

INFORMATION
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Future of International World Time

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The Role of Foreign Direct Investment Law on the Strengthening and Developing Cooperation in the Indonesian Economics

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Abstract: One of the important factors in developing the economy is through foreign direct investment. The role of foreign direct investment has significant impacts on the host countries. It not only brings money but also the transfer of technology, the introduction of new management skills and the creation of links to the world market. It also becomes a powerful engine for development throughout the world. One important element in facilitating the flow of private capital from one country to another is the role of law and legal institutions. Cooperation as one of the economic doers in Indonesia is not able to compete with other business entities such as Limited Liability Company. Even though under the Indonesian Constitution, Cooperation has an important role in contributing to the growth of Indonesian Economic, cooperations as a business entity is not favourable to the foreign investors and this circumstance may be a factor to why Cooperation is not able to meet the purposes as set forth in the Indonesian Constitution. To develop cooperatives, there need a courage to invite foreign investment. Therefore, the governments of the host country must adapt their policy and develop their legal and administrative systems for investment.

1. INTRODUCTION

There exist two concepts of direct foreign investment in a country.¹ The first concept is the extreme policy, i.e., a host country shall not be dependent on the foreign direct investment, if so the foreign direct investment shall be deemed as capitalism. The second concept is the concern for domination by the foreign direct investment in a country. The presence of foreign direct investment may cause an unbalance in the distribution of profit, which is in favor of the foreign direct investment and therefore, the host country will limit the involvement of foreign direct investment. Nowadays these concepts have changed. Foreign direct investment shall not be deemed as a

¹ Aminuddin Ilmar, *Hukum Penanaman Modal Di Indonesia (Investment Law in Indonesia)*, Jakarta : Kencana, 2004, page. 41

paranoid and the developing countries are of the opinion that foreign direct investment shall provide working capital, management skill, knowledge and networking.²

The foreign direct investment shall be an integral part of national economics and shall be placed as an effort to increase the economic growth, create the jobs for the community, stimulate the national economics and realize the welfare nation in a competitive method.³

The foreign direct investments constitute a primary sector in world countries to gear up the national economy. The foreign direct investment can play an important role in the development of the economy, to increase the volume of production, to expand the jobs and to manage the potential economic resources.⁴ The foreign direct investment is expected to contribute to increasing the quality of life in the communities and the development of the economy. The foreign direct investment is viewed as a favorable scheme to the host country, due to the foreign direct investment the host country may alter the use of the available domestic capital to public interest.⁵

After four decades the provisions for foreign direct investment, as set forth in Law of the Republic of Indonesia Number 1 Year 1967 On Foreign Direct Investment as amended by Law of Republic of Indonesia Number 11 Year 1970, were finally amended in Law of the Republic of Indonesia Number 25 Year 2007 on Investment ("Investment Law"). The Investment Law is issued as part of the implementation of the multilateral agreement on World Trade Organization.⁶

The philosophy of issuing the Investment Law is based on the spirit to create friendly investment environment, the Investment Law stipulates key elements such as basic policy of investment, form of legal entity and the involvement in the development of the economy with the economic doer, specifically referring to provisions on foreign direct investment for cooperation.⁷

The Investment Law contains several legal norms. The law maker tried to implement legal norms at the national and international level. It means the participation of Indonesia in several international fora will lead to universal legal norms to be adopted in the domestic law.⁸

The legal principle in the policy of investments based on the Investment Law inter alia is that the transparency in relation to the activities of investment is open for public and all parties. This principle causes the accountability of the investment policy to

² Huala Adolf, *Perjanjian Penanaman Modal Dalam Hukum Perdagangan Internasional (WTO) (Agreement on Investment Law in the Frame Work of International Trade Law)*, Bandung: CV Keni Media, 2010, page. 4-5.

³ As elaborated in the Elucidation of Law of Republic of Indonesia Number 25 Year 2007 on Investment.

⁴ Jeswald W. Salacuse, "Direct Foreign Investment and the Law in Developing Countries", *Foreign Direct Investment-Lessons of Experience No. 5*, New York, 1997, page. 5.

⁵ M. Sornarajah, *The International Law on Foreign Investment*, Cambridge: Cambridge U.P., 2010, page. 5.

⁶ An An Chandrawulan, *Hukum Perusahaan Multinasional, Liberalisasi Hukum Perdagangan Internasional dan Hukum Penanaman Modal* (Law on Multinational Companies, Liberated on International Trade Law and Investment Law), Jakarta: PIP Publishing, 2007, page 55.

⁷ As elaborated in the Elucidation of Law of Republic of Indonesia Number 25 Year 2007 on Investment.

⁸ Hendrik Budi Untung, *Hukum Investasi (Investment Law)*, Jakarta: Sinar Grafika, 2010, page. 45.

strengthen. The wider opportunity in investment for the public and the community shall have full economic access.⁹

The other principle in the Investment Law is "justice efficient" meaning the investment shall be efficient, able to compete on domestic and international market, reasonable price and good product quality, so that the community may benefit from the high level of welfare.¹⁰ However, the investment activities shall stimulate the principle of justice such as to provide fair opportunity for small and medium size entrepreneurs.¹¹

The Indonesian Government in determining the basic policy of foreign investment, as set forth in Article 4 of the Investment Law, stimulates a conducive business environment for foreign investors in order to strengthen the comparative national economy and to accelerate the degree of foreign investment and the Government shall provide opportunities to develop and protect cooperations.¹²

The provisions on cooperatives in the Investment Law in Chapter VIII concerning the Development of Investment for Micro, Small, Medium Companies and Cooperation and Article 13 of Investment Law stipulates as follows:

- (1) *The Government shall determine the business activities for micro, small, medium business and cooperation along with the business activities open for conglomerate business with the requirement of the said conglomerate business must have joint venture with micro, small, medium business and cooperation.*
- (2) *The Government shall grow and develop micro, small, medium business and cooperation through partnership program, to elevate the competitiveness, to provide incentive for innovation and expansion of market and the wider distribution of information."*

Even though the provision on cooperation is only stipulated in Article 13 of the Investment Law, the Government has given enormous attention on the role and position of cooperations as economic doers in the frame work of the growth of the Indonesian economy through the determination of business activities being allocated to the partnership program.¹³ The next line of question is whether the provision, as set forth in Article 13 of the Investment Law, is the product of harmonization of the law in Indonesia, particular the cooperation law, and the implementing regulations. Harmonization shall lead to standardization of law infrastructure comforting the investor from developed countries to invest in developing countries. This is the new

⁹ Didik J. Rachbini, *Arsitektur Hukum Investasi Indonesia (Analisis Ekonomi Politik)*, (The Architecture of Indonesian Investment Law – Politic Economic Analysis) Jakarta: Indeks, 2008, page. 23.

¹⁰ Sentosa Sembiring, *Hukum Investasi (Investment Law)*, Bandung: CV Nuansa Aulia, 2010, page. 132.

¹¹ Didik J. Rachbini, *Opcit*, page. 24.

¹² Hulman Panjaitan (et.al), *Komentar dan Pembahasan Pasal Demi Pasal Terhadap UU No. 25 Tahun 2007 Tentang Penanaman Modal (Comments and Analysis Article by Article of Law No. 25 Year 2007 on Investment)*, Jakarta: CV Indhill Co, 2007, page. 21.

¹³ As elaborated in the Elucidation of paragraph 1 of Article 13 of Law of Republic of Indonesia Number 25 Year 2007 on Investment in which stated that the business activities to be specifically to micro, small, medium business and cooperation so that they are able to be comparative to other economic doers.

paradigm in the borderless world and the borderless transaction shall need laws to regulate it.¹⁴

The nation has objectives to be achieved and the effort to reach the aims will be conducted by using laws as a tool to validate or not validate the laws in accordance with the course of the development faced by the public and the nation.¹⁵ The legislation is the inseparable part of law deliberately made by the nation. It is understood that legislation is not suddenly issued, it is issued with certain purposes and reasoning.¹⁶

In reality if the law is issued by legislator then no one will argue with being the product of politics, due to the fact that the law is crystalized, formed or legalized from political wills, which compete against each other through political compromises or domination of powerful political force.¹⁷ From the legal search of Hikmahanto Juwana on the economic law, the weaknesses of laws in Indonesia are not solely at the level of implementation of law.¹⁸ The issue is also at the level of the law making process. The first issue can be identified as doubt by the law maker in determining the politics behind the law, in particular on the validity of the policy. This happens if the President and the Parliament are not in consensus concerning the particular law. This causes difficulty in determining the law politics due to different interest. The second issue is at the level, where certain concept of law wants to be formulated in the wording of the law. There are several trigger points, such as lack of time, the law maker does not fully understand the basic policy or the validity of the policy of the concept of the law or are not diligent enough to formulate the articles. The weakness will be reflected in the law stipulation, which will have a different perspective from the desired law politic.

The issue of the Investment Law, which is formed and issued by the Parliament, is not in favor of small business. This statement is based on the suspicion that the Investment Law is favorable to foreign investor because the foreign investor has received more incentives in the development of business compared to small business.¹⁹

This is further supported by the fact that the legal form of foreign investor in the joint venture company is an Indonesian Limited Liability Company having the domicile in Indonesia.²⁰ The basic point is that cooperation is a the legal entity but the law maker does not deem cooperations as an ideal legal entity for foreign direct investment in Indonesia.

Four Laws on Cooperation have been issued as of Indonesian Independence on 17 August 1945, which has emphasized on the strategic role of the Cooperation in achieving the justice, welfare and a vigorous community. Cooperations has been chosen as the back bone of Indonesian economy, which in accordance with the objectives are to grow and develop the potential economy and to aim at a democratic economy, which

¹⁴ Hikmahanto Juwana, "Politik Hukum UU Bidang Ekonomi Di Indonesia" (Law Politic on Law of Economic in Indonesia), *Gagasan Dan Pemikiran Tentang Pembaharuan Hukum Nasional*, Vol.II, 2003, page. 24.

¹⁵ Moh. Mahfud MD, *Politik Hukum di Indonesia* (Law Politic in Indonesia), Jakarta : Rajawali Press, 2009, page. 2-3.

¹⁶ Hikmahanto Juwana, *Opcit*, page 1.

¹⁷ Moh. Mahfud MD, *Opcit*, page 5.

¹⁸ Hikmahanto Juwana, *Opcit*, page 6.

¹⁹ Didik J.Rachbini, *Op.cit*, page 107.

²⁰ As elaborated in Article 5 of Law Number 25 Year 2007 on Investment.

have the nature of a democratic, autonomy, participative, transparency and social nature (the principles of togetherness and family).²¹

However, in reality (*de facto*), the figure role of the cooperation is far from what was expected. The cooperation is an economic organization which should achieve the health of the community.²² The position of the structure of cooperation is in the low grade and facing several internal problems. The commitment to the spirit of Article 33 of the Indonesian Constitution 1945 has not yet created the powerful and continuous foundation and form of cooperation economics. As a business entity, cooperation has been shadowed as a symbol of failure for economic expectation, i.e., a profit legal entity. As a mover of the community economics, the cooperation has been deemed as a non-raising star of the economic democracy.²³

Even being valid for more than twenty five years, and both cooperation and business activities have improved, the existence of Law Number 12 Year 1967 on Principles of Cooperation has not yet accommodated for crucial matters to support the activities of cooperation; as a business entity or a movement of the community economic. The Law Number 25 Year 1992 on Cooperation has replaced the old Cooperation Law which claimed to be suited to the movement of cooperation and to define and emphasize the identity, purpose, position, role, management, business, capital and the nurturing of cooperation, as to guarantee the quality of cooperation as set forth in the Indonesian Constitution.²⁴ The Cooperation Law has since been replaced with Law Number 17 Year 2012 on Cooperation, which emphasized on the identity of Cooperation, principles and purposes, memberships, organ of organization, capital and supervision, roles of Cooperation Movement and Government and sanctions leading to achieving the objectives of Cooperation.²⁵ The new Law on Cooperation was anticipated and consistent to establish powerful, welfare, trustworthy, independent Indonesian Cooperation and benefits to the members and the Indonesian community. However, based on the decision of the Constitution Court No. 28/PUU-XI/2013, dated 28 May 2014 the Law Number 17 Year 2012 on Cooperation has been cancelled based upon a legal consideration that the concept of cooperation is deemed not being able to provide welfare to the community and consequently, Law Number 25 Year 1992 On Cooperation (“Cooperation Law”) is still valid until the issuance of a new law on cooperation.

Paragraph 1 of Article 33 of the Indonesian Constitution has stated that the Indonesian economy is composed by all efforts based on the principles of the priority of the family and community welfare and not individuals, and the ideal business entity for such purpose is the cooperation. The elucidation of Article 33 of Indonesian Constitution has placed Cooperation both as the mama guru of national economics or the integral part of the structure of the national economy.²⁶ Furthermore, the elucidation of Article 33 of Indonesian Constitution prior or after the fourth amendment *inter alia*

²¹ Bernhard Limbong, *Pengusaha Koperasi-Memperkokoh Fondasi Ekonomi Rakyat (Cooperation Entrepreneur – To Strengthen the Foundation of Community Economic)*, Jakarta: Margaretha Pustaka, 2012, page vii.

²² Man Suparman Sastrawidjaja, *Aneka Hukum Dagang (Variety of Commercial Law)*, Bandung: Alumni, 1984, page 23-24.

²³ Bernhard Limbong, *Ibid.*

²⁴ Andjar Pacht W (*et.al.*), *Hukum Koperasi Indonesia (Indonesian Cooperation Law)*, Jakarta: Kencana Prenada Media Group, 2005, page. 71.

²⁵ As elaborated in the elucidation of Law Number 17 Year 2012 on Cooperation.

²⁶ As elaborated in the elucidation of Law Number 25 Year 1992 on Cooperation.

stated that the welfare of the community is the first priority and not the welfare of individuals and the ideal form of business entity is cooperation.

The position of cooperation has played an important role in the growth and development of community economy and achieving economic democracy, which has the nature of democracy, togetherness, family, and transparency and cooperation has been given the space and wider business opportunity in relation to the quality of the community economy, but in reality, the growth of cooperation has not yet meet the standard as intended in the Indonesian Constitution.²⁷ As the prevailing law and regulation have not yet accommodated the crucial matters to support the cooperation as a business entity or economic movement and consequently, in parallel to the dynamic of changes, it is unavoidable to have new legal grounds able to stimulate cooperations to grow and become powerful and independent.

The development of cooperation shall be guided in order to create the cooperation that can contributed to the national economy, and the development of cooperation will be directed in a way so it applies the principles of cooperation and business economic.²⁸ Therefore, cooperation will be an economic organization, which is solid, democratic, autonomy, participative, has social character. In principle the development of the cooperation is to stimulate it to run the business and to play a central role in the economy.

The role of cooperation is very important and significant in developing the economic potential and to implement economic democracy, which have the nature of democracy, togetherness, family and transparency.²⁹ Apart from that cooperation have tried to develop and to utilize the structure of the national economy based upon the principles of development, justice and welfare community; The development of cooperation shall be directed to strengthening the institution of the cooperation and the business of cooperation so the cooperation may actively involve itself into global and national economy. Consequently, in order to eliminate all barriers needed for the development of cooperation the reformation of the cooperation law as required by the cooperation in conjunction with the progress of global and national economy should proceed.

2. THE LINK BETWEEN LAW, INVESTMENT AND COOPERATION

What is the link between law, investment and cooperation? The host country government needs to understand the fundamental link as they create the political environments and develop legal and administrative systems. The link lies in two concepts basic for an investment decision: *risk* and *return*. Investors will commit funds to a project when, in their judgment, the project will yield a satisfactory return at an acceptable level of risk. They will refuse to invest, when the reward is insufficient in view of the expected risk.

Laws, legal institutions, administrative structures, indeed whole legal systems may have a positive or a negative impact on an investor's evaluation of the risk and returns of a potential investment in a developing country. For example, a host country's high tax regime, lengthy and cumbersome governmental procedures, and prohibitive foreign

²⁷ As elaborated in the elucidation of Law Number 25 Year 1992 on Cooperation.

²⁸ As elaborated in the elucidation of Law Number 25 Year 1992 on Cooperation

²⁹ As elaborated in the elucidation of Law Number 25 Year 1992 on Cooperation.

exchange controls reduce returns to the investor and thus serve to deter investment. Similarly, an independent judiciary strongly committed to the sanctity of business contracts and their expeditious enforcement creates a less risky and therefore a more investment-friendly environment, than does a corrupt system of courts characterized by ten-year backlogs of cases and decisions that are invariably influenced by the country's governing elite.

In the era of globalization, cooperation shall follow the global world. It is about time to establish cooperation conglomerates and more autonomy. To establish cooperation conglomerates means adopting the model of conglomerate cooperation, cooperation with gigantic business, that are able to provide welfare to its members.³⁰ In order to establish cooperation conglomerates, the cooperate must be able to adopt to open management, transparent communication, and to prove it is a trustworthy and accountable institution. Meaning the principle of Good Corporate Governance and modern management needs to be accommodated in the management of the cooperation. In facing the challenge of globalization, cooperation must be a useful shelter to form a powerful resource. Cooperation is an organization, which is owned by all of its members. The sense of belonging is an important factor which causes the cooperation to survive under hard circumstances, i.e., to rely on the loyalty of the members and the willingness of the members and cooperation to face the said problem. Outside the cooperation there are other actors in the economy such as Limited Liability Company or firms, which are able to offer the same services as cooperation, meaning that cooperation must anticipate and compete with the other actors of the economic market.³¹

In principle, the welfare states kind dominates the state. However, the legal rights of the citizens are owned by them in accordance with the principle of democracy. A state is given mandate to perform its obligation to ensure the fulfillment of the rights of its citizens. The character of welfare state set in each state is unique. Each state experienced and had a different degree or course of development which affects the welfare.³²

The welfare state shall rely on serious efforts to create an open economy which count on industrial process and prospective and progressive trading. However an open economy will also rely on the role and function of the Government to ensure that the democratic and public policy is an integral- and not inseparable process.³³

In relation to Article 33 of the Indonesian Constitution, Mohammad Hatta in the Cooperation Day in the year 1956, stated as follows:³⁴

"If it carefully reviewed that the spirit of Indonesian Constitution, the development of national economic shall be conducted in two methods. Firstly, the strategic development shall be conducted by the

³⁰ Bernhard Limbong, *Op.Cit.*, page 347-348.

³¹ As stated in *Pedoman Kaderisasi dan Pendidikan Anggota Koperasi* issued by Ministry of Cooperation and Small and Medium Business of Republic of Indonesia in April 2012.

³² Kuhnle S, "Survival of The European Welfare State" Working Paper No.19, 1999, as referred by Darmawan Triwibisono and Sugeng Bahagjo, *Mimpi Negara Kesejahteraan*, Jakarta: Pustaka LP3ES, 2006, page 18.

³³ Team Research PSIK, *Negara Kesejahteraan dan Globalisasi*, Jakarta: Universitas Paramadina, 2008, page xxii.

³⁴ Sri-Edi Swasono, *Sistem Ekonomi Dan Demokrasi Ekonomi*, Jakarta: Universitas Indonesia, 1987, page 46-47.

Government or delegated to agency, specific legal entity under the full control and supervision of the Government. The guidance is "to achieve the maximum of the welfare community". Secondly, the non-strategic development or the small and medium development can be done by community through cooperation. Cooperation may transform itself from small contribution to bigger contribution or from home industry to become full industry. Among those categories, the effort of the Government and cooperation, it is a fact that the categories of private business are still dominant. By developing of state company based on commercial merits and to fulfil the social security of community and along with the development of cooperation then the private sector will be reduced significantly. It will not disappear. It will fade away smoothly and not because the government regulation but merely the positive impact of state company and cooperation."

It was repeated by Mohammad Hatta in his speech in 1970 with the title "The Dream of Cooperation in Article 33 of the Indonesian Constitution". The Article 33 of the Indonesian Constitution deemed that cooperation is maha guru of Indonesian Economic.³⁵ Mohamad Hatta as the founding father of Indonesia was interested in the cooperation system because of his visit to several Scandinavian countries, in particular Denmark, at the end of 1930.³⁶ Hatta frequently stated the values and the principle to help each other in cooperations, but the perception on the cooperation as a modern organization developed well in western countries. Hatta also differentiate between "social cooperations" which are based on the principle of helping each other and the "economic cooperation" which is established on the competitive and rational market economy. For Hatta cooperation is not an institution with anti market economy, cooperation is simply a *self-help* organization of poor communities to control the economic market. Therefore, cooperation must be able to compete in the market and to be efficient.

Critics of cooperation, are not disagreeing on the issue of how to manage the cooperation but on the basic concept of the cooperation itself. The cooperation is evaluated from the perspective of theory. M. Sadli stated that "the position of cooperation in Article 33 of the Indonesian Constitution always became the object of controversy".³⁷ Whether the legal business of cooperation is a "crowned legal entity" or shall be considered as one of the legal and business entities in the national economy? The experience of 69 years showed that cooperation is not able to become an influential legal business in the national economy. In particular the original form of cooperation as a nonprofit organization, which primary is a collection of members instead of a legal business with association to capital and the aim of profit orientation. The decision of the cooperation is based on *one-man-one-vote*, which is very democratic but as a business entity will be out-classed by a company with association of capital, where the decision will be made based on *one-share-one-vote*. The company is better able to bring required capital compared to the cooperation (the capital of cooperation usually is very small due to the limited number of the member and the value of shares must be equivalent with the

³⁵ Sri-Edi Swasono, *Ibid.*

³⁶ Tulus T H Tambunan, *Ibid.*

³⁷ Muslimin Nasution, "Mewujudkan Demokrasi Ekonomi Dengan Koperasi", Jakarta : PIP Publishing, 2007, page 101.

number of member of cooperation – one man one vote). In practice the cooperation is categorized as small and medium business. The role of cooperation in national economy cannot compete with Limited Liability Company or firms which have capitalistic orientation. The paradigm of Cooperation in Indonesia has been reduced as small business under the Ministry of Cooperation and Small Medium Business.³⁸ Even though Multinational companies provide benefits for the development of the national economy the Government must limit and supervise the activities of the multinational companies so that cooperation will not be stagnant.³⁹

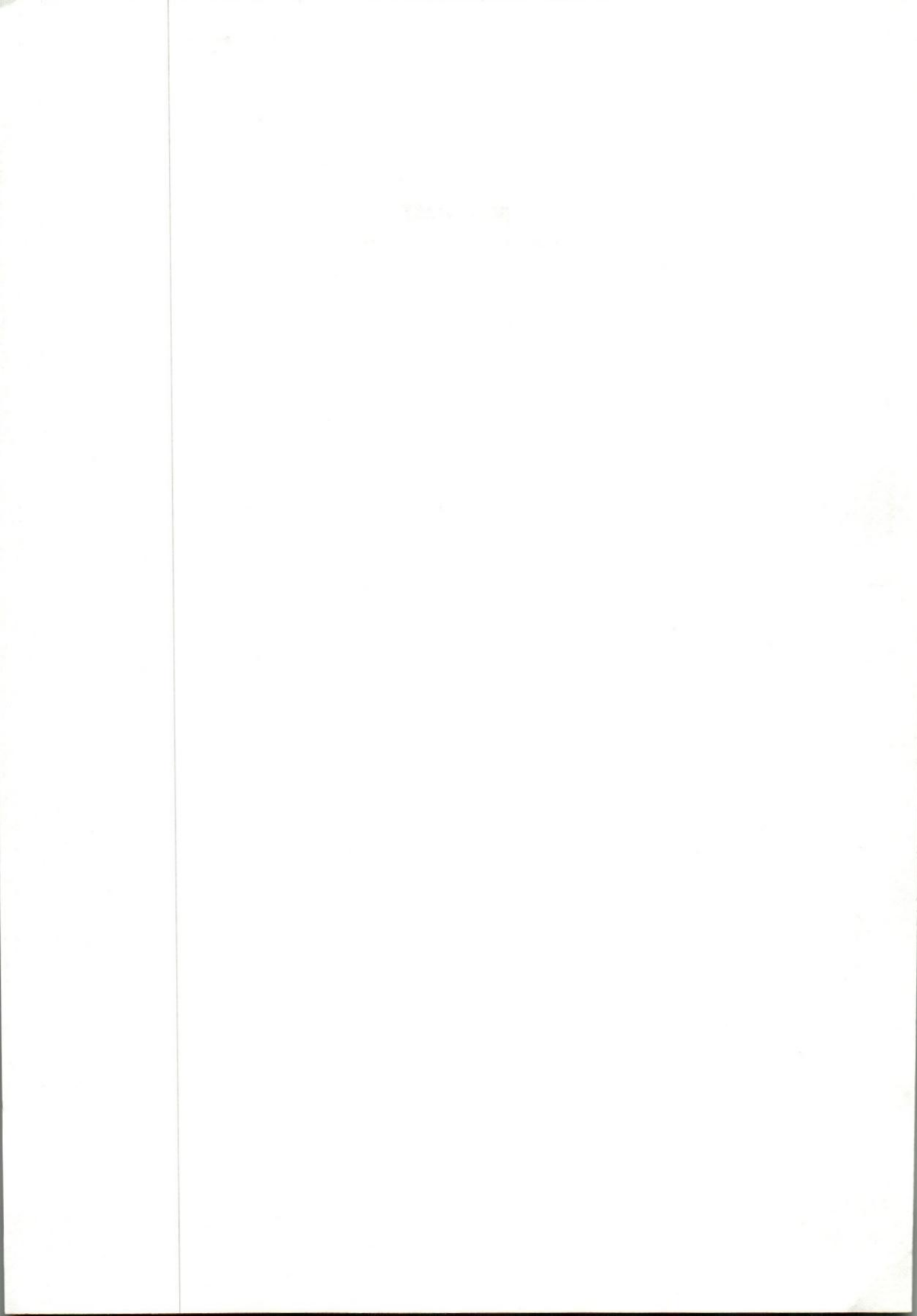
3. CONCLUDING REMARKS

Key issues affecting foreign direct investment in developing countries are legislative, institutional and systemic. A variety of mechanisms exist to address them. One person's obstacle is another person's protection. Consequently, in any program of reform aimed at these barriers, it is crucial to balance the benefits and costs of retaining them against the benefits and costs to be derived from new investment. Such balancing of interest is of the course of the traditional job of the law.

In line with the high expectation of the strategic role of cooperations in Indonesia the Government must make an effort to increase the degree of growth of the economy and the welfare of the community by harmonizing the Investment Law and Cooperation Law.

³⁸ Sri Palupi, *Proyek Mematisurikan Koperasi (Project to Mortal Cooperation)*, Article in Kompas dated 2 November 2012, page 6.

³⁹ An An Chandrawulan, "*Hukum Perusahaan Multinasional, Liberalisasi Hukum Perdagangan Internasional dan Hukum Penanaman Modal*" (*Law on Multinational Companies, Liberated on International Trade Law and Investment Law*), Jakarta : PIP Publishing, 2007, page 381.



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