-20	entry restriction, price control
35141	Pesticides raw materials	77.44	100.00	56	11	
35223	Herbal medicine preparation	67.21	75.79	Na	-7	
35224	Herbal medicine	48.87	82.12	Na	-7	
35299	Chemical n.e.c	50.51	91.58	15	2	
36110	Ceramic and porcelain	100.00	66.94	600	41	
36221	Sheet glass	60.83	90.90	111	5	

ISIC	INDUSTRY	CR4 - 1985	CR4-1995	ERP '87	ERP '95	Competition problem <'98
36310	Cement	39.57	61.68	138	-12	entry restriction, price setting, distribution control
38131	Fabricated metal products	21.25	71.41	135	73	local content
38330	Household electronic appliances	43.54	91.02	600	14	
38411	Ship/boats	77.87	82.43	-7	2	import restriction
38431	Motor vehicles	74.06	94.84	428	600	local content
38441	Motor cycle and motorized tricycles	80.00	100.00	600	0	local content
38490	Other transport equipments n.e.c	100.00	100.00	86	27	local content
38511	Professional equipments	55.58	62.18	3	-4	
39011	Jewelry	56.21	99.24	96	-1	

Source: BPS, Large and Medium Manufacturing Statistic
Fane and Condon (1996) in Shauki 1998, processed

3. How Government Policies Affects Business Competition, a Study on a Number of Industries as examples

To support the discussion on the government's role in competition problems in Indonesia, the following section will try to explain how the government through its policies conducts interventions on the market structure. It will also try to explain the motivation of such interventions, and also to examine price fixing and consumer protection created out of such policies.

a. Cement

The cement industry in Indonesia is a highly regulated industry, to which access was once prohibited through a Negative List for Investment (DNI) before such prohibition was finally lifted through deregulation by Presidential Decree No. 54/1993. The market is also full of rules which governs competition, such as market allocation and price fixing.

Cement is an industry that is considered as strategic in Indonesia. The cement industry has a natural characteristics of the economies of scale. The whole process of cement production, from selecting the factory location, production stages, and especially the distribution, is heavily affected by operation scale considerations. To operate efficiently,

the production and distribution have to be conducted massively. This fact is reflected from the concentration level of the cement market which reached 82% in 1993, and 61.68% in 1995, and in 1998 the biggest company in the industry controlled 28% of the industry's capacity⁸.

Considering the large significance being put on the distribution cost factor, the price of cement for consumers relies heavily on the mode of transportation used for distribution, since cement factories cannot be built on just any location. Consequently, distribution to consumers becomes a major problem in the cement industry. Regions which do not have a cement factory, such as Eastern Indonesia, have to pay a higher price compared to those which owns one. The geographical conditions of such regions make it impossible to build a cement factory, so that cement have to transported from other islands which have cement factories.

Regarding those reasoning the government conducted intervention on the market by introducing market allocation mechanism to each of the producers which are determined by negotiations in monthly meetings attended by representatives from the Ministry of Industry and Trade, Ministry of Communications and the Indonesian Cement Association (ASI). The quota is determined based on factories location, production capacity, and the condition of the cement market in the region. The purpose of this arrangement of distribution and quota was to assure cement supply and stock in every province at a relatively stable price. The cooperation between producers and the government in establishing regulations for distribution has created an agreement similar to a cartel, in which competition among producers are arranged.

Market allocation was first applied through Decree of the Minister of Trade No. 49/KP/II/1974, dated 6 February 1974, the material of which, among others, 1) determine the cement supplier, whether for cement produced in the country or abroad, 2) determine the distribution ratio for import quotas, 3) determine the division of the marketing area groups for cement, whether imported or produced locally, into 7

⁸ "Prospek Industri Semen pada Era Krisis", Indonesian Commercial Newsletter NO. 250 PT Data Consult Inc., Jakarta 24 October 1998, 8-24 and other data

marketing areas; 4) the appointment of distributors by the Minister of Trade and the appointment of retail sellers by the distributor.

Furthermore, in order to maintain the stability of cement price in the country, the government has established pegged pricing system with Maximum Retail Price (HET) system, the price is monitored at all times to ensure that the price of cement on the market is within reasonable range. The government originally set the price of Rp.1.650/bag on 17 February 1974. And by Ministry of Trade Decree No. 319/KP/IV/1979 later the HET system is changed into Local Price Standard (*Harga Patokan Setempat-HPS*) system, which even though provide guided price system to the retailer, it still does not provide sufficient binding power to retailer to adhere to such limit since it was only a guidance.

The basic idea of market intervention by government was to achieve public welfare in order to provide consumer with sufficient and affordable supply of commodities. Price fixing and market allocation policies was viewed as cross subsidy policies from consumer in producing region to non-producing region. Consumer protection idea was identifiable, where consumer rights to obtain goods in competitive price is focus of the government in establishing their cement policy.

However, in practice, such good faith is distorted by anti-competitive conduct by the Indonesian Cement Association (*Asosiasi Semen Indonesia-ASI*) who was operating as producer cartel. Prior the revocation of HPS system on 1997 through Ministry of Industry and Trade Decree No.403/MPP/Kep/II/1997 ASI's role toward the hike of cement price every year was substantial. Government could not refuse ASI's proposal to increase HPS price, in addition that there must be short of cement supply every year. Thus, the role of government practically has solely become the endorser of ASI's policy. Moreover, market allocation has also promoted the establishment of barrier to entry to cement industry.

This practice can be traced back from the early development of cement industry. Prior mid-70's ASI has established comprehensive system of market allocation system for cement industry. Every year ASI allocates specific quota of production and rights to certain geographical market area to each of its member, that later helps them to establish regional market.

b. Flat Glass Industry ⁹

During mid 80's, government has initiated a step-by-step action to deregulate flat glass industries. The government firstly enabled new players enter the industry. At the end of 80's government has lowered tariff into 25% on 1995 and later become 5% in 1997. Such deregulation has invited new investors in this industry. The biggest new company was owned by Mitra Asahimas (Rodamas Group). Later Asahimas and Rodamas Group were merging into one company on 1991. Thus, up to 1991 this industry was dominated by Asahimas that has more than 90% market share.

Muliaglass (a construction based industry conglomerate) started to build their own flat glass factory in 1989 and has roll into production by December 1992. Muliaglass has captivated 30% of domestic flat glass market share by three years after its firstly operated, mainly by acquire Asahimas share, which falls from 90% in 1991 to 60% in 1995.

c. BULOG Monopoly

State Logistic Agency (BULOG) is government body, which handled food distribution. The existence of BULOG is an inherent part of President Soeharto known as New Order strategy to stabilize and ensure the continuity of national food supply¹⁰. Basic idea of this exclusive monopoly is to provide people with subsidized food.

In its development BULOG also is granted monopoly of many major food material, which known as nine major food material consisting of rice, flour, sugar, garlic, soy bean, cooking oil, and others. BULOG role is very significant to small income citizen, since it

⁹ Loughlin, et.al. "Indonesian Competition Policy Report", ELIPS Project, 1999, p. 29

¹⁰ BULOG obtain his fist exclusive rights based on Keppres no. 114/U/1967

provides subsidy whenever fluctuation in market price exists which usually occurs periodically in every religious holiday, where food usually vanish from the market, and the price is hiking significantly. At that time, BULOG will present there as buffer which will provide additional food supply from its food stock to avoid further price hike. Through program known as Market Operation Mechanism BULOG also provides direct access for public to buy food supplies.

It was clear that BULOG monopoly was one of government intervention that could distort the market concerned. However, this policy was supposedly based on public welfare reason, while ensure the sustainability of food supply to the public BULOG also plays role to protecting public from harmful conduct by business actor who usually on the based of rent-seeking motive accumulate their food stock and retain it until the price hike.

One of the most popular market distortion was caused by BULOG monopoly over wheat flour. It resulted in distortion in instant noodle industry that is used as its major inputs for the production process.

This was due to condition that all major companies in flour industry and instant noodles industry were owned by Indonesian conglomerates Salim Group. Salim group enter the flour milling business on 1969, when they obtained exclusive milling rights from BULOG. Later they expand their instant noodles industry by establishing PT Sarimi Asli Jaya on 1982 with Sarimi brand.

It was interesting to take Loughen et.al statement, that before deregulation of wheat flour, Bogasari may have been earning excess profits on its milling of wheat flour in its resale to Bulog. All noodle producers purchasing wheat flour from Bulog, including the Salim Group, had to pay the same price. To the extent the Salim Group profited on the sales to Bulog, it therefore had achieved a lower net price of the key ingredient, wheat flour: the more wheat flour that Indofood used, the more wheat that could be profitably imported

and processed by Bogasari. The Salim Group's cost advantage may have allowed it to sell more noodles by lowering price and gaining sales.¹¹.

Flour industry is a very concentrated industry, only few business actor play in this field, this was due to limited entry provided by government to enter milling business during 1971 to 1993, in complement to BULOG import and distribution monopoly. Since BULOG does not have their own milling facility they appoint Bogasari as flour milling subcontractor. Along with Bogasari, was also appointed PT Berdikari, which was owned by former President Soeharto relatives. The latter was taken over its management to Bogasari. Flour that had been milled is sell back to BULOG with price which have include the component of wheat component, milling component and milling fee.

Access to milling industry was restricted since 1971 through Negative Investment List mechanism, and opened later in 1993, with relatively unreasonable requirements, i.e. obligation to the new investor to export 65% of their product. Until 1998, government also pegged the flour price including the milling fee component through Ministry of Finance decree.

Concentration in flour milling industry shows significant concentration rate. In 1990 concentration rate is close to 100%, while after 1993 deregulation the concentration is decreased into 99,98% on 1995 and keep decreasing to 99.03% in 1997.

Domination in milling industry brings direct advantage to Salim's Group Instant noodles division. Even though the vertical integration chain is limited by Ministry of Finance who established fixed price component, however we should note on how the system to establishes such price works.

People believe that there was nobody outside Bogasari knows actual milling cost by Bogasari. As the result, Bogasari could claim milling fee higher than its actual cost. Bogasari was also believed to be one of big and efficient company. Simply by establishing price just above other most efficient competitors, Bogasari has secure profit

¹¹ Loughlin, et. al *op.cit.* p. 38

from its large scale activities¹². Moreover, having this connected to previous preposition, there were big possibilities that such profit might be transferred by Salim Group to subsidize its Instant Noodles industry.

One source suggested that Indofood domination has been very significant in instant noodles industry. In 1975, CR4 of such industry was only 44%, and it rose to 75% on 1985, and later it skyrocketed into 96% in 1995. In 1997, Indofood also own 76,1% of planted capacity of all instant noodle industry. Salim group also integrated their business by acquiring distribution line of its own industry. Indomarco, along with other 4 Salim group subsidiaries distribute 75% from net sales of Indofood group, including instant noodles and other Salim's food processed products, i.e. Bimoli cooking oil, Indomilk milk product, and others¹³.

It can be said that BULOG monopoly has distorted the market substantially, however the fact is not self explaining that the monopoly is on the price of neglected public interest as consumer. In fact, in some cases the presence of BULOG is quite helpful despite of its inefficiency.

¹² *ibid*, p.37

¹³ Working Paper Research *Survey on Major Market-Pasar Mie Instant*, Partnership for Business Competition, 2000

Table 3.
Some Company with more than 30% Market Share

Product	Main Player	Company Group/ Owner	Brand	Market Share
Cooking Oil	PT Intiboga Sejahtera	Grup Salim/Liem Sioe Liong	Bimoli	60%
	PT Smart	Grup Sinar Mas/ Eka Tjipta Widjaya	Filma	30%
Instant Noodles	PT Indofood Sukses Makmur	Grup Salim	Indomie, Supermie, Sarimi	90%
Wheat Flour	PT Bogasari Flour Mills	Grup Salim	Segitiga Biru	90%
Mineral water	PT Aqua Golden Miss.	PT Tirta Investama/ Alm. Tirta Utomo	Aqua	83,7%
Soft drink	PT Coca-Cola Tirtalina Bottling Company	Grup Teknik Umum	Coca-Cola	40,9%
Detergen	PT Unilever Indonesia	Unilever	Rinso	58,9%
Instan Coffee	PT Santos Jaya Abadi	n/a	Kapal Api	50%
Cigarettes	PT Gudang Garam	Surya Wonowidjojo	Gudang Garam	43%
	PT BAT Indonesia	British American Tobacco Company		48,5%
	(Rokok Filter)		Ardath, 555, Commodore,	
	(Rokok Putih)		Lucky Strike	
Fast Food	PT Fastfood Indonesia	Grup Gelael	Kentucky Fried Chicken (KFC)	44,9%
Retail	PT Matahari Putra Prima	Grup Matahari/Hari Darmawan	Matahari Dept. Store	40%
Paper	PT Tjiwi Kimia	Grup Sinar Mas	Sinar Dunia	45%
Cement	PT Indocement Tungal Prakarsa	Grup Salim	Tiga Roda	40,8%
Tyres	PT Gajah Tunggal	Grup Gajah Tunggal/ Sjamsul Nursalim	GT Radial	47,8%
Flat Glass	PT Asahimas Flat Glass Co.	Grup Roda Mas	Asahi Glass	65%
Lubrication Oil	PT Pertamina	BUMN	Mesran	60,1%
Automotive	PT Astra Motor	Grup Astra	Toyota, Daihatsu, Isuzu, BMW, Peugeot, Nissan Diesel	49,4%

Source: WartaEkonomi: Mingguan Berita Ekonomi & Bisnis, edisi 8 Desember 1998. from various sources, 1992, 1995, 1996, 1997, 1998., taken from Loughen et. al.

4. Consumer Protection & Competition Policy

Prior to 1998, Indonesia has not yet adopted comprehensive consumer protection policy. The sole policy exist was the policy that integrated within sectoral policies, exactly similar to the approach in competition policy. Thus, before 1999, Indonesian consumer protection has following characteristic.

A. Consumer does not have any legal channel.

The absence of such channel has made informal channel established by non-governmental organization in fragmented manner and therefore has become ineffective. Consumer protection Institution-NGO based like Indonesian Consumer Institution Foundation, and the Indonesian Clerics Committee, special division on food and drug

research, usually find difficulties in advocating consumer's problems and complaint. Similarly, on the government side, only Directorate General food and drugs Ministry of Health who is relatively responsive to implement the consumer's protection.

B. Consumer are unorganized.

Due to the absence of comprehensive consumer protection law regime, the consumer is unorganized through empowerment effort. In addition, the absence of law anvil for the activity of Consumer Institution causing the consumer empowerment activities becomes neglected.

C. The inconsistent Government Policy.

The government idea of consumer protection was only in conceptual level, in the mean time, the inconsistency usually founded in the implementation that made the consumer being ignored.

5. Recent Reform

Reform activity has included action to restructure the law framework needed to create a fair competition climate within business environment, such as to enact Law No. 5 Year 1999 regarding Competition Law and the Law No. 8 Year 1999 regarding Consumer Protection. Furthermore, government has gradually undertook follow on reform, mainly to create strong basis to implement competition policy, such as to establish the Supervisory Commission for Business Competition (the Commission) by Presidential Decree No. 75 Year 1999. The Commission currently have issue the rule of procedure to submit claim regarding anti competition behavior; by the Commission Decree No. 05/KPPU/Kep/IX/2000.

In sectoral competition policy level, there are recorded series of significant reform. In November 1997, government has issued a deregulation package, which marks the series of reforms. In Cement industry it is includes elimination of HPS mechanism, and prohibit market. Moreover, government revoked some of BULOG exclusive rights, i.e.

to import wheat grain, soya bean, garlic; and opened import access to general importer¹⁴. Nonetheless, BULOG is still granted some exclusive rights in rice and supervising wheat flour distribution.

In international trade, tariff in all goods which previously subject to 15 to 25% tariff is reduced to 5%. Non-tariff barrier is also decreased by extending the types of goods that can be imported by general importer.

In addition to such policy reform, government has also taken firm measures toward industries which been indicated to have problem in competition conducted by private sector, i.e. to firmly prohibit the price fixing cartel on pulp and paper association, plywood, as well as to revoke Clove Support and Marketing Board monopoly over clove distribution.

Concerning automotive industry, in 1999, government has cut down the Tariff and Luxury Tax for Completely Build Up (CBU) product from 105- 200% to 35 -85%. Tariffs on Complete Knock Down's (CKD), which had ranged from zero to 65 percent, were decreased to 25 percent for almost all vehicle. However, tariff for passenger cars, were only reduced to 35, 40 or 50. These tariff reduction have enabled CBU automotive product to enter domestic market with realistic range of price and could compete with local assembly product. It was interesting to know that, even though the tax and tariff for CBU product is still higher than the CKD, however the importer could compete by providing very competitive price on CBU product on similar class, as well as offer more variety model compared to local assembly product which relatively static and expensive. Hitherto, the negative impact of this policy mostly is the rising rate of car-smuggling, and the more complex problems facing by consumer, including misrepresentation and after sales service.

¹⁴ By law importer are classified into general importer, registered importer, and producer importer. General importer are importer of commodities whose trade is not regulated. Registered import can only import commodities whose trade are regulated. Producer importer is importer of goods only for production purpose.

Government has also eliminated import tariff for sugar and allowed sugar to be imported by general importer in 1999. However, this policy has created trouble with local sugar producer, since imported sugar is cheaper than local sugar, thus make some turbulence in local sugar industry on that time. Thus, government has limited the import license to import producer through Minister of Industry and Trade Decree No. 364/1999.

Series of deregulation conducted by government were aimed to correct direction. Government mainly targeted industry that had indication of competition problems. Unfortunately, there is no significant result can be produced at this end due to limitation of data.

The enactment of Law No. 8 Year 1999 regarding Consumer Protection has also affected the competition policy. Consumer Protection Law has mandated the establishment of two new formal institutions, which will handle the implementation of the law. Those are the National Consumer Protection Body (“the NCPB”) and Consumer Dispute Settlement Body (“the CDSB”)

To the certain extent, the institutional characteristic of those two institutions are relatively similar to the character of the Commission. However, there were not single integration among their tasks, unlike in other countries that competition authority is placed under one roof with the consumer protection authority i.e the Federal Trade Commission in United States , and the Australian Consumer and Competition Commission (“ACCC”) in Australia.

C. HISTORICAL DEVELOPMENT OF COMPETITION LAW

1. Introduction

Prior to the enactment of Law No. 5 of 1999 concerning the Monopolistic Practices Prohibition and Unfair Business Competition, Indonesia virtually has no a comprehensive legal framework that serves as guidelines for Business Competition policies. The concept of Business Competition has been in existence and recognized by

the Indonesian people even since the early preparation of their independence. Having discussed in the previous chapter, the country's founding fathers realized that competition is a part of the modern live, but the model of free fight competition has never been desire to them, since it is feared that such form of competition will render a negative impact on Indonesia's economic development. Accordingly, in its constitution, Indonesia declares that it adopts an economic system which is based on the principle of camaraderie.¹⁵

2. Fragmented Regulating

Prior to the existence of the Competition Law, some of the business competition aspects had already exist in several regulations. However, they were very fragmented and limited to certain sectors. Following are the examples of those regulation.

1. Indonesian Civil Code (ICC)

Article 1365 constitutes the only provision in the ICC which can be made as a basis for protection against Unfair Competition conducted by Business Persons.

In article 1365 it is stated that *“every action which violates the law and creates a detrimental effect on other persons shall oblige the person who has, through his negligence, created such detrimental effect to undertake compensations for damages.”*

Thus, should a businessperson feels that he is being put at a disadvantage by anti competition activities of another business person, he or she can file charges at court for compensations.

Unfortunately, the definition of unlawful action in Indonesia has not been clearly determined, because its application is very extensive. Even worst, the judges think that there is not necessary to have a standard definition. As the result, the application of provisions regarding unlawful activities on business competition is very limited, and rests solely on the judges' discretion when a case arises. This clearly presents a problem for businesspersons intending to plan their activities in advance¹⁶, whereas the aspect of competition law has become very extensive.

¹⁵ Article 33 of the 1945 Constitution.

¹⁶ Agus Brotosusilo, Pokok-pokok Bahasa pada RUU Persaingan Usaha, presented in the Economic and Legal Dialogue with the theme: Urgency of the Law's Role in Facing the Economic Policies of Pelita VII, *Competition Law and Policy in Indonesia*

2. Indonesian Criminal Code

Article 382 bis of the Indonesian Criminal Code states that, “Any person who conducts fraud to mislead one or more persons, without necessarily having the intention of establishing or expanding his trade or business or those of another person, shall be guilty of unfair competition and shall be punishable by a maximum one year four months imprisonment or a maximum fine of Rp. 13.500,- if such action results in a detrimental effect for his competition or that of another person.”¹⁷

The above provision can provide protection to businesspersons only if the unfair competition in question is in the form of a fraudulent act. This provision is clearly inadequate, since unfair competition, activities such as market restrictions, and collusion are not necessarily conducted through fraud, thus the application of the provision is limited.

3. Other Legislation

Aside from the above legal codes, regulations concerning business competition are embodied in the following laws:

a. Law No. 19 of 1992 concerning Brand Mark.

Articles 81 and 82 of Law No. 19/1992 concerning Brand Name as amended by Law No. 14 of 1997 can also be considered as the law that provides protection to business competition. Articles 81 and 82 essentially prohibit every person from intentionally and unlawfully use the registered brand name of another person or legal entity for similar products and services being produced and/or marketed.

b. Law No. 5 of 1984 Concerning Industry.

Article 7 paragraph (1) of Law No. 4/1984 has established a foundation for government policy in the fostering of industry in Indonesia by determining that the government’s objective in regulating, fostering and developing the industry is to:

- i) Create a better, healthy and beneficial industrial development; ii) develop a sound and healthy competition and prevent unfair competition; iii) prevent

held by Institution for Academic Studies – Senate of the Faculty of Law, University of Indonesia, Jakarta 17 April 1998.

¹⁷ R. Soesilo, *Kitab Undang-undang Hukum Pidana dan Komentar-komentarnya Lengkap Pasal demi Pasal*.

centralization or control of industry by one single group or individual in the form of monopoly which is detrimental to the public.

This provision is not imperative in nature, i.e. without any criminal or civil consequence, since it only serves as a policy guideline for the government in developing the industrial structure.

c. Law No. 1 of 1995 concerning Limited Liability Companies

In this Company Law, the competitive aspects being regulated are mergers, consolidations and acquisitions. Articles 102 up to 109 form a chapter that governs mergers, consolidations and acquisitions. Article 104 paragraph (1) states that mergers, consolidations and acquisitions have to take into consideration the following matters:

- 1) The interest of the company, its minority shareholders and employees; and
- 2) The interest of the public and fair competition in conducting business.

This provision tries to compel mergers, consolidations and acquisitions to observe the aspects of business competition. Further, in Government Regulation No. 27 of 1998 concerning Mergers, Amalgamations and Acquisitions, article 4 reaffirms that mergers, consolidations and acquisitions can be undertaken only after due consideration of the interest of the public and fair competition in conducting business, in addition to taking into account the interest of the company, minority shareholders and employees.

d. In the banking sector, business competition related aspects are regulated through Government Regulation No. 70/1992 concerning General Banks, and Decree of the Minister of Finance No. 222/KMK.01/1993 concerning the Requirements and Procedures for Mergers, Consolidations and Acquisitions.

Article 15 paragraph (1) of Government Regulation No. 70/1992 states that mergers or consolidations of general banks can be effected only receiving approval from the Minister of Finance upon considerations from Bank Indonesia (the central bank). Further, article 19 states that if an acquisition results in the control of more than 50% of the acquired general bank, such acquisition has to receive approval from the Minister of Finance, upon considerations from Bank Indonesia.

This provision is reaffirmed by article 17 of the Decree of the Minister of Finance No. 222/KMK.01/1993, which stipulates that acquisitions of banks which requires the approval of the Minister of Finance are:

- 1) Acquisitions of general banks which results in share ownership of the relevant bank in excess of 50% of the total shares;
- 2) Acquisitions of public credit bank which exceeds 50% of the total shares of the relevant bank.

The approval is given after taking into account the considerations given by Bank Indonesia.

e. Provisions Regarding State Administrative Courts.

Indonesia has its Law No. 5 of 1986 concerning State Administrative Court. This legislation can be used by the public to file charges against the government, in this case are administrative officers, in the event an unfair business competition occurs due to market distortions caused by government policy, such as special concessions for selected business persons, bid rigging, and other concrete, individual and final government policies which create distortions in the competition.

f. Law Concerning Judicial Power.

Law No. 14 of 1970 concerning Judicial Power, in which renewed by Law No. 35 of 1999 states that judges are not permitted to refuse to try and judge a case due to a lack of governing law, or with the reason that the existing law is not sufficiently clear.

This provision was very useful in settling business competition related cases, since there was never any unified and comprehensive legal framework had been established for cases relating to business competition. Judges' opinions can be made as a valuable guide for disputes which involves business competition.

3. Business Competition Problems Presented before the Court of Law

In general, only few cases have been brought to court. Several prominent cases have been recorded, however they were limited to fraudulent acts concerning brand names. For example, in the case of the import of bottled wines for Barcelona, Spain, in 1925, where on the bottle labels were printed the words: *bottled for Bataviasche Handelen*

Commissie Maatschappij and *Produced in Portugal*. The *Raad van Justitie* that such action constitute a violation of article 382 bis. of the Criminal Code. Another example, on June 26 1930, the Hoge Rechtshof decided that the imitation of coffee cans of *NV Maatschappij tot voortzetting der zaken Eerste Dederlands Indische Koffiebraderig* by *NV Maatschappij tot Exploitatie der Stoomkoffiebranderij Karangrejo* constitute a violation of Article 382 bis of the Criminal Code.

Regarding Unlawful Conduct as stipulated in article 1365 of the Civil Code, the record presents the Decision of the Supreme Court No. 217 K/Sip/1972 dated December 13 1972 and NO. 401 K/Sip/1976 dated January 12 1977, both concerning disputes on brand names of, respectively, Tancho hair cream and Moon Elephant.

4. Interesting issue on the drafting process of the Law

The idea of formulating a comprehensive policy regarding business competition first appeared in the mid 1980s¹⁸, however it was soon forgotten and left without further attention. Although there were a number of modest efforts undertaken sectorally by the government¹⁹ for the purpose of drafting the Business Competition Law, very few results were achieved.

In 1992, the Research and Development Department of the Indonesian Democratic Party (PDI) had published a draft law for business competition. It was named Simulation of Economic Competition Law, nevertheless the draft was not tabled by the government to the Parliament.²⁰

The 1997 economic crisis gave a new life to the development of business competition law in Indonesia. The Letter of Intent (LoI) between the Indonesian Government and the International Monetary Fund (IMF) played a major role in accelerating the formulation

¹⁸ The idea was presented by Vice Cabinet Secretary Bambang Kesowo, in the Draft of Antimonopoly Law, A New Wind of Change in the Area of Trade, Gatra, May 25 1995. Although in fact Christiano Wibisono has also stated the need for an Antimonopoly Law since 1975, see Kompas February 6 1991.

¹⁹ For example, in 1995, Trade Minister SB Judono states that his ministry (Ministry of Trade, prior to its amalgamation into the Ministry of Industry and Trade) was currently preparing a bill regarding business competition, *ibid*.

²⁰ *ibid*.

of the Draft of Business Competition Law,²¹ which was recently enacted as Law No. 5 of 1999 concerning the Monopolistic Practices Prohibition and Unfair Business Competition.

Interestingly, unlike any common practice in Indonesia, the bill was formally initiated by the legislative body (parliament) that used its initiative right to propose a bill. On the other hand, another draft was being prepared by the Minister of Trade and Industry. Finally, it was the parliament's draft that was approved to be discussed further as the official draft. This presents an interesting phenomenon, since in the last 30 years of this state's administrative practice, the DPR as a legislative body hardly ever used its right to propose a bill, although such course of action is possible under the constitutions.

D. Global Competition and Open Economy: The Indonesia Story

I. Global Competition and the liberalization of Indonesian Economy

Indonesia began to open its economy in the aftermath of political succession in 1966. It was marked by the arrival of IMF mission team in Jakarta in June 1966 under the invitation from the new regime in order to stabilize the economy. This was followed by the flow of incoming foreign investment after the issuance of regulatory investment policy and the liberalization of the foreign exchange regime. In accordance to the 'successful' structural adjustment, this foreign investment and aid played a big part in the rehabilitation of the drained out Indonesian economy.

In 1974 this opening up process was stalled with the leap increase of world oil price. Having the abundant capital from the black gold and pressure from the local anti-foreign investment group in January 1974, the autarchistic-nationalism argument was implemented in Indonesian industrialization strategy throughout the 70's to the middle of the 80's. The Import-substitution industrial policy was the product of this condition.

²¹ Letter of Intent and Memorandum of Economic and Financial Policies by the Indonesian Government dated July 29, 1998. The government stated that it will present the Bill on Business Competition by no later than the end of December 1998.

The oil crash in the middle of the 80's had forced the industrialization strategy changed its focus to export orientation in order to close the trade deficit. Once again Indonesian economy aimed foreign market as its ally. The Industrial policy was a copy of Japan and Korean pattern of Industrialization process. Infant industry argument was used to protect the local new high valued industry from its foreign competitor to be able to reach the big economy of scale and becoming strong enough to compete in global market in the future. The liberalized economy was to open the access for private enterprises, promote the Indonesian stock market, restructure trade barriers from NTB to tariff barriers, low tariff and special procedure for import on inputs, import barriers on competing products, special export treatment, and licensing scheme.

In the late 80s, liberalization agenda reach the monetary and investment sector, further removal of non-tariff barriers and the promotion of foreign income generating sector such as tourism. This liberalization process showed its effect with high economic growth lasting to the middle of the 90s.

The neglection of imprudentiality principle created the balloon and overheated economy. It was blown out in the late 90s. Nonetheless, the liberalization effect has shown the potentials that can be reaped from opening up domestic economy to global market. Indonesia was actively took part in the global agenda to create an open market Economy. Its active role and commitment to several open market orientation scheme and organization was strengthened when the economy need to be transformed again, following the crash began in 1998. High natural endowment, competitive price labor, and infrastructure availability is the potential that could be capitalized in global competition. Under the IMF assistance scheme once again Indonesia undergo a liberalization of its economy to reap the highest possibility in future open market economy.

II. Indonesia's involvement in AFTA (ASEAN Free Trade Area)

In order to increase the economic competitive level, the members of ASEAN agreed to schedule their regional economic activity as a limited competition scheme as a training ground, anticipating the opening up of global economy. The agreement was reached at

the fourth ASEAN Summit in 1992. AFTA as the product of the agreement was established through the agreement to reduce intra-regional tariffs and removal of all Non tariff barriers on all manufactured products, including capital goods and processed agricultural products over a 15 years period, starting January 1st 1995 under Common Effective Preferential Tariff (CEPT) agreement. This timeline was accelerated under the agreement reached in AEM meeting on September 1994 to a 10-year period, ending in the year 2003.

In conjunction with the abolition of non-tariff barriers, a method is needed to solve the social externalities and consumer protection argument. Under AFTA, the answer to this problem is that CEPT was expanded with a program to reach a compatible standard of a list of products. This list consists of electronic products and its parts and rubber product (gloves and condom). The standardization process was also harmonized with international standards such as ISO and International Electro Technical Commission. The harmonization for treatment was also targeted to fourteen agricultural products, residual limit for pesticide and animal treatment.

As a reaction to the economic crisis, in order to accelerate recovery and promote growth, the members of ASEAN agreed to speed up the time frame of liberalization process. Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand would advance the implementation of AFTA by one year from 2003 to 2002. They also agreed to achieve a minimum of 90 % of their total tariff lines with tariffs of 0-5 % by the year 2000, which would account for 90 % of intra-ASEAN trade. Individually, each country would commit to achieve a minimum of 85% of the Inclusion List with tariffs of 0-5 % by the year 2000. Thereafter, this would be increased to a minimum of 90 % of the Inclusion list in the 0-5 % tariff range by the year 2001. By 2002, 100% of items in the Inclusion List would have tariffs of 0-5 % with some flexibility. Member Countries also agreed to deepen, as soon as possible, tariff reduction to 0% and accelerate the transfer of products, which are currently not included in the tariff reduction scheme, into the Inclusion List. The new members of ASEAN shall maximize their tariff lines between 0-5 % by 2003 for Vietnam and 2005 for Laos and Myanmar; and expand the number of tariff lines in the 0 % category by 2006 for Vietnam and by 2008 for Laos and Myanmar.

Under the revision of CEPT in 1998 Indonesia committed to restructure 6622 tariff lines of total 7212 (92%) tariff lines, 541 tariff lines under temporary exclusion 7,5%, 4 tariff lines categorized as sensitive sectors (0.0005%), and 45 tariff lines will be put under general exception (0.006%).

III. Asia Pacific Economic Cooperation

APEC was based on an agreement to set a time frame of economic liberalization in terms of trade and investments. The deadline is the year 2010 for the developed countries, and year 2020 for the developing countries. The agreement includes cooperation to develop the liberalization oriented policy, institutional building, technical assistance, etc. The framework for the cooperation was set in the first meeting of Governmental leader on Blake Island, Seattle in 1993 with a Vision of Asia Pacific Economic Community. The next meeting in Bogor, Indonesia produced a consensual liberalization time frame, together with the extension and the acceleration of Investment promotion program. In 1995, the next meeting in Osaka, Japan a principle to achieve the liberalization and facilitation of trade and investment was agreed. Preceding this meeting of economic leader, in June 1995 a Conference of competition policy was held in Auckland. It was agreed in this forum that there would be a continuing program towards promotion of policy dialogue and information exchange on competition policy and law issue. Upon this agreement a Competition policy and deregulation workshop was held annually from 1996 to 1999.

In the workshop held in Quebec city, Canada, May 1997 each member country present its commitment to implement the competition policy with an individual action plan. Indonesian plan was consist of:

1) CURRENT STATUS

- Indonesia's law contains several provisions on competition in the economy and provides the necessary precedents for the enactment of a more comprehensive/codified competition law in the future. Existing Indonesian law takes steps to protect consumers and businesses from unfair competition in business activities. These provisions are laid down in various laws such as

Criminal Code (article 382 bis), the Civil Code (i.e. Article 1365), the Capital Market Law, and the law pertaining to the protection of Intellectual Property Rights.

- In support of the law pertaining to fair competition, the government has enacted various laws concerning the protection of intellectual property, such as the Patent Law (1991), the Copyright Law adopted in 1982 and amended in 1989, the Trademark Law which was revised in 1992.
- Indonesia's laws affecting competition in the economy were significantly strengthened with the adoption of 7 March 1995 of Law no. 1 of 1995. This law, which primarily sets out the rules governing the creation and operation of companies, contains a legislative statement that promotes fair competition among business and prohibits monopolistic business combinations if they result from mergers, consolidations and other acquisitions.
- Indonesia's efforts over the past ten years to deregulate foreign trade and investment regime have substantially increased competition in the Indonesian economy. The Government efforts to carefully deregulate and privatize state owned enterprises in various sectors, such as banking, has also increased competitive forces in the economy.

2) INDIVIDUAL ACTIONS

Short/Medium/Long Term

- Indonesia will continue its efforts to promote competition through further deregulation of its economy.
- Indonesia will participate in competition policy dialogues among APEC economies to enhance mutual understanding of competition policy laws.
- Indonesia will review its competition environment for the purpose of identifying areas where policy changes could improve the welfare of its citizens.
- Indonesia will enhance transparency with regard to competition policy

On deregulation action plan, Indonesia's consist of:

1) CURRENT STATUS

- In its continuing effort to increase economic efficiency, to improve the environment for trade and investment, and to implement its commitment under APEC and the WTO, Indonesia has undertaken a series of deregulatory measures in trade, investment, taxation, finance, monetary and banking, and other economic sectors. The most recent deregulatory measures which have been undertaken are the May Deregulation Package of 1995 and June Deregulation Package of 1996 which cover: clear and certain schedule of continued tariff reductions; reduction of tariffs; elimination of tariff surcharges; elimination of non-tariff barriers; administrative simplification of import and export procedures; facilitation of trade services; relaxation of restrictions on export, import, and distribution activities for foreign manufacturing companies; clarification and simplification of regulations governing industrial estates; increased opportunities for participation of the private sector, and enactment of anti-dumping measures.
- Over the past 15 years, Indonesia has carried out a systematic effort to increase the pace of development through the removal of government-based restraints on trade and industry and the empowerment of the private sector through a consistent process of deregulation and de-bureaucratization.
- Before, the government provided most goods and services. Now, through Indonesia's privatization policy, the private sector has been given greater opportunity to provide goods and services. The privatization process in Indonesia started with the banking system. This steps was followed by a series of actions to begin deregulating trade and investment. These action broadened the opportunities for the private sector which led to substantial burst in economic growth that reduced the need for direct government actions.
- In the area of electric generation, the government has encouraged the development of private power producers. Paiton I and Paiton II were the

first big private power projects. Since then, a number of smaller private power projects have been approved.

- In telecommunications, Indonesia has sold part of the government's equity in its international communication firm (INDOSAT) and its domestic communication firm (TELKOM). This latter privatization will result in millions of new phone lines throughout the country over the next few years. In the area of cellular phone services, a number of private companies with some participation by TELKOM and INDOSAT, are currently operating in Indonesia.
- Privatization has also been implemented in the provision of other infrastructure services such as toll roads, harbours, airports, airline, and potable water. This privatization has dramatically expanded the infrastructure of the country. It is expected that further infrastructure services will be privatized in the future.

2) INDIVIDUAL ACTIONS

Short Term

- Indonesia will continue its efforts to further privatize state owned enterprises and economic sectors. This privatization improves the efficiency of the firms and sector involved, overcomes the shortage of government funds and helps to develop its capital markets. Indonesia is in the process of privatizing portions of its electric utility company (PLN) and other state owned enterprises.

Medium/Long Terms

- Indonesia will continue the policy to further deregulating its economy.
- The government will continue to explore ways and means to further increase transparency in the regulatory process.
- Indonesia will continue to privatize its public firms by offering the shares of government owned companies to the public.

- Areas that will be further privatized will cover, inter-alia, steel industries, services, shipping lines, and public railways.

IV. World Trade Organization

The Trade Policy Review Body has conducted review to the Indonesian trade policies. The most recent one was done in 1998 which is summarized in the following passage:

Trade policies and measures

Members commended Indonesia for having significantly liberalized its trade regime with: the reduction of MFN tariffs, from an average of 20% to 9.5%, well beyond Indonesia's WTO commitments; the phasing-out of all import surcharges; the reduction by half of restrictive licensing requirements and the commitment to remove all remaining measures by 2000; the phasing-out of local content programmes; and the conversion of restrictions and specific taxes on exports into low resource rent taxes, to remove the long-standing anti-export bias of Indonesia's trade policy.

Indonesia was commended for establishing a freer and more competitive market-orientated economy. This involved recent efforts to modernize legislation in the areas of customs, banking and intellectual property rights; the termination of a number of monopolies and restrictive marketing arrangements in sensitive sectors; and the removal of trade and tax privileges to specific groups. Members welcomed Indonesia's progress throughout the review period in liberalizing its investment regime, which is now one of the most open in the region. This contributed to attracting an unprecedented amount of foreign investment to the country. They pointed to recent liberalization of retail and wholesale trade and the possible further opening up of banking and telecommunications sectors.

Members raised questions and concerns in some specific areas on customs, including on the inspection and administration of imports. On tariffs, questions were raised on the possible binding of recent unilateral tariff reductions, which would reduce uncertainty for traders. Members pointed to remaining tariff peaks on motor vehicles, alcoholic beverages, and certain chemicals, and to tariff escalation in industry. Non-tariff barriers notably import licensing and bans, also attracted attention. Some Members raised questions concerning export restrictions and taxes as well as local content rules. They recommended further progress in creating a more competitive business environment, particularly by strengthening the competition framework and bankruptcy laws, introducing greater transparency in the attribution of government loans and subsidies and a better enforcement of laws and regulations in areas such as customs, intellectual property rights and government procurement. Members encouraged Indonesia to speed up privatization of state-owned enterprises, and cautioned on the excessive use of tax incentives to attract foreign direct investment.

In response, the representative of Indonesia stated that the Government was continuously taking steps to improve customs inspection and administration procedures, which included implementation of the early phase of the EDI system. Notwithstanding the recent cuts in applied tariffs, bindings would be maintained in accordance with Indonesia's existing commitments (which excluded automobiles and chemicals). Whereas applied tariffs on chemicals and steel would be reduced further, there were no plans to reduce high tariffs on alcoholic beverages, which were justified on social grounds. Import licensing had been significantly reduced and simplified, so that it now applied only for reasons involving public health and safety, security, public morals and environmental protection. As regards export measures, the Government had relaxed export controls on several products, including plywood, and cut export taxes on logs. The only sector subject to local content rules is the automobile sector. The representative outlined steps taken by the Government to foster competition, including the removal of exclusive or special privileges previously enjoyed by BULOG and implementation of a competition law, a draft of which is in Parliament. Measures were being taken to ensure protection of intellectual

property rights. The representative stressed the Government's commitment to privatization, which would proceed in a transparent fashion. On incentives, the Government felt that such measures were necessary to help restore investors' confidence.

Sectoral issues

Members commended Indonesia for the extensive liberalization of its agricultural sector; some sought clarification on the use of import subsidies. Some Members stressed that social considerations should be fully taken into account when reforming the sector. Questions on industry focused on recent liberalization and de-monopolization measures, but also on remaining tariff peaks and escalation in textiles and clothing, motor vehicles and steel. Questions were also raised on the state of implementation of the recommendations of the WTO panel on the National Car Programme and on the continuation of government support to IPTN, the national aircraft manufacturer. On services, Members commended Indonesia for its contribution to the recent GATS negotiations on telecommunications and financial services and asked about plans to further open these sectors to foreign investment.

In response, the representative of Indonesia provided further clarification on the liberalization of agriculture but expressed concern about its effects on net-importing countries, including current difficulties financing imports of basic foodstuffs at the current exchange rate, to guarantee its supply to the population at affordable prices and to ensure food security. On industry, the representative confirmed that all customs and tax privileges obtained under the National Car Program had to be repaid to the Government by the company concerned, and reiterated that Government had discontinued support to IPTN. On services, the representative confirmed that a new telecommunications law was under consideration. The representative confirmed the entry into force of a new Banking Law on 10 November 1998, which, among other improvements, removed foreign ownership limits in joint-venture banks.

In the year 2000 annual report some points regarding Indonesia are:

- With the financial crisis Indonesian stayed on track to pursue open trade and policy regime, with further liberalization agenda to stabilize and accelerate the economic recovery
- Ranked 17 in leading exporters of merchandise trade, valuing USD 48.5 billion; ranked 29 of leading importer of merchandise trade, valuing USD 23.9 billion; ranked 27 of leading importers of commodity services valuing USD 12.7 billion
- Exporters subject to initiations of countervailing investigations 1999: 5 initiations
- On anti dumping actions: 6 provisional measures, 7 definitive duties, with zero number on initiations and price undertakings.

V. Other Institutions

Other institutions that played in the legislation and implementation policy are the World Bank in parallel with IMF as already described in previous chapter. Aid agencies, such as USAID, AUSAID, and GTZ, have also played a big role in the financing of policy implementation the technical assistance of Indonesian competition policy.

PART II

GENERAL OUTLINE OF LAW No. 5 YEAR 1999

A. Background of Business Competition Laws in Indonesia

A fair business competition preconditions is crucial in maintaining the soundness and development of business sectors. This factor is an absolute requirement in order for the economic structure on the whole to remain sound and continue to grow and improve welfare. Therefore, the demand for the creation of a regulating instrument of business competition is considered to deserve high attention. Thus, the need for a Competition Law is an essential need for a “code of conduct” which can direct business actors to compete in a fair and honest manner. This legal instrument should regulate business competition, determine activities that can be categorized as violations of business competition law, and provide administrative, criminal and civil sanctions. This legislation should also introduce a commission or an independent body which conducts supervision, and investigations on business actors who commits business competition violations. The aim of this law is to protect consumers or the public from unfair business actors, to provide a corridor for business actors to compete in a fair and honest manner in the same arena, and also to increase efficiency.

This momentum has in fact been put to use by the people’s representatives from the PDI Fraction in the House of Representatives (DPR) but did not receive adequate responses from the House.²² The Business Competition Law was finally realized in March 1999. This law is known by the name of the Law Concerning the Prohibition on Monopolistic Practices and Unfair Competition, promulgated on 5 March 1999. This law containing 11 chapters and 53 articles is designated with the name of Law No. 5 of 1999 and is effective as of March 2000.

I. The Role of the Government in [Business] Competitions

The Law has an objective of protecting public interests. Therefore the Government has an important role in transforming the idea of fair competition among business actors.

²² Research and Development Concept of the PDI Perjuangan 1995.

The Government plays a part in creating “the right tool” to further effectively promote competition policies. The Government’s role in regulating fair competition can be identified in its power as an institution to create legislation to regulate competition.²³

In addition to providing *the right tool*, the Government also has the function of deciding cases relating to business competition. The Government through the Supervisory Commission for Business Competition (KPPU) is expected to project high credibility and integrity, with the guarantee that every case related to business competition or activities resulting in market distortion will be duly processed in the interest of the consumers.

Sanctions particularly administrative sanctions lie within the absolute jurisdiction of KPPU and constitute a substantial matter in any legislation. The sanction takes the form of nullification of agreements including mergers, termination of undertakings, damages, and fines. Such sanctions are imposed if the businessperson in question has been proven to conduct a violation. The sanctions, which are expected to be more effective due to their punishing nature, are criminal. Punishments in the form of imprisonment and substantial fines are *ultimum remedium* for business actors. Imprisonment can be imposed by referring the case to the police

Government policies are also subject to the Commission supervisory. This is parallel with the fact that monopolistic practices can also occur under the government’s consent. Several actions of the government gave evidence to that fact.²⁴ A number of facts indicate that the government plays a significant part in establishing the monopolistic condition and in not promoting fair competition. The government can be fall into monopolistic practice when conducting *natural monopoly* in a number of strategic industries due to lack of transparency in its management. The government’s aim in implementing competition policies is to maintain the freedom to compete which is associated with freedom of trade, freedom of choice and access to market.²⁵ Thus, as stated by Chief Justice Warren Berger in his opinion, the general aim of the government

²³ Teck et. al. stated that, “(I)n order to ensure a certain degree of good competition among firms, governments often enact antitrust laws...” See Hoon Hian Teck, et. al. 1998. *Economics : Theory and Applications*, Singapore: McGraw-Hill Book Con. page 14 as quoted from Hikmahanto Juwana, Law Magistrate Journal, Vol. 1 No. 1, September 1999.

²⁴ Achmad Shauki, *Competition Law in Indonesia*, unpublished paper, 1999.

²⁵ A Framework for the Design and Implementation of Competition Law and Policy, *op. cit.*, page 2.

is no other than protection of competition itself, and not only of the competitors (business actors).²⁶

B. Essential Contents of the Business Competition Law

The Competition Law has the objective of controlling the actions of business actors' in order to prevent them from undertaking monopolistic business practices, in addition to promoting a fair, honest and open competition. Law No. 5 of 1999 covers wide ranging matters: from actions that constitute violations, the Commission that supervise the implementation of the law to provisions regarding sanctions.²⁷

Actions that are extensively regulated in the Law are *cartel, exclusive dealings, mergers/acquisitions*, whether by companies engaging in similar areas or vertically, *price fixing, oligopoly, tying contracts (tied products, tying products, division of market allocation)*, and *boycotts*.

Sanction plays an important part as responses to violations, taking the form of administrative and criminal sanctions. Business actors' may be imposed with a variety of administrative sanctions, such as the nullification of agreements, termination of undertakings suspected of having an unfair nature or actions which abuse the position of the business actors, cancellation of mergers, damages, and significant amounts of fines to effect the performance of companies which has been proven to have committed a violation.

The Law also provides criminal sanctions to business actors who do not cooperate with the Commission. Additional criminal sanctions can also be applied in the form of revocation of business licenses, prohibition for a business person from occupying a certain position, or the termination of a certain activity or action which has an adverse effect.

²⁶ Ernest Gellhorn, et. al., *Antitrust Law and Economics in a Nutshell*, West Group, 1994, page 34.

²⁷ Harian Bisnis Indonesia, 17 June 1998, "Penyusunan UU Antimonopoli Agar Didampingi Tim Independen."

The Commission was established as an independent body, similar to those in other countries such as the United States with its Federal Trade Commission or Australia's Australian Competition and Consumer Protection. Members of the Commission are appointed by the President with the consent of DPR (House of Representatives) to be approved. The Commission may play a passively role, such as waiting for reports from the public or parties who feels to have been disadvantaged or those who have knowledge of an unfair practice. Otherwise, the Commission could also acts proactively by conducting studies, seeking inputs, and conducting inquiries on business actors in searching for the truth.

C. General Content Matter of the Law

Law No. 5 of 1999 concerning the Monopolistic Practices Prohibition and Unfair Business Competition consists of 11 chapters and 53 articles as follows:

- Chapter I : General Provisions
- Chapter II : Underlying Principles and Objectives
- Chapter III : Prohibited Contracts
- Chapter IV : Prohibited Activities
- Chapter V : Dominant Position
- Chapter VI : Supervisory Commission for Business Competition
- Chapter VII : Case Handling Procedures
- Chapter VIII : Sanctions
- Chapter IX : Miscellaneous Provisions
- Chapter X : Transitional Provisions
- Chapter XI : Concluding Provisions

In such Law, Chapter I consist of 1 article on general provisions which contains definitions of the terms used in the Law, namely definitions of monopoly, monopolistic practice, centralization of economic power, dominant position, business person, unfair business competition, agreements, business collusion or conspiracy, market, relevant market, market structure, market behavior, market share, market price, consumer, product, service, business competition supervisory commission, and district court.

Chapter II consists of 2 articles, which stipulates the underlying principles of the Law and its objectives.

Chapter III concerns prohibited agreements, consisting of 10 parts and 13 articles on oligopoly, price fixing, market allocation, boycott, cartel, trust, oligopsony, vertical integration, closed agreement, and agreements with foreign parties.

Chapter IV concerns prohibited activities, consisting of 4 parts and 8 articles regarding monopoly, monopsony, market control, and conspiracy.

Chapter V concerns dominant position, consisting of 4 parts and 5 articles regarding general provisions, double position, shareholding, merger, amalgamation and takeovers.

Chapter VI concerns the supervisory commission, consisting of 5 parts and 8 articles regarding status, membership, membership requirements, duty, authority and funding.

Chapter VII concerns case handling procedures, consisting of 9 articles regarding processing of reports, preliminary and advanced investigation, investigation on business actors and evidence, duration of investigation, Commission's decision, legal power of Commission's decision, and legal means.

Chapter VIII concerns sanctions, consisting of 3 parts and 3 articles regarding administrative actions, primary criminal sanction, and additional criminal sanction.

Chapter IX concerns other provisions containing 2 articles regarding exemptions under the Law and monopoly by state owned enterprises (BUMN).

Chapter X contain transitional provisions which stipulate that business actors are given 6 months as of the enactment of the Law to apply adjustments.

Chapter XI contains concluding provisions that provide that the date the Law will come into effect shall be one year after its promulgation which is on 5 March, 2000.

D. Prohibited Agreements

Law No. 5 of 1999 concerning the Monopolistic Practices Prohibition and Unfair Competition prohibits several agreements (Articles 4 to 16), activities (Articles 17 to 24) and misuse of dominant position (Articles 25 to 29). Concerning agreements that are prohibited under the Law, there are many interesting issues. The definition of agreement in this Law,²⁸ for example, is very broad. It includes not only written but also unwritten agreement

²⁸ See Article 1 point 7.

1. Concept of Agreement According to Law No. 5 of 1999

Article 1 point 7 of the Law states that, “Agreement is an action taken by one or more business actors to bind themselves with one or more other business actors under any name, either made in writing or otherwise.”

From the above definition it can be concluded the following::

1. An agreement does not have to have an objective.
2. An agreement occurs as the result of an action.
3. Parties in an agreement are entrepreneurs.
4. An agreement may or may not be in writing.

The definition of agreement according to Article 1 point 7 does not state any purpose, which means that it does not state the reason the parties enter an agreement. Therefore, the definition of agreement as stated in this article can be considered clear without being read in context with actions taken under agreements which are regulated in subsequent articles.

Similar to Article 1313 of the Civil Code, the definition of agreement according to Article 1 point 7 uses the term “action”. A number of writers remark that the use of the term “action” is a flaw of Article 1313 since the scope of the term is considered to be too wide.²⁹ In competition law, this term will be useful as it widens the scope of the prohibition.

The parties in an agreement according to Article 1 point 7 are business actors. In Article 1 point 5 of this Law it is expressly stated that business person may be individuals or business entities, whether in form of legal entities or otherwise.

²⁹ See Sofwan, Sri Soedewi Masjchoen, *Hukum Perutangan*, Civil Law Section, Faculty of Law Gadjah Mada University, 1980., p.1.

See also Muhammad, Abdulkadir, *Hukum Perikatan*, PT. Citra Adtya Bakti, Bandung 1990, p.78.

Article 1 point 5 does not provide a clear stipulation that individuals who are subject to this Law must be domiciled within the territory of Indonesia. This suggests that the scope of the definition for individual business person is very far reaching that is any business actors conducting their business activities in Indonesia is subject to the Law.

2. Several Types of agreements prohibited by Law No. 5 of 1999:

a. Oligopoly

The prohibition to practice joint monopoly is stated in Article 4 paragraph (1) of the Law. Under this provision, oligopoly agreements are prohibited if they are detrimental to competition, thus they are not per se illegal. This poses an interesting aspect since the prohibition regarding oligopolies is placed only under the category of prohibited agreements. This can narrow the scope of the prohibition considering the limited scope of the definition of agreement. Article 4 paragraph (2) presents the assumption that a market share of 75% held by 2 or 3 business actors could be suspected to have control over production and marketing.

b. Price Fixing

Article 5 paragraph (1) prohibits business actors from entering into agreements with their competitors in order to set the price on a certain goods or service for consumers or customers. Thus such an agreement would eliminate any competition which should exist amongst those business actors.

Article 5 paragraph (1) stipulates that horizontal price fixing agreements are disallowed without having to see whether there exists a negative effect on competition. Since such price fixing agreements are per se illegal, no matter on what level the price are being set. In other words, even if its negative effect on competition is negligible, price fixing is illegal. This would also mean that the market power of the parties to such agreement is irrelevant, although a more significant increase in price would occur if market share were to increase as well.

c. Market Allocation

Price fixing agreements are not the only means to control prices. Another method that can be used, although it may not control the price directly, is an agreement among business actors to eliminate competition between one another, in which they allocate market areas for their goods or services. Article 9 of Law No. 5/1999 says “Business Actors are prohibited from making any contract with other business actors with intention to divide the marketing areas or market allocation of the goods and/or services that can caused monopolistic practices and/or unfair business competition”. The wording of this article suggested that market allocation agreements under this law are not per se illegal, viewed only from the rule of reason perspective since they are prohibited only if they cause monopolistic practices or unfair business competition.

d. Cartel

Article 11 of Law No. 5/1999 states that “Business Actors are prohibited from making any contract with other business competitors with the intention to influence the price by determining production and/or marketing of goods and/or services, that can cause monopolistic practices and/or unfair business competition” This provision again suggests that Cartels is viewed as a rule of reason violation.

e. Boycotts

Boycotts are horizontal agreements between competitors to refrain business transactions with other competitors, suppliers or certain consumers. This may by a form of attempt of the competitors to eliminate other competitors by, either directly or indirectly, force the supplier or the customers to cease doing business with those other competitors.³⁰ This is the kind of situation which is described in Article 10 Law No. 5/1999. This kind of boycott may prevent access to inputs which are needed by those other competitors.

E. Exempted Agreements

1. Exemption From All Provisions of Law No. 5/1999

Article 50 of the Law exempts a number of agreements from all the provisions contain agreements created to implement a provision of the law, agreements related to Intellectual Property Rights (IPR), agreements to establish a certain technical standard, agency agreements, research agreements with the aim of improving living standards, ratified international agreements, and export agreements.

³⁰ The World Bank, op cit., p 34.

F. Prohibited Activities

1. Merger Prohibitions

Prohibitions regarding mergers in Indonesia are *rules of reason*. Mergers are allowed provided they do not substantially decrease competition. Article 28 paragraph (1) states that business actors are prohibited from conducting mergers or amalgamations of enterprises which may result in monopoly and/or unfair competition. Paragraph (2) of the same article further states that acquisition of shares of other companies is also disallowed, if such activity causes monopoly and/or unfair business competition.

The same article also stipulates that mergers (including in this case mergers, amalgamations and acquisitions) are not exclusively limited to limited liability companies, but also applies to other business entities. Paragraph (3) of the said article further stipulate that a more detailed provision with respect to mergers or amalgamations of business enterprises, and also share acquisition, shall be regulated through a Government Regulation. This means that the government will later provide a merger guideline.

2. Monopoly

A monopoly is a control over the production and/or marketing of a certain goods and/or service by one businessperson or one group of business actors.³¹ Whilst, monopolistic practice is defined as centralization of economic power by one or more business actors which result in the production control of a certain goods and/or service, thus causing unfair business competition and which may prove detrimental to public interest.³²

The qualifications of a monopolistic practice are:

1. Control over a product;
2. Control over the marketing of a product;
3. Such control may cause monopolistic practice;
4. Such control may result in unfair business competition.

To prove the presence of such qualifications, the following criteria have to be met:

³¹ See Definition in Article 1 paragraph (1) Law No. 5/1999

³² *Ibid.*, paragraph 2.

1. No substitute exists for the product in question;
2. Other competitors find it hard to enter the market for the same product (high barrier to entry);
3. Such other competitors are business actors who have significant competitive capacity in the said market;
4. One businessperson or one group of business actors have taken control of over 50% of the market for one type of product.

3. Monopsony

Monopsony is a condition in which one business group holds control over a large market share to purchase a certain product. The existence of such sole purchaser would then cause monopolistic practice and/or unfair business competition, and also if said sole purchaser controls over 50% of the market share of a certain goods or service.³³

Consequently, monopsony can be proved if the following qualifications are found to be met:

1. The activity is conducted by one business person or one group of business actors;
2. Businessperson or group of business actors control over 50% of the market share for one certain of product.

4. Market Share Control

Control over a market by one or more business actors is regulated in Articles 19, 20, and 21 of Law No. 5 of 1999. Article 19 regulates activities that may cause monopolistic practice or unfair business competition, which are:

1. Refusing or obstructing a certain business person from conducting the same business activity in the same market;
2. Obstructing the consumers or customers from conducting business with the competitor;
3. Limiting the distribution and/or sale of goods or services in the relevant market;
4. Conducting discriminative practices.

5. Selling Below Cost

³³ *Ibid.*, Article 18.

Article 20 prohibits the supply of good or services by way of selling below cost or establishing an extremely low price with the aim of eliminating or extinguishing the competition's business and which may lead to monopolistic practice or unfair business competition.

Article 21 prohibits business actors from committing dishonest acts in establishing production and other costs which constitute a component of the price of goods and/or services, which action may lead to unfair business competition.³⁴

6. Conspiracies

Besides agreements which may result in monopoly or unfair business competition, conspiracies which has the same purpose are also disallowed. Conspiracy is a form of commercial cooperation among business actors with the intention of controlling the relevant market in the interest of the parties to the conspiracy.³⁵ The essence of a conspiracy is not necessarily the existence of an agreement to conspire, merely because its substance is difficult to formulate in an agreement, such as stealing information from other business actors.

Article 22 stipulates prohibitions for business actors to make a conspiracy with other parties to arrange or determine the winner of a tender (bid rigging). This act clearly constitutes a dishonest act, since tenders and the winner of tenders are determined secretly (although some tenders are held openly).³⁶

Article 23 prohibits conspiracies with other parties in order to obtain information regarding the business activity of a competitor, which information is classified as company secret, and Article 24 prohibits conspiracies which may hamper the production or marketing of the goods or products of a competitor, with the intention to cause the

³⁴ Elucidation to Article 21: indication of manipulated costs are prices which are lower than the actual prices.

³⁵ Article 1 paragraph (8)

³⁶ Elucidation to Article 22 states that tenders are offers to submit a price in order to undertake a project, supply goods or provide services.

goods offered or supplied in the relevant market to decrease in volume or quality or to disrupt the time table.

G. Exemptions in Law No. 5 of 1999

Exemptions stipulated under Law No. 5 of 1999 have been partly discussed in the preceding sections. The actions previously described include agreements which causes monopolistic practice or an unfair business competition which is prohibited under the Competition Law. A number of exemptions to this Law have sparked ongoing debates. Opinions as to the reasons for these exemptions will provide a media for debate and a difficult agenda for the Business Competition Supervisory commission in the future.

Several activities that are exempted in under Law No. 5 of 1999 is contained in Article 50. Article 50 states that agreements, which are exempted, are agreements with respect to intellectual property, namely patents, trademarks, copyrights, industrial product design, integrated electronic assembly, trade secrets, and franchise related agreements.

1. Franchise

Especially regarding franchises, exemptions have indeed been accepted in international legal practices. Although logically it seems that the principles of competition law has been disregarded. Franchise agreements can easily be seen as adopting tying contracts or reciprocal dealing. This can be observed in the case example of the McDonald franchise.³⁷

2. Patent

The granting of intellectual property expressly provides monopoly right for the patented product. Protection for patents also constitute incentive for the inventor for the purpose of efficiency. In practice, patents which have the characteristics of a monopoly is a universal legal principle.

³⁷ Areeda, *ibid*, p 743 Principle vs. Mac Donald's Corp., 631 F.2d 303 (4th) Cir.1980, cert.denied, 451 U.S. 970 (1981) (trademarks license., building lease, and security deposit are, as matter of law, single product – the franchise – because challenged aggregation essential to system's formula for success: scientific site election, site continuity, building style exclusivity, franchise selection based on management ability alone, and quasi-partnership.

3. Agreements to establish certain technical standards.
4. Agency agreements, the content of which does not specifically discuss the provision to re-supply the goods and/or service at a price lower than agreed.
5. Cooperative agreements for research or the improvement of the people's living standards.
6. International agreements ratified by the government.
7. Agreements and/or activities conducted for the purpose of exports which does not disrupt domestic demand and/or supply.
8. Business actors categorized as small enterprises and cooperatives that provides services only to their members.

Annex 1.

In addition to the Law No. 5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, there are legal provisions in a score of laws which are relevant to the promotion of fair competition.

- **Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), including Trade in Counterfeit Goods**
 - **Trademark Law**
 - **Patent Law**
 - **Copyright Law**
 - **Anti Dumping**
 - **The Criminal Code**
 - **The Civil Code**
 - **Law No. 5/1984 on Industrial Affairs**
 - **Company Law No. 1/1995**
 - **Capital Market Law No. 8/1995**
 - **Small Business Law No. 9/1995**
 - **Consumer Protection Law 8/1999**
-

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), including Trade in Counterfeit Goods

On 7 May 1997 Indonesia promulgated Presidential Decrees ratifying three WIPO treaties, They are:

1. Presidential Decree No. 15/1997 regarding the Amendment of Presidential Decree No. 24/1979 on the Ratification of Paris Convention for the Protection of Industrial Property and Convention Establishing the World Intellectual Property Organization;
2. Presidential Decree No. 16/1997 regarding the Ratification of the Patent Cooperation Treaty (PCT) and Regulations under the PCT;

3. Presidential Decree No. 17/1997 regarding the Ratification of the WIPO Trademark Law Treaty of October 27,1994;
4. Presidential Decree No. 18/1997 regarding the Ratification of the Bern Convention for the Protection of Literary and Artistic Works;
5. Presidential Decree No. 19/1997 regarding the Ratification of the WIPO Copyrights Treaty of December 20,1996.

Trademark Law

The Law No. 14/1997 governs issues on trademark. The law is a revised version of the Law No. 19/1992 which was amended on May 7,1997 to put it in conformity with the WIPO Trademark Law Treaty 1994. The Government and the Parliament are now in the process of discussion to further improve the Law No. 14/1997.

Patent Law

Issues on patent are subject to legal provisions of the Law No. 13/1997. The patent law is a revised version of the Law No. 6/1989 that was amended on 7 May 1997. The Government and the Parliament are now in the process of discussion to further improve the Law No. 13/1997.

Copyright Law

On 7 May 1997 Indonesia also amended the Law No. 7/1987 concerning Copyright. The new law--Law No. 12/1997--is the third version of its kind, the first one being the Law No. 6/1982. The latest amendment was intended to bring the law into conformity with the WIPO Copyrights Treaty of 1996. The Government and the Parliament are now in the process of discussion to further improve the Law No. 12/1997.

Anti Dumping

As part of its efforts to ensure fair competition in the market place, Indonesia promulgated on 4 June 1996 the Government Regulation No. 34/1996 on Anti Dumping and Countervailing Duties. The Indonesian

Anti Dumping Committee was subsequently set up based on the Decree of Minister of Industry and Trade No. 136/MPP/Kep/6/1996 which was then amended by the Decree of minister of Industry and Trade No. 430/MPP/Kep/9/1999.

The Criminal Code

Article 382 bis of the Code stipulates that" those who, with the aim of gaining, conducting, or expanding the results of trade or their own companies or companies of other persons, undertake unfair actions by misleading the public or certain persons, shall be liable, due to unfair competition, to imprisonment for one year and four months ...or to a fine of thirteen thousand five hundred rupiahs at the most, if such action cause damage to competitors of such persons or competitors of such other persons."

The Civil Code

Once a court determines that an individual is guilty under the Article 382 of the Criminal Code, parties injured by the unfair practice are entitled by Article 1365 of the Civil Code compensation for their losses.

Law No. 5/1984 on Industrial Affairs

Article 7 of the law maintains that the Government shall regulate, promote and develop industry to (a) achieve better, healthier and purposeful industrial development; (b) develop fair and healthy competition and prevent unfair competition; and (c) prevent industrial concentration or control by one group or individuals in the form of monopoly which is detrimental to the public.

Company Law No. 1/1995

The law contains provisions regulating mergers, consolidations, or acquisitions of companies in Indonesia. Article 104 (1) of the law stipulates that mergers, consolidations or acquisitions of companies must observe not only the interest of the companies concerned (including the employees and the right of the minority share holders to sell their shares

in a reasonable price), but also the interests of the public and fair competition in doing business.

Capital Market Law No. 8/1995

The law provides several provisions which--in effect--prohibit unfair business practices. Article 10 prohibits the stock exchange to issue policies which may form barriers to entry and restrain competition. With respect to exchange conduct, the law strictly prohibits false and misleading statements, fraud deception in selling and buying stock (Articles 90 and 93), exchange misrepresentation (Article 91), collusive intervention in order to disrupt the market for speculative purposes (Article 92), and insider trading (Articles 95, 96 and 97).

Small Business Law No. 9/1995

Articles 6 and 8 of this law authorize the Government to promote business climate which is conducive to development of small enterprises and to prevent the formation of market structures which create unfair competition in the forms of monopoly, oligopoly and monopoly that are detrimental to small-scale business, as well as to encourage the establishment of business partnership among small scale business and cooperatives.

Consumer Protection Law 8/1999

The law, which was promulgated on 20 April 1999 and will become effective on April 2000, recognizes such consumer rights as the right to obtain safety and comfort when consuming or using products and services, the right to choose and obtain goods and services, the right to correct and honest information on products and services, and the right to compensation.

ANNEX II.

Government summary on the review of Trade Policy Review Board

KEY DEVELOPMENTS IN TRADE AND ECONOMIC POLICY

May 1995 Deregulation Package

In May 1995, the Government of Indonesia announced a series of deregulation measures as part of its efforts to improve efficiency and endurance of the national economy, and to increase the competitiveness of Indonesian products in the international market. This deregulation package includes, among other items, the following provisions:

(v) Gradual reductions in the rate of import tariffs. All import tariffs that are currently over 20% will be reduced to a maximum rate of 20% by 1998 and a maximum rate of 10% by 2003. Import duties that are currently 20% or lower will be reduced to a maximum of 5% in the year 2000;

(vi) Numerous import duties will be immediately reduced to a rate between 5% and 20%;

(vii) Many current import surcharges will be eliminated or reduced;

(viii) A number of products previously protected by non-tariff barriers and which could only be imported by registered importers or importer producers, will be opened to general importers;

(ix) Capital goods with a minimum value of 30% of the companies original investment which are imported by companies undergoing business restructuring will be exempted from import duties;

(x) Some business sectors previously closed to new investment have been opened. These sectors include, among others, cooking oil from palms, finished/semi-finished rattan products, manufacture of industrial boilers, motor vehicle industry, aircraft maintenance, and domestic trade support services;

(xi) Some business sectors are closed to new investment. These include mangrove wood processing, cyclamate and saccharine industries, manufacture of pulp using sulfite, manufacture of chlor alkali using mercury, and chlorofluoro carbon (CFC/Freon) industry;

(xii) Licensing procedures for industry have been simplified. Industries in the Industrial Zone and Bonded Zone will be directly provided with an industrial license (IUI-Izin Usaha Industri) without being required to first obtain a Letter of Principle Approval. In order to expand, a company needs only submit its plan for expansion. A registration receipt, which acts as an industrial business permit, will be given to small-group industries; and

(xiii) a number of business sectors remain reserved for small business or small businesses in cooperation with medium or large businesses. Such sectors include, for example, poultry breeding, traditional hats, and tools.

1996 Deregulation Measures

In January and June 1996 the Government of Indonesia announced a set of economic deregulation measures which include:

(xiv) **Continuation of the Scheduling of Tariff Reductions.** In the May 1995 Deregulation Package, the Government announced the phase reduction of tariffs. One group of tariff lines is to be reduced in steps, so by the year 2000 they will not exceed 5%. Another group of tariff lines is to be reduced so, by the year 2003, they will not exceed 10%. The government is now announcing the schedule of tariff reductions (see attached table) to be implemented in coming years so the business community can best plan investment and production.

(xv) **Reduction in Tariffs on Imported Capital Goods.** A number of steps have been taken to reduce the tariffs on imported capital goods.

(xvi) **Elimination of Tariff Surcharges.** In accordance with the Customs Law, the surcharges on imported goods will be eliminated. In doing so, Indonesia accelerates the implementation of the WTO commitments.

(xvii) **Simplifications of Non-Tariff Barriers.** To expedite the procurement of capital goods and raw materials and to improve the efficiency of industry, several non-tariff barriers have been eliminated. These steps also reflect the acceleration of Indonesia's commitment under the WTO to reduce the number of non-tariff barriers.

(xviii) **Regulation on Anti-Dumping.** To counter dumping practices by foreign exporters, the Anti-Dumping Regulation has been introduced. This measure is consistent with the WTO Agreement on Anti-Dumping.

(xix) **Facilitation of Exports.** Simplification of requirement and procedures to obtain the Certificate of Origin, elimination of inspection of export goods by Surveyor, and elimination of the PEB document for exports with a value of Rp 100 million or less, are measures adopted to facilitate export.

(xx) **Simplification of Licenses for Industry within Industrial Estates.** To increase export activities, the Government simplified license requirement for industries within the Industrial Estates.

(xxi) **Operation of Bonded Areas/Bonded Warehouses.** The operation of Bonded Areas and Bonded Warehouses, which could previously be done by state enterprises, is now opened to the private sector.

(xxii) **Relaxation of Restrictions on Export and Import Activities by Foreign Investment Manufacturing Companies.** Some latitude is given to foreign investment

manufacturing companies for import and sale of their own products up the wholesale level.

(xxiii) **Simplification of Procedures for the Import of Waste as an Industrial Raw Material.** Procedures for the importation of waste as industrial raw material will be improved and adjusted under Customs Law.

1997 Deregulation Packages

On 7 July 1997 the Government announced the economic policy deregulation as a continuation of the preceding series of deregulation packages. The economic policy reform in this deregulation package included: reduction of import tariff, private auction house, non-direct investment company, transfer of capital goods, export without notification, regional taxes and redistribution and non tax revenues in the industry and trade sectors. The purpose of this package was to decrease bureaucracy and increase exports.

Starting from 17 September 1997 the Government reduced the import duty on raw and auxiliary materials for certain products covering 153 tariff items. This reduction was implemented to stimulate export oriented industries and to increase the sustainable national economy.

The range of the reduction of import duties is between 5 to 10 percentage points, and the final tariff will become zero, 5, 10 and 15 percent. The reduced duties apply to raw materials for: textiles (40 tariff items), wood processing (67 tariff items), basic chemical products (31 tariff items) and leather products (9 tariff items).

The raw and auxiliary materials for steel, machinery and automotive and agriculture products, are respectively 3 tariff items each.

Indonesian Economic Policy in 1998

Recognizing the problems confronting the country, the government of Indonesia has introduced various programs and adjustment measures. As a member of the IMF, World Bank, and ADB, Indonesia frequently consults these institutions and invites them to provide advice about how to improve the economy. On 15 January 1998, the Government adopted the Program of Economic and Financial Reform and Restructuring. This program was formulated to cover actions in several areas including: efforts to restore financial sectors, fiscal consolidation, monetary issues, the exchange rate, and structural adjustments in the form of broadening and deepening the deregulation program. To complement and modify the Memorandums of 15 January 1998, the Government of Indonesia signed two Supplementary Memorandums on 8 April 1998 and 24 June 1998.

Considering its broad scope and its coverage of a number of economic aspects, the program will be implemented over the three-year period. Its implementation will be closely monitored and reviewed. To that end, Indonesia will be assisted by experts from the IMF, World Bank, and ADB.

The fundamental objective of the structural adjustment program is to increase national efficiency and competitiveness of the Indonesian economy. To accomplish this objective, the steps to be implemented include:

(xxiv) On 21 January 1998, special tax and customs benefits previously granted to the National Car Program were discontinued.

(xxv) A gradual reduction of import tariffs, including those on chemical products and iron/steel, to 10 percent in the year 2003. Starting on 1 January 1998, import tariffs on a large number of chemical products were reduced from 10 – 20 percent to 5 percent. Most tariffs on iron/steel will also be reduced starting January 1999.

(xxvi) Starting 1 January 1998, various commodities, such as wheat, wheat flour, soybean and garlic, can be imported freely under General Importer status. Currently, soybean and garlic imports are subject to a 20 percent tariff and wheat and wheat flour imports are subject to a 10 percent tariff. They are to be reduced to 5 percent in the year 2003, and the administered retail price of cement has also been abolished.

(xxvii) A reduction of obstacles hindering exports, including export taxes, is to be implemented in stages.

The main structural elements of Memorandum of Economic and Financial Policies include further deregulation, trade liberalization, privatization of state enterprises, improvements in the banking system and corporate restructuring.

While medium-term outlook remains uncertain given the severity of the crisis, the objective of the Government of Indonesia is to restore sustainable economic growth with low inflation as quickly as possible.

The Government of Indonesia attaches the highest priority to ensuring that food and other essential items are available at affordable prices to the entire population. Food prices, particularly the price of rice and cooking oil, have risen drastically since the beginning of May 1998, causing serious social hardship. While most private trade is functioning well, the Government is taking a number of actions to ensure that there are no remaining impediments to the efficient movement of basic commodities throughout the country.

The program also envisages that virtually all of the restrictions that have been in place over time will soon be removed. For instance:

(xxviii) From 1 February 1998, BULOG monopoly is limited solely to rice;

(xxix) the Clove Marketing Board is eliminated by June 1998;

(xxx) all restrictive marketing arrangements are abolished by 1 February 1998, specifically: cement, paper, and plywood;

(xxxi) all formal and informal palm oil plantation barriers are removed by 1 February 1998;

(xxxii) effective on 1 February 1998, tariffs on all food items were cut to a maximum rate of 5 percent, while tariff rates on non-food agricultural products were reduced by 5 percentage points; and

(xxxiii) on 29 May 1998, the Government adopted a reformation policy on investment in which the list of Sector Closed for Investment was revised.

Sectors Closed for Investment

(i) Primary Sectors

Cultivation and Processing of Marijuana and the like

Exploitation of Sponges

Contractors of Forest logging

Uranium mining

Secondary Sectors

Hazardous Pesticides of Penta Chlorophenol, Dichloro Diphenyl Trichloro Ethane (DDT), Dieldrin, Chlordane.

Production of pulp using Sulphite processing and production of Pulp with whitening Chlor

Alkaline Chloride Industries using Mercury process

Manufacturing of Chloro Fluoro Carbon (CFC/Freon)

Manufacturing of Cymate and Saccharine

Processing of mangrove wood to produce finished/semi-finished goods

Liquor/Alcoholic beverages

Firecrackers and fireworks

Explosive Materials and the like

Manufacturing of weapons and related components

Printing of valuable papers

Postage stamps

Duty stamps

Commercial Paper of Bank Indonesia

Passports

Stamped Postage

Tertiary Sector

Casino/Gambling

Sectors Closed for Investment when a part of the shares are owned by foreign citizens and/or foreign legal entities

Primary Sectors

Freshwater fish and fresh water fish cultures

Forest Utilization Right

Tertiary Sectors

Taxi/Bus transportation

Local shipping

Private television broadcasting, Radio broadcasting services, News Paper and Magazines

Operation of cinema

Spectrum Management of Radio Frequency and Satellite Orbit.

Trade Services and its support Services, except: Retailer (mall, supermarket, department store and shopping center), Distributor/Wholesale, Restaurant, Quality Certification Services, Market Research Services, and After Sales Services.

Medical Services: general clinics, maternity Clinic, specialist clinic and dental clinics.

INDONESIAN COMMITMENTS IN THE INTERNATIONAL FORA

the implementation of multilateral initiatives

The ratification of Marrakesh Agreement has been done by the government of Indonesia on 2 December 1994. The government supports the role of WTO in strengthening the multilateral trading system and commits to the implementation of the obligations and

responsibilities arising from the Uruguay Round. This was shown by Indonesian commitments in WTO which recently includes information technology, telecommunication, and financial services.

Concerning the implementation of the UR results, Indonesia abolished most of the non-tariff barriers it committed to in Schedule XXI. Furthermore, the Government has also eliminated import surcharges since June 1996. The remaining non-tariff barrier is in the oil sector.

As a member of the WTO, Indonesia has implemented the WTO Valuation Agreement since 1 April 1997. Since that time, the determination of customs value for the imported goods is based on the provisions of the Agreement. Moreover, Indonesia created the following instruments in the form of law and regulations, such as Custom Law No.10/1995; Ministerial Decree of Finance No. 690/KMK.05/1996; Circulated Letter of Customs Director General No.SE-11/BC/1997; Director General of Customs Decree No.KEP-14/BC/1997 and No.KEP-21/BC/1997. In line with the implementation of the Agreement, Indonesia also revised its import procedures to accommodate the new customs valuation system. Thus, the imported goods are processed through a green or red channel. The selection for the green or red is based on the risk assessment conducted by intelligence unit.

Since 1994, Indonesia has undertaken a concerted exercise to improve existing IPR protection and procedures according to international standards and practices as prescribed by all international conventions and intellectual property rights. Efforts are also underway to enact new laws and amend existing ones in compliance with WTO/TRIPS Agreements. As of May 1997, Indonesia enacted three new laws in the field of IPR, namely:

(xxxiv) Laws No.12 of 1997 regarding The Amendment to Law no.6 of 1982 on Copyright, as amended by law No.7 of 1987;

(xxxv) Law No.13 of 1997 regarding The Amendment to Law No.6 of 1989 on Paten; and.

(xxxvi) Law No.14 of 1997 regarding The Amendment to Law No.19 of 1992 on Trademark.

Steps are being undertaken to fulfill Indonesia's WTO/TRIPS obligations by the year of 1999. Enactment of new laws, namely, for the protection of plant varieties, performers' right and lay-out designs of integrated circuits as well as minor amendments to the existing patents and trademark laws are at various stages of drafting.

Indonesia has put into effect the most favored nations for all WTO members and has never changed the status since mid 1995. As for information, the Ministerial decree of Finance signed on January 21, 1998 mentioned reducing the tariff with MFN system for all nations.

The Implementation of Regional Initiatives

Indonesia attaches strong importance to regional cooperation and continues to participate actively in various regional groupings, such as ASEAN and APEC.

As one of the Bogor Declaration initiators on trade and investment liberalization on 2010 for industrialized economies and 2020 for developing economy APEC members, Indonesia has committed to continual liberalization on trade and investment. Indonesia will continue to pursue tariff reductions in line with its trade liberalization efforts and commitments in ASEAN and APEC.

Indonesia's priority is focused on efforts to enhance trade and economic cooperation within ASEAN in the field of trade and services, intellectual property rights, transportation and communication, infrastructure development and industrial cooperation.

To implement the ASEAN-AFTA commitments, Indonesia has taken measures since 1994 to lower its tariffs, and renewed the schedule of tariff reduction for AFTA by the year of 2003, which includes 7.212 tariff lines. Those tariffs consist of Inclusion List (6.622), Temporary Exclusion List (541), Sensitive List (4), and General Exception list (45).

The current economic crisis will not change Indonesian commitment to implement CEPT-AFTA scheme by the year 2003.

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