

Legal Perspective on Trade Competition:

A Study of State-Owned Enterprise in Indonesia

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Abstract—The research is purposed 1) to know and describe the position of interest from the right of monopoly of The State Owned Enterprise in legal perspective on trade competition, and 2) to know and describe also to find out the essence of State Owned Enterprise existence in legal perspective on trade competition. The Research is done in Ambon. Type of this research is empirical normative, with descriptive character. Data collection was done through interview and documentation. Data analysis done qualitative analysis technique. The result of this research have shown that 1) the right of monopoly of the State own enterprise under the state is instructed from our economic system as the instrument of economic macro to keep the best interest of its people. 2) The essence of the existing of State own enterprise in legal perspective on trade competition is to increase the efficient, while the government have obliged to conduct the macroeconomic functions and to increase the growth of economic stability to reach the goal in order to solve the weak of the market like in efficient due to the monopoly practicisism by interfere the market in regulating or the law of anti-monopoly.

Keywords—the right of monopoly; state own enterprise; the trade competition

I. INTRODUCTION

Economic democracy willing to have the economic empowerment for people and for to give the widest chance to the whole to join and control the production branches. The economic situation is not just happened and give to the marketing power, but necessary needs to interfere from the state, whether direct or indirect. State interfere in economic trade as a consequent from one of the function of the state as a guarantor and in charge for the people welfare. Apart from that, the state interfere in economic trade is not mean to create the monopoly and narrowing the economic trade of people [1].

Prevention of monopoly and the economic empowerment of citizenship, in the essential is part of obliged that mentioned under article 33 of RI constitution 1945. But both of them is come from the same problem, which is means, it is impossible the economic empowerment of citizenship will success without the policy to fix the structure of monopolistic product. Due to imbalance of economic structure, potential to oppressive and afflict the people by other who have strong economic and politic. It have been improvement to the liberalism Countries (classical liberalism) [2].

The government intervention in economic is no need to see as prohibition. The succeeded of State in East Asia even due to characterized by the strong intervention of the government, while in contradicted, many intervention is not guarantee either the succeeded of economic development [3].

The fact is undoubted that State Own Enterprises have place in important position in economic sector, even in half of the sector have dominated and monopoly. The principle of legal consideration of Constitution Court in its decision like, art 33 point (2) RI Constitution 1945 have given the authority to the state to hold the production branches that important to the state and hold the public interest. On the production branch that have no type of product yet, the State have the right to be priority in the way that state have their own enterprise and hold the production branch also in the same time prohibited the individual or private company to held the production of branch [4].

Different situation with Chine in manage the State own enterprise that able to contribute to the government and society is one of the interesting sample to mentioned. The manager of State Own Enterprises in China, State-owned Asset Supervision and Administration of China (SASAC), that just established in year of 2003, did the reformation on the management of state own enterprise trough the establishment of holding in some of industries. The comparative of asset, revenue and profit of State Own Enterprise Indonesia and State Own enterprise of China in year 2002 (112,47:861,26) milliard dollar, in year 2007 become (164,76 : 2.048,84) milliard dollar [5].

In General, the legal principles of trade competition first is must be efficient in economic. In one of efficient economic will birth the innovation, productivity and creativity since the competitive market only can survive in efficient. Second fairness or appropriateness. All the trader might run for profit and become bigger but in a fair way not to cut other trader and unfair competition. Third, democracy economy. In order to reach the same chance between the competitor with equal access. Equal access is based on democracy economy [6].

Article 51 Law Number 5 year 1999 of monopoly practice prohibition and unfair competition trade, except monopoly by State own enterprise. However, it is still left some problem and need to be study and discuss so the monopoly given will arrange clearly. Based on those explanation above, so the

issues of this research is the given of monopoly right for the state own enterprise can caused the obstacle in the economic competition specially that have connected with the field of trades that hold the public interest and branch production that is important for the state.

II. METHOD

The Research is done in Ambon. Type of this research is empirical normative, with descriptive character. Data was obtained from library covering law on trade and theories of enterprises. Data collection was done through interview and documentation. Data analysis done qualitative analysis technique.

III. RESULT AND DISCUSSION

A. *The Position of the Right of Monopoly of the State Own Enterprise in Legal Trade Competition*

1) *The Purpose and the Function of State:* All countries have their own purposes mentioned in their constitution. The objective of the Republic of Indonesia as mentioned in the Preamble to the 1945 Constitution is to establish an Indonesian government that protects all citizens and all peoples in Indonesia and to promote the welfare of the people, educate people and participate in maintaining world peace based on peaceful and social justice.

Moss stated that main obligation of the state is to create the monopoly of power and guarantee the conduct of legal in the whole of its State. This is a long together with opinion from Weber that more oppressed the state as a monopoly in using the legality power in certain area. Even Rockman have offered about 3 concept of obligation and role of the State, like [7]:

- A policy making system that authoritative that called decision making state;
- Giving the collective goods and distribution or often called production state;
- Keeping, created and facilitator the interest of people or often called as intermediary state.

Adam Smith mentioned that in the scope of state activity, c.q the government is very limited, like to conduct the general activity that not conduct by the private company and only covers three kinds of field, like:

- To conduct the justice;
- To conduct the defense and security; and
- To conduct the General work

Furthermore, the function of the state according to Ballard from the sociologic view can be considered into four types [5]:

- Social conservation, social value that very important for the security social and politic, like to increase the intern of regulation by solve the conflict of the State.
- Social control, is to reconcile, fitted and coordinate the group's conflict attitude, competitive, like the defense

to the external aggression, conduct the social justice, etc.

- Function of social amelioration, from the lost group. Included the effort to eliminate the poverty and keeping the disability.
- Functions of social improvement like the wider in field of life from the groups.

Consider the opinion above, in fact the duty and role of the state is not only limited to the guarantee of conduct of the regulation based on the power, but also role as one of the economic trader by playing the role as "production state". This is can be seen clearly to the explanation of State function from (1970) that provided to the 4 (Four) function, like:

- as a conductor or guarantor of the welfare or the state as provider;
- as a controller or as regulator;
- as entrepreneur; and
- as the state as umpire.

The same statement from Sachs [8] that the function of State have covered into 3 categories, like entrepreneurship function, regulator function. More, Charles E. [9] also mentioned the function of the state in five categories, like justice functions, public welfare functions and freedom functions. The whole function of state have mentioned above conduct by the government with based on the power to the state. Without the power of state, the conduct of state function also to fulfill the goal of state will have the obstacle, even more unreachable.

B. *The Meaning of State Power Under Article 33 Point (2) RI Constitution 1945*

The right of state power, basically is the logic consequent from the goal of the state that need to establish. The goal of the state that based for the achievement reference of the willingness of the state but also important is the used of power [10]. One of the RI purpose as mentioned on the preamble of RI Constitution 1945 is to promote the welfare of the people and to educate the nations. Based on it, so regulated basic and economic system of Indonesia on the article 33 of RI Constitution 1945. Moreover, in the definition of the article, the conducted is most debatable even though the explanations of the constitution itself consider to be clear. Although some people think that those article is hardly to understand and need to more interpreted, whether the big idea contain inside or there is no the legal policy yet [10]. In general, the seemed to doubt whether the economic system that come out lately as regulated, will limit some of economic problem that often come up lately. |like "free trade area") that have come into last step of the implementation of no obstacle and no discrimination principle [10].

Basic principle of economic value is contain the harmonize principle which is the establishment of harmony, balance and equality. The thought of development and economic practice in Indonesia must be based on the practice that sometime not

along together with the commitment and refer on the basic of our economic system. The definition of the characterization of economic basic system in Indonesia based on Pancasila and RI Constitution is keeping to conduct and develop by Mubyarto with his explanation that the future of economic system Indonesia describes his view of the future of the Indonesian economic system by stating that in Pancasila, on the other hand, fits in with the facts and is alarming. Because that characterized is that we in Pancasila increasingly blurred. The same statement from Mohammad Hatta [11] which was a concept from article 33 RI constitution 1945, by mentioned that after more than 20 years.

Moreover, the need to concern and conduct is private sector must work under the controlling of the state, also in the maintenance of kind of trade that meet the criteria to guarantee the welfare for its people and also for the state interest itself [10]. From many opinion and argument mentioned above about the meaning of domination by the state, so can be concluded that the state domination not must participate by the state directly in order to manage the branch production in order to have the state enterprise but can be trough the regulation making or economic policy for the best interest for the state and people. It is different with the definition of ownership that from the word of owner or to owner that means to have or the right to have for a thing. In this case, state can be categorized as the owner who have the right of the important production branches for state and hold the best interest of people. In this definition, the state have right to do anything regarding it willingness without concerning the best interest of its people.

C. The Essential of Existing State Own Enterprises in Perspective of Legal Trade Competition

1) *Role of state in economic situation:* The success of national economic development in East Asia before crisis in 1997-1998 often associated with the strong role of paly from the government. It is not like in West Countries that put in priority on the market mechanism and posited the government on minimal role in economic development; in East Asia Countries the government is often associated with the strength of Private sector roles interacted in one of the institute that have possibility to raise the economic development in efficient and have a competitive effort [3]. Before the economic crisis, was not small of liberal economic or neo classic that thought that the succeeded of East Asia cannot be fully explain by the concept of theory that they have believed. Even among them have underestimated by stated that the results of its research that indicated the high era in East Asia mostly end due to its worker that cheap worker, natural resources and cheap capital loan that un able to expect continuously [3]. Capitalism or liberalism have proved the ability in wayfaring the people. But when seeing it from the only glasses of physical development, communism also have ability to conduct even though not as good as the capitalism. The phenomenon of the success of East Asia also have proved that the west capitalism is not the only one system that guarantee the success. The problem is more if the indicator of success is not only in material aspect but also the empowerment of human being integrity.

In the context of mixed economic, Friedman described 4 (four) functions of state, such as:

- Provider. The capacity of provider conduct to fulfill the minimum standard that need in society in order to less the impact of free market that can be damage the society.
- Regulator. The state must guarantee the orderliness like in infestation in order the industry can growth and develop, the regulation and limitation to export and import in order to provide the enough foreign exchange to hold the trade.
- Entrepreneur. State as entrepreneur conduct trough state own enterprise because of the field of trade must be protected the best interest of people.
- Controller. The controller function related to the legal product to keep the order and social justice also as the law enforcer [12].

Function of administration (*bestuursdaad*) by the state conduct by the government with its authority to issue and abolish the facility of permit (*vergunning*), license (*licentie*), and concessive (*concessie*). The function of regulation by the State (*regelendaad*) conduct with the authority of legislative together with the executive (government). Function of management (*beheersdaad*) conduct trough mechanism of shareholding and/or through the direct involvement in management of State Own Enterprise as the instrument of the State instate to use it domination of the natural resources that shall use for the best interest of the people. Function of Controlling by the State (*toezichhoudensdaad*) conduct to control and handle in order the implementation of the empowerment of the important branch production and/or to dominate the best interest of people [4]. From economic view, it seemed that the entrepreneur to look for the superiority of monopolistic that can be understand if connected with the purpose of establishment of the enterprise to get huge profit. The government have the big role in order to create the trade market competitive when it willing to limited the attitude of monopolistic that will impact to the risk of lost for people whether as a consumer or as an entrepreneur. The government should have an effort to fix the market failure, for example, to prevent the monopoly for raised the efficient. The government shall also promote the equality trough the tax program and reattribute of income for the certain groups. The government shall use the instrument of tax, finance and monetary regulation to achieve the stability and the economic macro growth, to less the inflation and jobless also increase the economic growth for the whole. To know more the third of role of play, will be discuss under the following statement:

a) *Efficiency:* One of main deviation from the perfect competition is imperfect competition or the element monopoly. The impact caused from the monopoly holder is the ability of huge company to interfere the economic prices for the whole. The monopoly holder is seemed to create price too high, farer to the production of cost that will cause the decrease of expenditure of the consumer in the standard limitation pattern of price that is too high with the low output.

The government in some states to handle the monopoly holders take direct intervention to maintain the cost and profit for the monopoly entrepreneur. The government conduct to handle the monopoly through the policy making. According to McEachem, there are 3 (three) types of government policy to change or to handle the attitude of the company like social regulation, economic regulation and the antitrust of activity. Social regulation is the government policy to increase the health and secure. Economic regulation is connected to handle the cost, output, the new company comer and the service quality in industry that potentially to raise the monopoly or monopoly industry [13].

b) Economy macro growth and stability: Apart to increase the efficient, the government have obligation to conduct the economic macro function and to increase the growth and economic stability for the whole. The main purpose that focusing on economic Macro policy for the long term is the growth of economic and the fast level of productivity. The growth of economic means the level of growth in level output is for the whole country, while in productivity level is the ratio between the output and input to use for the result. The government role in handling the weak of market like in efficient due to the monopoly practicum actually can be conduct through the intervention on manage the market with the policy making like regulation or law on anti-monopoly.

According to those explanation above, the intensity of government intervention might be categorized based on the steps. As a developing state, Indonesia might choose to the slow way or the way that have been passed by the developed country. In the earlier. The capacity of market mechanism is still restriction. The role of government is to strengthening the part of mechanism enforce of the market or used to call as market friendly approach. Usually without the government autonomy, is even the intervention of the government had happened, in the certain field that market mechanism more guarantee for the success. With autonomy and the good capacity of the government will give better guarantee to choose the right policy instrument with sanction and targeting for the parties that unable to fulfil.

IV. CONCLUSION

The right of monopoly of State Own Enterprise in the state refers to the thought of basic system in our economic system as a macroeconomic to keep the interest of the people. The essential of the existing of state own enterprise in legal

perspective of law trade competition is to increase the efficient, the government have obligation to conduct the function of economic macro and to increase the economic growth and stability for the whole to achieve the goal in order to handling the weaknesses of the market like in efficient due to monopoly practice that can be conduct through the intervention on making policy or regulation on anti-monopoly.

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