CHAPTER I

INTRODUCTION

1.1 Background

Every nation strives to achieve economic development, with a long term goal to improve the living conditions and livelihoods of its people. In regards to economic development, it is important to note that the business sector has one of the largest contributions to the national economic growth, indicating its crucial role to a nation's economic development.[1] Discussing upon the business sector, it is inevitable that every business is established with the objective of reducing its costs of production and generating the most profits.[2] This objective motivates businesses to compete with each other constantly, creating competition in the market.

Competition or rivalries between businesses should be seen as a positive thing and necessary in carrying out business activities.[3] Such is due to the fact that competition will motivate businesses to continuously improve the qualities of their products and services to provide the best for their customers.[4] As such, competition between businesses is not prohibited, as long as the methods to

[1]Kiagoos Aziz, "Perjanjian Yang Dilarang Berdasarkan Perspektif Hukum Persaingan Usaha Indonesia", Jurnal Ilmu Sosial dan Pendidikan, Vol. 5, no. 2 (2021), p. 49.
[2]Putri Regina, "Praktik Monopoli dan Persaingan Usaha Tidak Sehat Oleh Temasek Holding dalam Perspektif UU Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat", Journal of Civil and Business Law, Vol 1, no. 1 (2020), p. 2.
[3]Kiagoos Aziz, "Perjanjian Yang Dilarang Berdasarkan Perspektif Hukum Persaingan Usaha Indonesia", Jurnal Ilmu Sosial dan Pendidikan, Vol. 5, no. 2 (2021), p. 49
[4] *Ibid*

compete with one another does not include prohibited agreements (such as: oligopoly, price fixing, boycott, cartel, oligopsony, vertical integration, & etc) or other unfair practices.[5] This is due to the fact that participating in the aforementioned actions could lead to: (1) the death or reduction of competition between business actor; (2) the emergence of monopolistic practices where the market is solely controlled by the said business actor; and (3) the tendency of business actors to exploit consumers by selling goods at high prices with inadequate quality.[6] In other words, unfair business competition will inflict harm to the market, other business actors, as well as the consumers.

Considering such facts, competition laws or antitrust laws were enacted by every country as a tool to control and fight against unfair business competition.[7] As such, the existence of competition law in a country's regulation is to safeguard the consumers and enhance the economic foundations of a country.[8] In order to fulfill such objective, competition law in general prohibits economic concentration to a certain individual or group of people, but instead broadens the opportunity for businesses to compete fairly and creates a competition climate that will enable businesses to carry out similar business activities in the market.[9]

Indonesia itself is one of the countries that have enacted its own competition law namely, Law No. 5/1999 concerning Prohibition of Monopolistic

[5]*Ibid*, p. 50.
[6]Asti Amalya, "Prinsip Ekstrateritorial Dalam Penegakan Hukum Persaingan Usaha", Jurnal Ilmiah Mandala Education, Vol. 6, no. 1 (2020), p. 172.
[7]Endik Wahyudi and Wahyu Prakoso , "Urgensi Penerapan Prinsip Ekstrateritorial bagi Penegakan Hukum Persaingan Usaha di Indonesia", Lex Jurnalica, Vol. 18, no. 3 (2021), p. 258–259.
[8]Mansur Armin Bin Ali, "Penegakan Hukum Persaingan Usaha di Negara Berkembang (Studi Kasus Putusan KPPU dalam Perkara Temasek)", Jatiswara, Vol 31, no. 1, p. 114.
[9]*Ibid*

Practices and Unfair Business Competition **["Law No. 5/1999"]**, in which On 5th March 1999 the Indonesian government issued this particular law to establish and define a clear limit in regulating business competition.[10] The existence of this law ensures legal certainty, that will further accelerate the economic progress and improve public welfare.[11] Furthermore, the government hoped that with the enactment of Law No. 5/1999, it will facilitate businesses and give them the opportunity to compete fairly in the existing market.[12]

Within this context, Law No. 5/1999 is the first competition law to be enacted in Indonesia and is still applicable to this very day. This law was born in the midst of the 1998 monetary crisis that later on had developed into an economic crisis as well as a crisis of trust and confidence in the government's authority.[13] During this crisis, Indonesia seeked the help of the International Monetary Fund **["IMF"]**, in which the IMF is an organization that provides financial assistance in the form of loans and inputs to its member countries.[14] At that time, the IMF agreed to dispense a loan to Indonesia with the condition that Indonesia must enact several new laws, including a law regulating the business competition and the prohibition of monopolistic practices, in which Indonesia expresses its compliance through the enactment of Law No. 5/1999.[15]

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[10]Kiagoos Aziz, "Perjanjian Yang Dilarang Berdasarkan Perspektif Hukum Persaingan Usaha Indonesia", Jurnal Ilmu Sosial dan Pendidikan, Vol. 5, no. 2 (2021), p. 49.
[11]*Ibid*
[12]Endik Wahyudi and Wahyu Prakoso , "Urgensi Penerapan Prinsip Ekstrateritorial bagi Penegakan Hukum Persaingan Usaha di Indonesia", Lex Jurnalica, Vol. 18, no. 3 (2021), p. 259.
[13]Rizky Novyan Putra, "Urgensi Keberadaan Hukum Persaingan Usaha Dan Anti Monopoli Di Indonesia", Business Law Review, Vol. 1 (2016), p. 39.
[14]Mutia Fauzia, "APA ITU IMF: Pengertian, Sejarah, Dan Tujuan Pembentukan Halaman All.," *KOMPAS.Com*, https://money.kompas.com/read/2021/10/15/151038026/apa-itu-imf-pengertian-sejarah-dan-tujuan-pembentukan?page=all., , accessed on 20 July 2023
[15]Rachmadi Usman , *Hukum Persaingan Di Indonesia* (Jakarta: Sinar Grafika, 2013), hal 1.

In addition to the enactment of Law No. 5/1999, the Indonesian government by Presidential Decree Number 75/1999 concerning the Commission for the Supervision of Business Competition **["Kepres No. 75/1999"]** also established a government body, namely the Supervisory Commission of Business Competition **["KPPU"]** to facilitate the enforcement of Law No. 5/1999.[16] According to the general provisions contained in Article 1 number 18 of Law No. 5/1999, the KPPU is a commission established to supervise business actors in carrying out its business activities, ensuring that the business does not commit monopolistic practices and/or unfair business competition. Law No. 5/1999 and Kepres No. 75/1999 grants the KPPU the authority and rights to take preventive as well as repressive measures against business actors.[17] Within this context, preventive measures refers to the KPPU's duties to carry out prevention before a violation occurs, whereas repressive measures take form in the enforcement of the law itself against business actors who committed violations.[18] Over the past few decades the enactment of Law No. 5/1999 and the establishment of the KPPU as a state auxiliary has greatly helped in protecting Indonesia's competitive climate and market. However, it cannot be said that Law No. 5/1999 is perfect as there have been several issues in regards to the provisions that are considered to be non-coherent with the current business conditions, in which it needs to be studied in

[16]Ketut Nurjaya , "Peranan KPPU dalam Menegakan Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha tidak Sehat", Jurnal Dinamika Hukum, Vol. 9, no. 1 (2009), p. 84.
[17]Alifa Sabrina, "Penerapan Prinsip Ekstrateritorialitas terhadap Pengawasan Pengambilalihan Saham dalam Hukum Persaingan Usaha", Juris-Diction, Vol 3, no. 4 (2020), p. 1286.
[18]*Ibid*

more depth.[19] One of these issues is in regards to the applicability of Law No. 5/1999 to foreign business actors who are located outside the jurisdiction of Indonesia.[20]

As of right now globalization is causing rapid economic development.[21] Within this context, globalization refers to the process of how concepts, information, expertise, products and services, go across national and international borders. In business and economic terms, globalization is interlinked with free trade, the unrestricted movement of capital across nations, and ease of access to foreign resources.[22] As such, globalization will provide the opportunities for countries, especially developing ones, to participate in the international market.[23] A country's participation in the international market will bring positive impacts as it increases trade, domestic business expansion, and further encourages foreign investments, which will significantly help in increasing state income and assist the country in creating more employment and jobs.[24]

However, with globalization and a country's participation in the international market, it cannot be denied that it will definitely alter the

[19]Gaung Zelina, "Cross-Border Competition Framework: Implementasi Prinsip Ekstrateritorialitas Penerapan Hukum Persaingan Usaha di Indonesia dibawah Undang-Undang Nomor 5 Tahun 1999", Santhet: Jurnal Sejarah, Pendidikan, dan Humanitarian, Vol 7, no. 1 (2022), p.190.
[20]*Ibid*
[21]Muhammad Habib, *et al*, "Urgensi Revisi Undang-undang Anti Monopoli Indonesia Studi Perbandingan Fair Trade Commission Jepang", Jurnal Ilmiah Universitas Batanghari Jambi, Vol 22, no. 1, (2022), p. 107.
[22]Ben Lutkevich, "What Is Globalization? Globalization Explained," *CIO*, https://www.techtarget.com/searchcio/definition/globalization, accessed on 20 July 2023,
[23]Muhammad Habib, *et al*, "Urgensi Revisi Undang-undang Anti Monopoli Indonesia Studi Perbandingan Fair Trade Commission Jepang", Jurnal Ilmiah Universitas Batanghari Jambi, Vol 22, no. 1, (2022), p. 107.
[24]*Ibid*

competition within the said country.[25] This is due to the fact that when a country participates in the international market, it will have to open its country's borders, meaning that it will have to decrease its trade and investments restrictions allowing foreign trade to come into the country, increasing the competition for domestic business actors as well as its production.[26] In addition to that, it will also open up opportunities for business actors to participate in cross-border anticompetitive practices that are damaging and will have a harmful impact on the domestic competition.[27] Within this context, these cross-border anticompetitive practices are actually similar to those found in domestic situations, but involve international or foreign participation (such as: international cartels, mergers, or acquisitions).[28] As such, it is essential and crucial for a country to establish laws and regulations that will serve as a guideline as well as to ensure equal and fair treatment for both domestic and foreign business actors.[29] In general, relations with foreign business actors are regulated by the rules agreed in international agreements, but there are presently no underlying and binding international regulations regulating the policy in regards to the implementation of competition law, as such, numerous countries across the globe implements the laws of their respective countries towards foreign business actors whose actions affects their

[25]Gaung Zelina, "Cross-Border Competition Framework: Implementasi Prinsip Ekstrateritorialitas Penerapan Hukum Persaingan Usaha di Indonesia dibawah Undang-Undang Nomor 5 Tahun 1999", Santhet: Jurnal Sejarah, Pendidikan, dan Humanitarian, Vol 7, no. 1 (2022), p.191.
[26]*Ibid*, p. 190.
[27]Udin Silalahi, "The Application of Extraterritoriality Principle in ASEAN Economic Community Era: Challenge and Feasibility", Jorunal of Business Law and Ethics, Vol. 7, no. 1 & 2 (2019), p. 2.
[28]Asti Amalya, "Prinsip Ekstrateritorial Dalam Penegakan Hukum Persaingan Usaha", Jurnal Ilmiah Mandala Education, Vol. 6, no. 1 (2020),p. 173.
[29]*Ibid,* p. 172.

economy.[30] However, the implementation of a country's competition law should be implemented with caution as there is a possibility that diplomatic conflicts between jurisdictions can occur.[31]

In regards to Indonesia, it has also been actively participating in the international market. However, the Indonesian competition law has not been able to facilitate its participation in the international market. Such is due to the fact that even though now foreign business actors actively participate in Indonesia's economy and competition, the Indonesian competition law, namely Law No. 5/1999, does not apply to foreign business actors whose business activities are located outside the jurisdiction of Indonesia.[32] This can be seen in Article 1 Number 5 of Law No. 5/1999, regulating on the scope of applicability of the law itself, in which only businesses that are established, domiciled, and carry out its business activities in Indonesia are subject to Law No. 5/1999.[33] This is very detrimental to Indonesia as it is very possible for anti-competitive practices committed abroad to have a deep impact in Indonesia.[34] Ditha Wiradiputa who is one of the drafters of the Academic Paper on the Bill Prohibiting Monopoly Practices and Unfair Business Competition stated that due to Indonesia's participation in the international market, the economic impact of cartels, mergers, and anti-competitive practices are no longer limited by national boundaries, meaning that the regulatory instruments need to accommodate these needs, in

[30]*Ibid*
[31]*Ibid*
[32]Hassan Qaqaya, "The Qualified Effects Doctrine in the Extraterritorial of Competition Law Application: An Indonesia Perspective", Sriwijaya Law Review, Vol 5, no. 2 (2021), p. 193.
[33]Asti Amalya, "Prinsip Ekstrateritorial Dalam Penegakan Hukum Persaingan Usaha", Jurnal Ilmiah Mandala Education, Vol. 6, no. 1 (2020), p. 173.
[34]*Ibid*

which it can only be done by the application of jurisdiction or extraterritorial principles.[35]

One of the aforementioned extraterritorial principles that can be applied is the notion of effects doctrine. Within this context, the effects doctrine refers to a basis of jurisdiction that was developed with the objective of reaching foreign nationals abroad whose actions transpires beyond the borders of the enforcing state but has an impact within that state.[36] Other countries such as: the United States, the European Union, and Australia, as well as countries in Asia such as: Japan, South Korea, and Singapore have exercised their control outside of their territorial boundaries by incorporating the effects doctrine in their laws and regulations, giving them the ability to examine someone without considering the perpetrator's own jurisdiction.[37] The disparity between Indonesia and other countries in regards to their regulations of effects doctrine will hurt Indonesia in the international trade aspect, as other countries whose competition law incorporates the effects doctrine will have the ability to prosecute Indonesian companies, while Indonesia does not have the ability to prosecute foreign companies who violate the Indonesian competition law.[38]

However, even though currently Law No. 5/1999 does not regulate or incorporate the effects doctrine or the extraterritoriality principle, over the past few years, the KPPU as the enforcer of the Indonesian competition law, has

[35]*Ibid*
[36]Najeeb Samie, "The Doctrine Effects and the Extraterritorial Application of Antitrust Laws", University of Miami Inter-American Law Review, Vol 14, no. 1 (1982), p. 23.
[37]Asti Amalya, "Prinsip Ekstrateritorial Dalam Penegakan Hukum Persaingan Usaha", Jurnal Ilmiah Mandala Education, Vol. 6, no. 1 (2020), p. 173.
[38]*Ibid*.

exerted its efforts to deal with foreign business actors whose business activities are outside the jurisdiction of Indonesia, but its actions have brought negative impacts to Indonesia's economy.[39] This is evident through KPPU Decision Number 07/KPPU- L/2007 and KPPU Decision Number 17/KPPU-M/2015.[40] Within this context, KPPU Decision Number 07/KPPU-L/2007 is a case against Temasek Holdings Pte. Ltd **["Temasek"]**, a Singaporean-based company, while KPPU Decision Number 17/KPPU-M/2015 is a case against Toray Advanced Material Inc. **["TAK"]**, a South Korean based company.[41] Regardless of the domicile of the business actors involved in both of these cases, the KPPU was able to indict and render a decision against them.[42] However, it cannot be said that this decision was made without any difficulties, as in both cases one of the issues that were raised by the defendant is in regards on whether the KPPU has the jurisdiction and authority to indict the defendant, considering the fact that Law No. 5/1999 does not include foreign business actors whose base of operations are abroad as its legal subject.[43] In addition to that, the applicability of Law No. 5/1999 to foreign business actors in both of the aforementioned cases raises uncertainty in regards to the parameters of Article 1 Number 5 of Law No. 5/1999 regulating the definition of business actors as well as the scope of the law itself.[44]

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[39]Hassan Qaqaya, "The Qualified Effects Doctrine in the Extraterritorial of Competition Law Application: An Indonesia Perspective", Sriwijaya Law Review, Vol 5, no. 2 (2021), p. 193.
[40]*Ibid*, p. 194.
[41]*Ibid*, p. 198 & 200.
[42]Asti Amalya, "Prinsip Ekstrateritorial Dalam Penegakan Hukum Persaingan Usaha", Jurnal Ilmiah Mandala Education, Vol. 6, no. 1 (2020), p. 174.
[43]*Ibid*
[44]Siti Anisah, "Comparative Study Application of Extraterritorial Jurisdiction in Competition Law between Indonesia and US Antitrust Law", International Journal of Law, Environment, and Natural Resources, Vol 2, no. 1 (2022), p. 3.

Considering such facts, this thesis would like to focus on comparing Indonesia's competition law with the US's Antitrust law. Within this context, the Antitrust law refers to a group of federal and state regulations as well as laws that are enacted to ensure that businesses do not participate in unfair business competition, in which the key laws that serve as a foundation to antitrust law consist of The Sherman Act, The Clayton Act, and The Federal Trade Commission Act.[45]

The reason behind such comparison is due to the fact that the Indonesia has yet to regulate on the effects doctrine in its competition law, while the US is one of the many countries who have incorporated the effects doctrine to its laws and regulations, in which it can be seen in Section 1 and 2 of the Sherman Act, giving legal certainty to the American competition supervisory committee, namely, the Federal Trade Commission **["FTC"]** and the Department of Justice **["DOJ"]** to implement the effects doctrine against foreign business actors whose actions disrupted the US economy. Additionally, due to the legal certainty that its law provides the US have long standing history of successfully implementing the extraterritoriality principle and the effects doctrine in several cases, in which two of the most notable ones are the US vs Aluminum Co. of America **["Alcoa"]** and Timberland Lumber Co. vs Bank of America. As such, the author wishes to further assess and compare on how Indonesia and the US regulates and implements the effects doctrine in their competition law, so that Indonesia can

[45] *Ibid*

also thrive in the international market as well as effectively protect its domestic market from any cross border anti-competitive practices.

1.2 Formulation of Issues

Based on the background that have been written, the author has formulated the following issues:

1. How is the effects doctrine regulated based on the US Antitrust law and Law No. 5/1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition?
2. How is the implementation of the effects doctrine in Cases of Unfair Business Competition in the US and Indonesia?

1.3 Research Purposes

1. To solve the legal issues in the field of competition law that are occurring in the society.
2. To carry out legal findings in the field of competition law.
3. To further develop legal knowledge in the field of competition law.

1.4 Research Benefits

Based on the aforementioned research purposes, it is hoped that the results of this thesis will bring both direct and indirect educational advantages. For the author, this thesis is the fulfillment of one of the requirements to obtain a bachelor degree in law. In addition to that, through this thesis the author can also utilize

and apply the knowledge that has been obtained throughout law school. Other than the benefits for the author, this thesis will also be beneficial for other parties. In specific the research benefits will be divided into two parts, namely: theoretical benefits and practical benefits.

1.4.1 Theoretical Benefits

The theoretical benefits are as follows:

a. It is hoped that this thesis can provide some insights for the government on how to regulate cross border anti-competitive practices as well as the implementation of effects doctrine.
b. It is hoped that this thesis can provide scientific contributions in regards to the implementation of effects doctrine in Indonesia.
c. It is hoped that this thesis can be used as reference for subsequent studies in the field of competition law.

1.4.2 Practical Benefits

In regards to the practical benefits, it is hoped that the results of this thesis can be used by the government and the KPPU as a study material to identify the issues of cross border anti-competitive practices as well as the need to include the effects doctrine in Indonesia's competition law.

1.5 Framework of Writing

This paper will be organized into five (5) main chapters, so that the readers can easily understand the discussion of this thesis:

CHAPTER I: INTRODUCTION

This chapter comprises of the introduction which will be divided further into 5 parts namely: (1) The background of the issue containing the reasons that are used as the basis of conducting this research, (2) formulation of issues containing fundamental problems that will be the focus of this research, (3) research purposes containing an explanation of the purpose of this research, (4) research benefits which contains an explanations of the benefits of conducting this research, and (5) framework of writing containing the composition of this thesis which is divided into five main chapters INTRODUCTION, LITERATURE REVIEW, RESEARCH METHODOLOGY, ANALYSIS & DISCUSSION, AND CONCLUSION.

CHAPTER II: LITERATURE REVIEW

In this chapter, the author will discuss the literature review that is relevant with the topic of this thesis. The literature review will be divided into two parts, namely, the theoretical framework and the conceptual framework. The objective of the literature review is to help the author and reader better understand the research that is to be studied.

CHAPTER III: RESEARCH METHODOLOGY

This chapter will discuss the type of research, the type of data, data analysis method, and the research approach that the author will be using to discuss the issue in this thesis.

CHAPTER IV: DISCUSSION AND ANALYSIS

In this chapter, the author will discuss the research problems and the solutions. This chapter will be further divided into two sub-chapters, in which through each of these sub-chapters, the author will answer the research questions as listed on chapter 1.

CHAPTER V: CONCLUSION & SUGGESTION

In the last chapter, the author will draw up a conclusion and solutions from the research and analysis that has been carried out from chapter 1 until chapter 4. It is hoped that the suggestions given by the author will be useful for related parties and readers.