

## The Regulation Impact of Foreign Ownership on the Cooperation Projects Air Transportation

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### ABSTRACT

This study aims to identify, locate, and analyze constitutional issues regarding the impact of foreign capital ownership above 50% (fifty percent) in government-business cooperation projects, particularly in the area of public interest projects involving air transportation infrastructure. This normative research examines legal texts, mainly primary and secondary legal materials. This research found that, first, the changes in the Presidential Regulation regarding foreign investment in the field of public interest, such as airport services, were incompatible with the Constitution. The changes abolished the maximum percentage limit of foreign investment regulated in the previous provisions so that currently, foreign investment may carry out Government Cooperation with Business Entities on air transportation infrastructure projects without a percentage limit. Second, based on the Indonesian Constitution, ownership of air transportation should be under the state's authority, learning from China, which excessively applies foreign investors in the air transportation sector, causing consumer welfare to be affected by very high airplane ticket prices.



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## 1. Introduction

Foreign capital ownership has a role in economic development in Indonesia. Economic development can be aided by foreign direct investment (FDI). The government oversees investment projects that are meant to further the nation's social, economic, and other interests. This relates to how the government helps strengthening the nation's economy. The entire community is meant to benefit from economic democracy as a form of prosperity. There are a total of 269,603.4 Indonesian citizens till 2020, based on forecasts by the Central Statistics Agency, who are Indonesian nationals, who need to have their rights protected by the government.<sup>1</sup> The role is stated in the state constitution Article 28D paragraph (1), and sets it apart from its other provision, because the entire community of

<sup>1</sup> Prisca Listiningrum and others, 'The Space Between Us: Questioning Multi-Spatial Justice in the Upcoming Indonesia's Capital', *Journal of Human Rights, Culture and Legal System*, 3.3 (2023), 706–30 <https://doi.org/10.53955/jhcls.v3i3.169>

the nation is governed by the Indonesian government,<sup>2</sup> hence the government is accountable for all issues pertaining to the welfare and prosperity of all its citizens.

The government in Indonesia regulates various aspects that are applied to the community in an effort to maintain the stability of the country, especially on various community needs that contain the livelihood of many people, including in terms of the economy, which is clearly regulated in the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), contained in the provisions of Article 33. Being under the state's control does not imply that the state transforms into a businessperson, entrepreneur, or *ordernemer*. The control is directed at the sectors of production that are considered to be significant for the nation and that have a significant impact on the lives of many people. This is strongly related to putting in place an economy based on economic democracy with the prosperity of society as a whole as the primary goal.<sup>3</sup>

Provisions related to sharing of ownership in companies established in the context of foreign investment emphasize that foreign investment is a joint venture between foreign capital and capital owned by Indonesian citizens and/or Indonesian legal entities. The provisions emphasize that investment belongs to Indonesian citizens or Indonesian legal entities at least 5% (five percent) of the total capital. Referring to these provisions, it can be seen that foreign capital ownership in a cooperation can exceed 50% (fifty percent) of the total capital. This is a rather strong question since the existence of foreign capital should only serve as a complement to a national development financing process. The implementation of the nation's independence in national development, in terms of financing, should indeed be understood as prioritizing country's potentials but it does not mean to block the inflow of foreign capital to the country. However, when the ownership of capital will affect the state's role and control, then there should be restrictions on the use of foreign capital, especially in developments that are public in nature or link to the interests of the public at large. The importance of such restrictions is also related to the elements of Indonesia's constitutional enforcement.<sup>4</sup>

The concept of control by the state as an endeavor to safeguard the interests of society has been raised in different commercial domains, notably in the development of public-private partnerships. Types of infrastructure that can be collaborated include transportation infrastructure, as stated in the Presidential Regulation of the Republic of Indonesia Number 38 of 2015 concerning Cooperation between the Government and Business Entities in the Provision of Infrastructure. Cooperation between the Government and Business Entities (PPP) is realized in business transportation, especially in airport services. The previous provisions, namely Presidential Regulation Number 44 of 2016 concerning List of Closed Business Fields and Open Business Fields with Requirements in the Investment Sector,

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<sup>2</sup> Nurfaika Ishak, Rahmad Ramadhan Hasibuan, and Tri Suhendra Arbani, 'Bureaucratic and Political Collaboration Towards a Good Governance System', *Bestuur*, 8.1 (2020), 19 <https://doi.org/10.20961/bestuur.v8i1.42922>

<sup>3</sup> Ahmad Asari Taufiqurrohman, Dwi Edi Wibowo, and Ong Victoria, 'The Regulation on Sexual Harassment in ASEAN Workers: Evidence from Several Countries', *Journal of Human Rights, Culture and Legal System*, 4.2 (2024), 538–68 <https://doi.org/10.53955/jhcls.v4i2.198>

<sup>4</sup> Herawati Zetha Rahman and others, 'Research Trends, Themes and Gaps of Public Private Partnership in Water Sector: A Two Decade Review', *Urban Water Journal*, 19.8 (2022), 782–97 <https://doi.org/https://doi.org/10.1080/1573062X.2022.2088393>

stipulate that the type of airport service infrastructure in terms of implementing cooperation, it can be carried out with a maximum condition of 49% (forty nine percent) on foreign capital ownership.<sup>5</sup>

However, these regulations have been amended and revoked 3 (three) times, until now the applicable provisions are the Regulation of the President of the Republic of Indonesia Number 10 of 2021 concerning Investment Business Sector (hereinafter referred to as the Presidential Decree on Investment), which revokes regulations related to airport services so that the limitation on the ownership of foreign capital becomes not determined by the maximum limit. This triggers the issue of arrangements' disharmony concerning foreign capital ownership in public infrastructure development between presidential regulations and Indonesia's constitutional basis.<sup>6</sup>

The issue of the constitutionality of foreign share ownership of more than 50% (fifty percent) in the air transportation sector, which is thought to be capable of luring international investors to invest their shares in the aviation industry needs to be studied from the perspective of the air transportation sector under the scope of regulation of Article 33 of the 1945 Constitution of the Republic of Indonesia, especially paragraph (2). As is well known, Article 33 paragraph (2) of the 1945 Constitution of the Republic of Indonesia states, "Production branches that are important for the state and affect the livelihood of the general public shall be controlled by the state". The provisions of the 1945 Constitution of the Republic of Indonesia imply that there are two things that are interrelated, between the regulation of foreign share ownership in the air transportation sector and the statement of the type of product that controls the lives of many people needs to be controlled by the state, this needs to be studied in depth.<sup>7</sup>

Based on these issues, this writing specifically focuses on Presidential Regulation Number 10 of 2021 in conjunction with Presidential Regulation Number 49 of 2021 concerning Amendments to Presidential Regulation Number 10 of 2021 concerning the Investment Business Sector, the two identified legal issues are identified, reviewed and analyzed argumentatively in the first case, the air transportation sector is an important production branch for the country and control the lives of many people so that it must be controlled by the state. Further study is needed with regard to the purpose of the establishment of State-Owned Enterprises (hereinafter referred to as the SOEs) as a company engaged in the public interest. As well as second thing, foreign share ownership that exceeds 50% (fifty percent) in the air transportation sector, especially airport services, is considered to have contradicted or not with Article 33 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. This provision explicitly becomes the benchmark and vision for the management of state assets to be carried out by the

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<sup>5</sup> Mahameru Rosy Rochmatullah and others, 'Is Quantifying Performance Excellence Really Profitable? An Empirical Study of the Deployment of the Baldrige Excellence Measurement Model in Indonesia', *Asia Pacific Management Review*, 28.3 (2023), 287–98  
<https://doi.org/https://doi.org/10.1016/j.apmr.2022.10.006>

<sup>6</sup> Ellia Kristiningrum and others, 'Quantifying the Economic Benefit of Standard on Auto-Electric Stove for Batik Small Medium Enterprises in Indonesia', *Heliyon*, 7.6 (2021), e07299  
<https://doi.org/https://doi.org/10.1016/j.heliyon.2021.e07299>

<sup>7</sup> Matías Herrera Dappe and others, 'State-Owned Enterprises as Countercyclical Instruments: Quasi-Experimental Evidence from the Infrastructure Sector', *World Development*, 179 (2024), 106608  
<https://doi.org/https://doi.org/10.1016/j.worlddev.2024.106608>

government. It will be a problem if the element of state control is transferred to private parties.<sup>8</sup>

The government has so far carried out cooperation projects with the private sector, such as in the development of the air transportation sector. PT Angkasa Pura II established a strategic cooperation with a foreign company, GMR Airports Consortium to manage Kualanamu International Airport in Deli Serdang, North Sumatra. The cooperation was carried out at the end of 2021, with 49% (forty-nine percent) foreign ownership. At that time, PT Angkasa Pura II applied the maximum capital investment that could be provided by foreigners as mandated in the provisions. There will become a problem if the current provisions change to an undetermined number of foreign ownerships in an air transportation cooperation in Indonesia.<sup>9</sup>

This is urgent for legal reform in Indonesia. For this reason, in the initial part of this research will analyze in depth in advance to anticipate the possibility of a *judicial review* of the norms of laws and regulations governing foreign share ownership, both whether these settlements take the shape of laws or statutory rules enacted as a result of legislation (in this case, including presidential rules). If the norms of the statutory regulations are in the form of laws, the institution authorized to adjudicate and decide on such review is the Constitutional Court, whereas if they are in the form of statutory regulations under a law, the institution authorized to adjudicate and decide on them is the Supreme Court.<sup>10</sup> Regardless of who adjudicates and decides on the review of the norm, however, it is what needs to be emphasized is that it must prioritize the principle of *ius curia novit* and can override the principle of *nemo iudex in propria causa*, this aims to uphold the constitution and in an effort to protect the constitutional rights of citizen.

Research by Effnu Subiyanto, found that the false corporate strategy implemented by the state-owned airline Garuda Indonesia due to multiple malpractices. Excessive investment should expand the scale and scope of the business but, otherwise, the strategy has accelerated management's chaos and disruption. This study provides guidance and lesson learned for corporations that would have been considering doing business expansion due to wishing to increase the scale and scope of the corporation.<sup>11</sup> Corporate strategy is very important to uphold along with applicable government regulations in opening up opportunities related to air transportation investment in Indonesia, as will be discussed in this article.

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<sup>8</sup> Patdono Suwignjo and others, 'Framework for Measuring Process Innovation Performance at Indonesian State-Owned Companies', *Journal of Open Innovation: Technology, Market, and Complexity*, 8.2 (2022), 95 <https://doi.org/https://doi.org/10.3390/joitmc8020095>

<sup>9</sup> Rian Saputra and Silaas Oghenemaro Emovwodo, 'Indonesia as Legal Welfare State: The Policy of Indonesian National Economic Law', *Journal of Human Rights, Culture and Legal System*, 2.1 (2022), 1–13 <https://doi.org/https://doi.org/10.53955/jhcls.v2i1.21>

<sup>10</sup> Armalia Berlinda Irawan, Rahayu Subekti, and Bobur Baxtishodovich Sobirov, 'Legal Protection in Land Acquisition for Public Interest: A Dilemma Between State Regulation and Social Welfare', *Journal of Sustainable Development and Regulatory Issues (JSDERI)*, 2.2 (2024), 148–68 <https://doi.org/10.53955/jsderi.v2i2.38>

<sup>11</sup> Effnu Subiyanto, 'Excessive Investment Failure Corporate Strategy: A Case Study of the Bankruptcy of the State-Owned Indonesia Airline Garuda Indonesia', *Case Studies on Transport Policy*, 10.2 (2022), 1401–6 <https://doi.org/10.1016/j.cstp.2022.05.005>

Based on several research, no existing specific study addressing this issue. In the discussion of this article, it is important to link the issue of the constitutionality of laws and regulations related to how China regulate their air transportation as a lesson learn, about the product that can affect the livelihood of the general public with the foreign ownership of shares in the air transportation sector, which is not part of the consideration.

## 2. Research Method

This study employs the statutory, fact, and case approaches to conduct normative legal research. It examines the applicable legal norms viewed from statutory, legal-conceptual, as well as case approaches. As a normative legal research, this article depends primarily on legal materials or legal research literatures, particularly primary and secondary legal materials, with the aim of tracing, finding, studying, and analyzing the issues that arise and the need to deepen the constitutional perspective on the impact of the regulation of foreign ownership above 50% (fifty percent) on the Public-Private Cooperation Projects in Air Transportation Infrastructure.<sup>12</sup> This research conducts comparative legal study with lesson learn from China. The author chose China as a comparative country because of the basic vision of the mandate of the Chinese people and state, sustainable development, social development models, the environment, international trade in China, and the world class economy, for the welfare of all Chinese people. Policies to encourage foreign direct investment have been done to encourage the national economy.<sup>13</sup>

## 3. Results and Discussion

### 3.1 *The Concept of Public and Private Cooperation Agreement*

In theory, collaboration between the public and commercial sectors consists of several terms, including Build and Transfer; Built, Operate, Transfer (BOT); Cooperation Build, Operate, Leasehold, and Transfer (BOLT) Cooperation Build, Transfer, and Operate (BO) Collaboration Renovate, Operate, and Transfer Renovate, Operate, Leasehold, and Transfer (ROLT) Cooperation; Cooperation Build, Transfer, Leasehold (BTL). The use of each type of contract with the government depends on the project that the business entity is working on.<sup>14</sup> Through this type of agreement or contract with the government, it can be seen that there has been a development in contract law. The International City/County Management Association (ICMA) states that, "besides traditional infrastructure funding through the APBN or APBD, there are several other alternatives in infrastructure financing, namely through new funding sources, new financing mechanisms, or through new funding patterns."<sup>15</sup>

The mechanism of this financing pattern can be in the form of a new loan method that is flexible and/or potentially cost-effective for funding an infrastructure project. Finally, new funding patterns

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<sup>12</sup> I Gusti Ayu Ketut Rachmi Handayani and Jasurbek Rustamovich Ehsonov, 'Governing Illegal Settlements: Housing Policy in Singapore and Australia', *Journal of Sustainable Development and Regulatory Issues (JSDERI)*, 2.2 (2024), 86–107 <https://doi.org/10.53955/jsderi.v2i2.44>

<sup>13</sup> Rina Arum Prastyanti and Ridhima Sharma, 'Establishing Consumer Trust Through Data Protection Law as a Competitive Advantage in Indonesia and India', *Journal of Human Rights, Culture and Legal System*, 4.2 (2024), 354–90 <https://doi.org/10.53955/jhcls.v4i2.200>

<sup>14</sup> Thiri Shwesin Aung, Indra Overland, and Roman Vakulchuk, 'Environmental Performance of Foreign Firms: Chinese and Japanese Firms in Myanmar', *Journal of Cleaner Production*, 312 (2021), 127701 <https://doi.org/https://doi.org/10.1016/j.jclepro.2021.127701>

<sup>15</sup> Rachel Georgha Sentani and Mathijs ten Wolde, 'The Legal Policy of Executability in the International Arbitral Tribunal Decision Rachel', *Bestuur*, 9.2 (2021), 144–55 <https://doi.org/https://dx.doi.org/10.20961/bestuur.v9i2.54451>

may incorporate new partners (commercial, non-profit organizations, or communities) to participate in infrastructure finance and project delivery. PPP can bridge the completion of some infrastructure finance needs through the participation of the private sector. With the help of this partnership model, the private sector can be entrusted with the operation and maintenance of infrastructure as well as the funding, design, and construction of infrastructure projects.<sup>16</sup>

The PPP project is an infrastructure project whose provision is carried out by the Government in collaboration with Business Entities. The PPP scheme is realized through a partnership agreement (contract) involving the Government as the Cooperation Project Responsible Agency (GCA) and the Business Entity. At the end of the cooperation period, the cooperation infrastructure will be handed over to the GCA. The basis of the PPP project cooperation agreement is the distribution of risk allocation between the Government (through the GCA) and Business Entities. Each risk is assigned to a party that can reasonably manage, control, prevent, or absorb it. GCA in this instance could be a company or organization that represents the government in the delivery of PPP projects.<sup>17</sup>

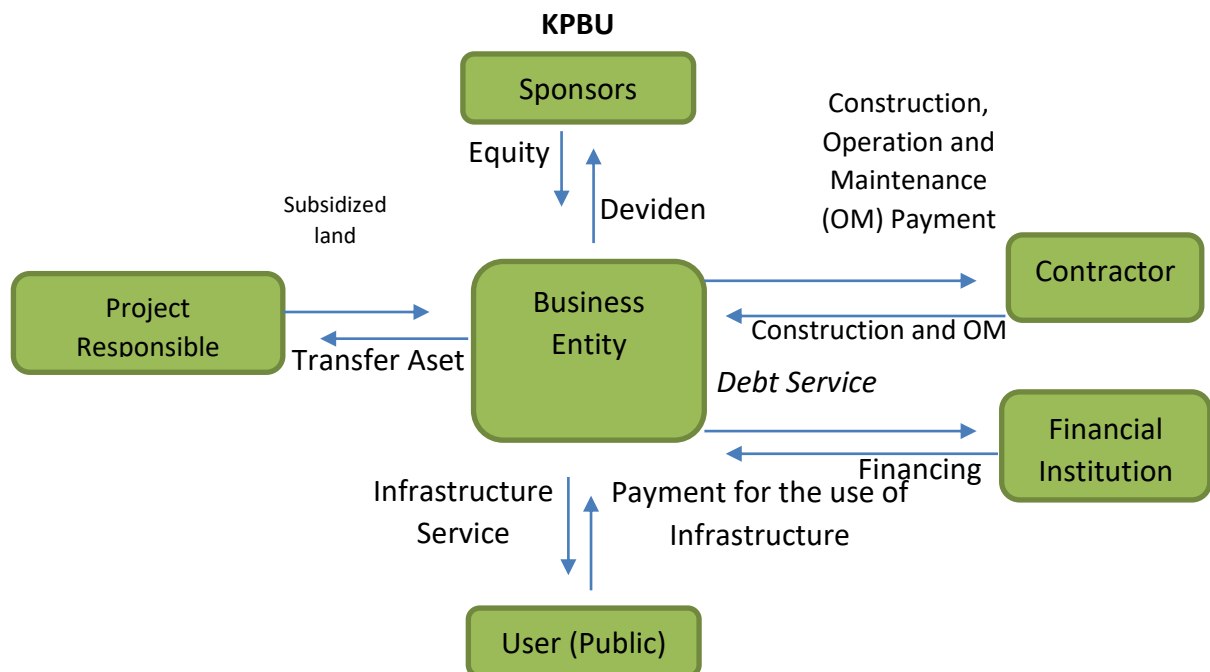


Figure 1. The Relationship of the Parties in the PPP Project, Source:

There are a number of infrastructure projects in Indonesia that were implemented using the PPP model. There are various issues that are important for further research, including those related to the effectiveness of PPP scheme fiscal facilities as well as critical success factors in the implementation of PPP projects. Due to this, it is crucial that its execution abide by Indonesia's laws, notably those pertaining to foreign investment. Due to the fact that they will serve as the

<sup>16</sup> Judith M Dean, Mary E Lovely, and Hua Wang, 'Are Foreign Investors Attracted to Weak Environmental Regulations? Evaluating the Evidence from China', *Journal of Development Economics*, 90.1 (2009), 1–13 <https://doi.org/https://doi.org/10.1016/j.jdeveco.2008.11.007>

<sup>17</sup> Sebastian Wandelt and others, 'Status Quo and Challenges in Air Transport Management Research', *Journal of the Air Transport Research Society*, 2 (2024), 100014 <https://doi.org/https://doi.org/10.1016/j.jatrs.2024.100014>

foundation for cooperation between the government and the business entity,<sup>18</sup> legal provisions governing public legal entities should be carefully considered. The provisions regarding this collaboration are regulated in Presidential Regulation Number 10 of 2021 jo. Amendments to Presidential Regulation No. 10 of 2021 Concerning the Investment Business Sector are described in Presidential Regulation No. 49 of 2021. (Hereinafter referred to as Presidential Regulation regarding Investment).<sup>19</sup>

Agreements involving public services are permissible between local governments and private parties. In her description of public services, Olive Holtman noted that they "usually cannot choose clients, roles are constrained by legislation, politics institutionalize conflict, complex accountability, very open to security, action must be justified, and aims outcomes difficult to state/measure". Other approaches are required in the interim since the government lacks the capacity to develop public services that the entire community can use as a means of welfare for everyone to be continuously enhanced. Because of these limited capabilities, the government does not rule out the possibility of government failure, which becomes the basis for enacting private intervention for a number of reasons, such as an increase in urban population while government financial resources are in a limited state. The services provided by the private sector are considered to be more efficient, to the extent that there are many service areas that cannot be handled by the private sector. This is significant because it reflects the state's function as a body tasked with formulating laws that promote social welfare.<sup>20</sup>

The highest level of organization in a region's social fabric might be referred to as the state. The state as an entity encompassing a region has the capacity to lawfully impose its authority on all other power groups and can set the aims of that common life.<sup>21</sup> The state establishes the manner and limits to which power can be utilized in that common life, both by individuals and organizations or organizations, as well as by the state itself.<sup>22</sup> Thus the state has the power to combine and steer the social activities of its residents towards common goals, which is something that requires consideration in the role of the state as an organization, especially for the objectives included in the state constitution. In order to fulfill what the country's aims are, it is vital to develop a government structure. The President, who serves as the head of government and holds the authority to manage state finances as part of government power, plays a role in the state's function as an organization in relation to the management of state finances. The government establishes laws relating to foreign powers in deciding the development of Indonesia's economy with share ownership in infrastructure through a presidential regulation.

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<sup>18</sup> Dinda Agustin Wulandari, Abdul Kadir Jaelani, and Hilaire Tegnan, 'Income Tax Regulations for Child Content Creators of TikTok Platform: Inefficacy of Indonesian Legal Frameworks', *Journal of Sustainable Development and Regulatory Issues (JSDERI)*, 2.2 (2024), 169–91 <https://doi.org/10.53955/jsderi.v2i2.35>

<sup>19</sup> Roberto Cardinale, Matteo Landoni, and Zhifu Mi, 'Global State-Owned Enterprises in the 21st Century: Rethinking Their Contribution to Structural Change, Innovation, and Public Policy', *Structural Change and Economic Dynamics*, 68 (2024), 468–72 <https://doi.org/https://doi.org/10.1016/j.strueco.2024.01.013>

<sup>20</sup> Eric Tchouamou Njoya and Aliyu Buhari Isah, 'Assessing the Economic Impact of the Single African Air Transport Market: The Case of Tanzania', *Research in Transportation Economics*, 101 (2023), 101351 <https://doi.org/https://doi.org/10.1016/j.retrec.2023.101351>

<sup>21</sup> Kenneth Button, 'The Economics of Africa's Floriculture Air-Cargo Supply Chain', *Journal of Transport Geography*, 86 (2020), 102789 <https://doi.org/https://doi.org/10.1016/j.jtrangeo.2020.102789>

<sup>22</sup> Hong-li Tang, Jian-min Liu, and Jin-guang Wu, 'The Impact of Command-and-Control Environmental Regulation on Enterprise Total Factor Productivity: A Quasi-Natural Experiment Based on China's "Two Control Zone" Policy', *Journal of Cleaner Production*, 254 (2020), 120011 <https://doi.org/https://doi.org/10.1016/j.jclepro.2020.120011>

### 3.2 *The Constitutional Perspective on the Purpose of Establishing Cooperation between the Government and State Enterprises*

Identifies the channels and restrictions through which people, groups, or even the state itself can exercise power in daily life. As a result, the state can direct and organize the social activities of its residents in order to achieve common goals. The state can be viewed as a group of individuals who live and cooperate to achieve a single objective. It might be claimed that the ultimate purpose of every country is to produce happiness for its people (*bonum publicum*, common good, common wealth). The government, acting in its capacity as the state's architect, is required to be able to enact laws and rules that benefit the populace.<sup>23</sup> In order to make it tangible that the existence of law is crucial to fostering people's welfare, this is a fundamental step in realizing the idea of a welfare state in a state that is based on the rule of law. Achieving the aims of human welfare in the presence of government and business entity collaboration, such as in foreign investment implementation of cooperation in practically every economic area, such as agriculture, fisheries, plantations, forestry, manufacturing, mining, finance, postal and telecommunications, transportation, electricity, industry and trade, and construction. The government plays a vital role in public services for Indonesian society today since they are in direct contact with the lives of many people, even though part of their shares is also owned by individuals or private company entities.<sup>24</sup>

Regarding this principle of kinship, Sofian Effendi stated that the same idea of interconnectedness that provided the Preamble's philosophical foundation was used to write each item of the 1945 Constitution. Because of the strong sense of kinship that permeates the nation of Indonesia, citizens prioritize the needs of their community over their own in terms of thought, action, and obligation. Then it was also stated that for the government and the state as a whole to function, state administrators' and leaders' morale is essential. In effect, the Constitution is useless if state administrators and other government leaders have an individualistic mindset, despite the fact that the document was created with family values in mind.<sup>25</sup>

Article 33 paragraph (1) of the Indonesian Constitution states "...the economy is structured as a joint venture based on the principle of kinship...". In Article 33 paragraph (2) it states "... Branches of production which are important for the state and which affect the livelihood of many people are controlled by the state...". In Article 33 Paragraph (3) states "...Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people...". Whereas Article 33 paragraph (4) explains that "...the national economy is organized based on economic democracy with the principles of togetherness, fair efficiency, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity...". The requirements in Article 33 of the Indonesian Constitution must serve as the

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<sup>23</sup> David H Rosenbloom, Rosemary O'leary, and Joshua Chanin, *Public Administration and Law*, Routledge, New York: 2017, p. 300, <https://doi.org/10.4324/9781315089348>

<sup>24</sup> Rami Al Rawashdeh and Gary Campbell, 'Mineral Policy in the Gulf Cooperation Council (GCC) Countries: The Case of Saudi Arabia', *The Extractive Industries and Society*, 9 (2022), 101042 <https://doi.org/https://doi.org/10.1016/j.exis.2021.101042>

<sup>25</sup> Lishan Sun and others, 'Reducing Energy Consumption and Pollution in the Urban Transportation Sector: A Review of Policies and Regulations in Beijing', *Journal of Cleaner Production*, 285 (2021), 125339 <https://doi.org/https://doi.org/10.1016/j.jclepro.2020.125339>



cornerstone for the development of Indonesia's economic legislation. Economic democracy and wealth for all people are the foundations of the economy.<sup>26</sup>

The State must have authority over the sectors of the economy that are crucial to it and have an impact on the livelihood of the vast majority of people. If not, those in authority and the people they regularly oppress take control of the production process. Economic Democracy, which prioritizes the prosperity of society and not the prosperity of individuals...", means prioritizing togetherness (mutualism), not based on individualism. The application in Article 33 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, relates to the role of the government as the ruler of the state to take control of every economic development activity aimed at the public interest. In short it is said that "essential for the nation" are strategic producing branches. Only in the framework of Article 33 of the 1945 Constitution of the Republic of Indonesia can the understanding be adopted that "controlled" by the state does not necessarily imply "owned" by the state (i.e., it may be held by a private or foreign enterprise). Based on the goal of putting the government in full charge in order to carry out Section 33(3) of the 1945 Constitution.<sup>27</sup>

Funding is necessary for national development that is focused on economic growth; as a result, aid from abroad flowed, along with the IGGI (Inter Governmental Group on Indonesia) conference, starting in 1967, in the context of using foreign investment, much like it did in *Repelita* I during the New Order era. The establishment of Law Number 1 of 1967 concerning Foreign Investment and Law Number 8 of 1968 concerning Domestic Investment, which have both since been abolished and replaced by Law Number 25 of 2007 concerning Investment, demonstrate how economic progress affects legal development. The investment can be realized in the form of cooperation between the government and business entities. The government creates chances for partnership with the private sector on the basis of attempts to implement Article 33 of the 1945 Constitution, with the goal of accelerating the nation's growth in an effort to prosper the people. This gives the government new chances to offer the community goods and services using a variety of approaches.<sup>28</sup>

The government supplies the community with all manner of public services. The government performs the roles of a service<sup>29</sup> producer and service arranger. Regarding the guidelines for putting public-private partnerships into action, they have been revoked and updated numerous times. The most recent version, the Presidential Regulation of the Republic of Indonesia Number 38 of 2015 Concerning Government Cooperation with Business Entities in the Provision of Infrastructure, states the following the Presidential

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<sup>26</sup> M H Ali El-Saie, Yahya M H Ali El-Saie, and Ahmed Deghedi Moneer, 'Financial, Economical and Technical Aspects of Establishing Remote Desalination Plants', *Desalination*, 135.1 (2001), 25–42 [https://doi.org/https://doi.org/10.1016/S0011-9164\(01\)00136-9](https://doi.org/https://doi.org/10.1016/S0011-9164(01)00136-9)

<sup>27</sup> Jihai Yu, Li-An Zhou, and Guozhong Zhu, 'Strategic Interaction in Political Competition: Evidence from Spatial Effects across Chinese Cities', *Regional Science and Urban Economics*, 57 (2016), 23–37 <https://doi.org/https://doi.org/10.1016/j.regsciurbeco.2015.12.003>

<sup>28</sup> M R Elkadeem and others, 'Sustainable Siting and Design Optimization of Hybrid Renewable Energy System: A Geospatial Multi-Criteria Analysis', *Applied Energy*, 295 (2021), 117071 <https://doi.org/https://doi.org/10.1016/j.apenergy.2021.117071>

<sup>29</sup> I.G.A.K. Rachmi Handayani, Lego Karjoko, and Abdul Kadir Jaelani, 'Model Pelaksanaan Putusan Mahkamah Konstitusi Yang Eksekutabilitas Dalam Pengujian Peraturan Perundang-Undangan Di Indonesia', *Bestuur*, 7.1 (2019), 36–46 <https://jurnal.uns.ac.id/bestuur/article/view/42700>

Regulation Number 38 of 2015 in Article 1 point (6) has state, that Government-business collaboration, also known as public-private partnerships, involves the government and business entities working together to provide infrastructure for the general public in accordance with the guidelines set forth by the minister, head of the institution, head of the region, state-owned enterprise, or regional-owned enterprise. Partially or entirely utilizing business entities' resources while considering the parties' shared risk is what is meant to be considered.<sup>30</sup>

As stated in the rules of Government Regulation of the Republic of Indonesia Number 28 of 2018 about Regional Collaboration, foreign investment may be utilized in this cooperation. Government Regulation of the Republic of Indonesia Number 27 of 2014 concerning Management of State/Regional Property. The participation of other parties in the implementation of cooperation is governed by both of these regulations and any modifications thereto. Regarding what is meant by "third parties," it is stressed in the Investment Law's Article 5 paragraph (2). "Foreign Investment must be in the form of a limited liability company based on Indonesian law and domiciled in the territory of the Republic of Indonesia, unless otherwise stipulated by law". Addressing paragraph (3), it emphasizes that a foreign investment must be made in accordance with local regulations currently in effect and may be made by participating in the formation of a company, purchasing shares, or by other ways. Based on this explanation, it is clear that foreign investment businesses are permitted to take part in a variety of project developments as well as government cooperation activities, subject to compliance with existing laws and the state constitution of Indonesia.<sup>31</sup>

As a comparative study, we will study what China has done 16,000 multinational enterprises (hereinafter referred to as MNEs) had established some 22,000 foreign affiliates in 179 countries and territories by end-2012. In addition to the swift and rapid surge and the remarkable elements already mentioned, there are two other traits that define China's foreign direct investment. The first is that, unlike most other large overseas investors, state-owned enterprises account for a significant portion of FDI capital flows and stocks abroad. Additionally, many non-state-owned companies (especially larger companies) are connected to the Chinese government in one way or another, including by senior management and members of the Chinese government.<sup>32</sup> The board of directors are members of the Communist Party of China, sometimes in high positions. This condition starts the question of whether China's foreign investment (or at least a large part of it) can be made for non-commercial purposes and, in particular, whether it can harm the national security of the host countries. The Chinese government has encouraged private companies to invest abroad. For example, in 2012 the National Development and Reform Commission issued implementation statements to actively encourage and direct private companies to

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<sup>30</sup> Veronika Agustini Srimulyani and others, 'Internal Factors of Entrepreneurial and Business Performance of Small and Medium Enterprises (SMEs) in East Java, Indonesia', *Heliyon*, 9.11 (2023), e21637 <https://doi.org/https://doi.org/10.1016/j.heliyon.2023.e21637>

<sup>31</sup> Irfan Ridwan Maksum, Amy Yayuk Sri Rahayu, and Dhian Kusumawardhani, 'A Social Enterprise Approach to Empowering Micro, Small and Medium Enterprises (SMEs) in Indonesia', *Journal of Open Innovation: Technology, Market, and Complexity*, 6.3 (2020), 50 <https://doi.org/https://doi.org/10.3390/joitmc6030050>

<sup>32</sup> Aniela Raluca Danciu and Vsasile Alecsandru Strat, 'Factors Influencing the Choice of the Foreign Direct Investments Locations in the Romanian Regions', *Procedia - Social and Behavioral Sciences*, 109 (2014), 870-74 <https://doi.org/https://doi.org/10.1016/j.sbspro.2013.12.556>

invest abroad, and created a preferential policy for foreign direct investment by private companies, including tax incentives, financial support. and adaptive reform. This is the reason for the large amount of Chinese investment abroad, including in Indonesia.<sup>33</sup>

As the fastest growing economy, China is a country that needs to be studied. However, the country's air transportation sector shows substantial changes in the 30 years after deregulation. State-owned airlines still enjoy a dominant status in the Chinese market. Airport concentration in China is not well implemented leading to no cost savings and increased airfares, due to China's lack of antitrust compliance culture. As for China, consumers cannot explore their welfare benefits to the fullest because airport concentration is positively related to airfares. In relation to China's regulation of foreign ownership in the aviation sector, In China, four state-owned airline groups dominated the domestic market with an aggregate market share of 90% in 2016 whilst in India, the private airlines commanded a market share of around 80% in recent years, with low-cost carriers (LCCs) gaining a share of about 65%. China's first LCC, Spring Airlines, was launched by private investors in 2005 after the CAAC allowed private sector to participate in the civil aviation industry, and increased the limit on foreign ownership participation in Chinese airlines from 35% to 49% in 2004. By the end of 2016, China had 59 commercial airline companies, including 44 state-owned airlines and 15 privately owned or controlled airlines.<sup>34</sup>

Seven airlines were publicly listed, twelve had foreign equity participation. The four major airline groups commanded a market share of about 87.8% of the total traffic measured in ton-kilometers with other airlines (mainly private carriers) carrying the rest. The policy indices compiled, have proved quite robust in estimating the relationship between aviation policy and passenger traffic flows. It should be noted that the competition policy embodied in a country's antitrust laws plays a vital role in facilitating the development of the airline industry as it seeks to promote competition and to prevent abuses of market power by dominant airlines (i.e., influencing firms' conduct) in the country, which will eventually foster innovation and improve customer choice (i.e., influencing firms' performance). Based on the research, China has no antitrust in the air transportation sector, because of their regulation on air transportation ownership. National airline ownership in China, partly privatized and all the big three government-controlled airlines (Air China, China Eastern and China Southern) are publicly listed. Aviation policy in China about foreign equity participation in domestic airlines, is maximum share of foreign equity in Chinese airlines was raised from 35% to 49% in 2002. Those key policies in China have influencing the airline industry.<sup>35</sup>

In any case, in the views of some nations, making a difference firm to contribute overseas has gotten to be undesirable, at slightest when it includes SOEs. The central

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<sup>33</sup> Mohammad Hamed Abdi and Patxi J Lamíquiz-Daudén, 'Transit-Oriented Development in Developing Countries: A Qualitative Meta-Synthesis of Its Policy, Planning and Implementation Challenges', *International Journal of Sustainable Transportation*, 16.3 (2021), 195–221 <https://doi.org/https://doi.org/10.1080/15568318.2020.1858375>

<sup>34</sup> H Caspi and Y Perlman, 'Consumer Environmental Awareness and Privatization', *IFAC-PapersOnLine*, 55.10 (2022), 1134–40 <https://doi.org/https://doi.org/10.1016/j.ifacol.2022.09.542>

<sup>35</sup> Lihua WU and others, 'Improvement of Regional Environmental Quality: Government Environmental Governance and Public Participation', *Science of The Total Environment*, 717 (2020), 137265 <https://doi.org/https://doi.org/10.1016/j.scitotenv.2020.137265>

reason might well be that MNEs from rising markets, and particularly SOEs from China, have ended up critical outward investors. Such offer assistance, within the frame of domestic nation measures, is seen as giving extraordinary preferences to SOEs, misshaping in this way the competitive OFDI scene in favor of these endeavors within the markets in which they contribute. The important concept is ‘competitive neutrality’. Within the worldwide setting, this concept implies that no entity in a universal showcase ought to have undue competitive preferences vis-a`-vis its competitors. In this way, measures to assist firms in their outward FDI, indeed when accessible similarly to both open and private substances, may within the future be assessed in terms on competitive nonpartisanship. It can be seen based on this explanation that China has a vision that is quite different from Indonesia, where the strength of the Chinese state supports the country to provide support to other countries as a form of control. This is different from the conditions and vision of Indonesia, which should be the nation's goal in the application of referring to the basis of the state constitution.<sup>36</sup>

### ***3.3 The Regulation of Foreign Ownership on the Cooperation Projects Air Transportation***

The government must be more flexible in how it implements associated legislation given the significant role that investment plays in initiatives to improve the welfare of Indonesians, particularly in the infrastructure and services sector investment from abroad, particularly in ASEAN,<sup>37</sup> Parties of the ASEAN organization are presently bound by the outcomes of the accord that approved the ASEAN Framework Agreement on Services (AFAS) on December 15, 1995, in Bangkok, Thailand, in an effort to strengthen economic cooperation in trade in the services industry. In addition, a Coordinating Committee on Services (CCS) was established to oversee the agreement. Its job is to compile guidelines for managing service liberalization discussions within the AFAS framework, which includes 8 (eight) sectors, including business services, construction, telecommunications, tourism, finance, health, and logistics. As of this year, ASEAN has ratified AFAS Package 8, with AFAS Package 10 expected in 2015. This creates numerous opportunities for foreign investment to enter industries that are concerned with the welfare of people. Since Indonesia is an archipelagic nation, air travel is one enticing alternative for inter-island travel.<sup>38</sup>

Airport services which are included in services opened for foreign investment, based on the first specifications outlined in the wording of Presidential Regulation Number 44 of 2016 about the List of Business Fields That Are Closed and Business Fields Open with Requirements in the Investment Sector. As may be seen in the graphic below, these regulations limit foreign investment in airport services to a maximum of 49%. (forty nine percent), that can be seen at appendix list of open business fields with requirements in

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<sup>36</sup> Xuhua Kang and others, ‘Research on Economic Risk Early-Warning of China’s Overseas Investment of Coal-Fired Power Generation: Take Indonesia as an Example’, *Structural Change and Economic Dynamics*, 56 (2021), 298–309 <https://doi.org/https://doi.org/10.1016/j.strueco.2020.12.003>

<sup>37</sup> Khotimatun Nafisah, Analisis Hukum Tentang Kepemilikan Saham Asing Dalam Perusahaan Penanaman Modal Asing Di Indonesia, *Jurnal IUS Kajian Hukum Dan Keadilan*, vol. 4, no. 2, Agustus 2016, p. 108-122, <http://dx.doi.org/10.12345/ius.v4i2.337>

<sup>38</sup> Juan Bu and others, ‘Mitigating Soft and Hard Infrastructure Deficiencies in Emerging Markets’, *Journal of World Business*, 59.4 (2024), 101540 <https://doi.org/https://doi.org/10.1016/j.jwb.2024.101540>

presidential decree 44 of 2016.<sup>39</sup> While the most recent regulation, Presidential Regulation Number 10 of 2021 Concerning Investment Business Fields, does just that. Amendments to Presidential Regulation Number 10 of 2021 regarding Investment Business Fields are outlined in Presidential Regulation of the Republic of Indonesia Number 49 of 2021. Both of these clauses remove the limitations on foreign investment in the airport services industry. Due of its impact on the concerns of Indonesian citizens, this will become the article's principal problem. That can be seen at appendix list of open business fields with requirements in presidential decree 49 of 2021.<sup>40</sup>

Considering the constitutional interpretation of the Article 33 of the 1945 Constitution, in particular paragraph, it is essential to question whether the "The state must have control over the air transportation industry because it is a significant source of production and affects the livelihood of a large number of people." The Constitutional Court is the state entity with the jurisdiction to interpret or apply the 1945 Constitution's provisions in the present Indonesian constitutional system (after changes to that document) (MK). The Constitutional Court has regularly indicated its position on this matter and has included legal arguments in several of its judgements since 2003. The Constitutional Court has asserted its position in opposition to Article 33 paragraph (2) of the 1945 Constitution, holding that the following production sections must be under state control: I those that are crucial to the state and influence the livelihood of many people, (ii) those that are important to the state but do not affect the livelihood of many people, or (iii) those that are not important to the state but still affect the livelihood of many people. All three must be under the government's authority and utilized to the maximum benefit of the populace. In light of this, the Constitutional Court decided that a production branch must be "controlled by the state" if it individually and collectively satisfies the criteria of being "important for the state" and "controlling the livelihoods of many people," as well as more broadly if it is "essential for the state despite the fact that it doesn't influence the livelihood of many people" and "is not pivotal for the state but it does control the wellbeing of many people."<sup>41</sup>

The Government along with people's representative institutions are responsible for deciding when a branch of production is deemed important for the state and/or has an impact on the lives of many people. According to the Constitutional Court, "However, it is up to the Government together with people's representative institutions to assess what when is a branch of production deemed important for the state and/or having an impact on the livelihood of many people? However, if it turns out that some parties feel their constitutional rights have been violated as a result of the legislator's decision, the Court also has the power to analyze the situation by comparing it to the Constitution of 1945."<sup>42</sup>

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<sup>39</sup> Hediye Tuydes-Yaman and others, 'Barriers and Opportunities (B&O) for Developing Low Carbon Transportation (LCT) Policies in Turkey', *Journal of Transport Geography*, 118 (2024), 103903 <https://doi.org/https://doi.org/10.1016/j.jtrangeo.2024.103903>

<sup>40</sup> Agus Riwanto, Sukarni Suryaningsih, and Delasari Krisda Putri, 'Reform and Breakthrough in Business Regulations for Empowering MSMEs in Indonesia and the Netherlands', *Journal of Human Rights, Culture and Legal System*, 3.3 (2023), 513–40 <https://doi.org/10.53955/jhcls.v3i3.109>

<sup>41</sup> Dewi Kurniawati and Henry Yuliando, 'Productivity Improvement of Small Scale Medium Enterprises (SMEs) on Food Products: Case at Yogyakarta Province, Indonesia', *Agriculture and Agricultural Science Procedia*, 3 (2015), 189–94 <https://doi.org/https://doi.org/10.1016/j.aaspro.2015.01.037>

<sup>42</sup> Fatma Ayu Jati Putri and Jasurbek Rustamovich Ehsonov, 'The Impact of Land Reform Policies on the Sustainable Management of Natural Resources in Local Communities', *Journal of Human Rights, Culture and Legal System*, 4.2 (2024), 510–37 <https://doi.org/10.53955/jhcls.v4i2.197>

At first glance, the last sentence in the paragraph establishing the Constitutional Court appears to contradict the preceding statement, "which published important qualification for the state and/or monitoring the livelihoods of the people to the government and people's representatives in people's representative institutions." However, this is not the case because the previous statement is a normative matter that the Constitutional Court must uphold. This is due to the fact that, once again, under the current constitutional structure, not a single statute or regulation may contradict or restrict citizens' constitutional rights.<sup>43</sup>

The claim that a citizen's constitutional rights have been violated is used as a justification for the citizen to file a lawsuit against the Constitutional Court, specifically by asking that the Constitutional Court review the provisions that are claimed to be harmful to citizens' constitutional rights. That is, although the government and institutions that serve as the voice of the people (in this case, the DPR) have the authority to enact laws that specify which production branches are important to the state and/or have an impact on the general welfare of the populace, it is important to keep in mind that such arrangements must not violate citizens' constitutional rights.<sup>44</sup>

Acknowledging this requires close attention because, in accordance with the Constitutional Court's interpretation as stated above, the said production branch must be "controlled by the state" once the government and the DPR decide (in law) that a branch of production is "essential and affects the lives of many people," "not vital yet manages the livelihoods of many people," or significant but does not affect the lives of many people." Or, alternatively, if the government and DPR decide that a sector of production is the other way around (not crucial for the state and does not have a significant impact on many people's livelihood), then that sector of production is not required to be "managed by the state."<sup>45</sup>

It matters whether the government and the DPR have indicated in a law that the air transportation sector is an important production branch for the state and/or controls the livelihood of many people, or that it is a production branch that is not important for the state and also does not control the livelihood of many people, whether that statement is made explicitly or implicitly. There is no need to apply the principle of state control if the government and DPR believe that the aviation industry does not control the livelihood of many people and is not a significant producing branch for the state. However, on the contrary, if the government and the DPR are of the opinion that the air transportation sector is an important branch of production for the state and or controls the livelihood of many people then the principle of state control applies to it.<sup>46</sup>

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<sup>43</sup> Meutia and Tubagus Ismail, 'The Development of Entrepreneurial Social Competence and Business Network to Improve Competitive Advantage and Business Performance of Small Medium Sized Enterprises: A Case Study of Batik Industry in Indonesia', *Procedia - Social and Behavioral Sciences*, 65 (2012), 46–51 <https://doi.org/https://doi.org/10.1016/j.sbspro.2012.11.089>

<sup>44</sup> Andiga Dompok Baharaja Tarihoran and others, 'Market-Based Dynamic Capabilities for MSMEs: Evidence from Indonesia's Ornamental Fish Industry', *Journal of Open Innovation: Technology, Market, and Complexity*, 9.3 (2023), 100123 <https://doi.org/https://doi.org/10.1016/j.joitmc.2023.100123>

<sup>45</sup> Paulina Permatasari and Juniati Gunawan, 'Sustainability Policies for Small Medium Enterprises: WHO Are the Actors?', *Cleaner and Responsible Consumption*, 9 (2023), 100122 <https://doi.org/https://doi.org/10.1016/j.clrc.2023.100122>

<sup>46</sup> Adhy Riadhy Arafah and others, 'FIR Agreement Indonesia – Singapore: What Are the Legal Implications?', *Heliyon*, 10.8 (2024), e29708 <https://doi.org/https://doi.org/10.1016/j.heliyon.2024.e29708>

The question should be whether foreign ownership of shares exceeding 49% violates the concept of "controlled by the state" as defined in Article 33 paragraph (2) of the 1945 Constitution if we adopt the latter scenario. This is also the article's primary concern regarding constitutional law. We must comprehend the definition of "controlled by the state" to address this inquiry adequately. Once more, this is a matter of constitutional interpretation; therefore, the Constitutional Court's decision is definitive in this instance. In its decision to evaluate the Law on Electricity, the Constitutional Court emphasized that the term "controlled by the state" encompasses more than just "owned by the state" and does not merely refer to "regulated by the state." This position was subsequently reaffirmed in numerous subsequent decisions.<sup>47</sup>

The Preamble of the 1945 Constitution's directives to "promote public welfare" and "realize a social justice for all Indonesian people" cannot be carried out if the phrase "controlled by the state" is only understood to mean ownership in the civil (private) sense. As a result, the goal of "the greatest prosperity of the people" cannot be achieved. Nonetheless, one of the logical outcomes of state control, which also incorporates the idea of public ownership by the collectivity of the people of these sources of wealth, is the thought of civil ownership itself, which must be acknowledged. As the power to regulate is naturally inherent in the functions of the state and not something that needs to be particularly declared in the fundamental law, the concept of "regulated by the state" cannot be understood to be confined to this right.<sup>48</sup> The state is immediately empowered to carry out regulatory functions even if Article 33 is not present in the 1945 Constitution, as is typical in many nations that subscribe to liberal economic ideas and do not regulate the fundamental economic standards in their constitutions. Consequently, the words "controlled by the state" cannot be interpreted to mean only the state's authority to govern the economy. Therefore, the Court rejects both the viewpoints that read "controlled by the state" as meaning ownership in the civil sense and the viewpoint that reads "controlled by the state" as meaning only the state's statutory authority.<sup>49</sup>

Accordingly, the phrase "controlled by the state" must be understood to mean authority by the state in the broadest sense. This interpretation is sourced and generated from the idea of the sovereignty of the Indonesian people over all sources of wealth, including the idea of public ownership by the collectivity of the people over the sources of wealth, "earth and water and natural resources contained therein." The 1945 Constitution established the people as a whole and required the state to create policies (*beleid*) and take management (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*), and supervision (*toezichthoudensdaad*) activities for the benefit of the people's greatest prosperity. With the authority to grant and abolish licensing facilities (*vergunning*), licenses (*licentie*), and concessions, the government performs the management function (*bestuursdaad*) of the state

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<sup>47</sup> Rebecca Meckelburg and Agung Wardana, 'The Political Economy of Land Acquisition for Development in the Public Interest: The Case of Indonesia', *Land Use Policy*, 137 (2024), 107017 <https://doi.org/https://doi.org/10.1016/j.landusepol.2023.107017>

<sup>48</sup> Maman Suhendra, 'Penyediaan Infrastruktur Dengan Skema Kerjasama Pemerintah Dan Badan Usaha (Public-Private Partnership) Di Indonesia', *Jurnal Manajemen Keuangan Publik*, 1.1 (2017), 41–46 <https://doi.org/https://doi.org/10.31092/jmkp.v1i1.97>

<sup>49</sup> Alexander Abramov, Alexander Radygin, and Maria Chernova, 'State-Owned Enterprises in the Russian Market: Ownership Structure and Their Role in the Economy', *Russian Journal of Economics*, 3.1 (2017), 1–23 <https://doi.org/https://doi.org/10.1016/j.ruje.2017.02.001>

(*concessie*). Through the power of law passed by the DPR and the Government and regulation by the Government, the regulatory role of the state (*regelendaad*) is carried out (*executive*).

The management function (*beheersdaad*) is conducted out through a share-holding system and/or through direct involvement in the management of State-Owned Enterprises or State-Owned Legal Entities as institutional instruments through which the state c.q. The government employs its control over the sources of income to be utilis for the greatest prosperity of the people. The state also performs the duty of governmental oversight (*toezichthoudensdaad*). The government is in charge of monitoring and regulating how the State's assets are being used. The governance in the sense of overseeing and regulating so that the state's implementation of control over significant production branches and/or those that influence the livelihood of many people is actually carried out for the maximum welfare of the complete people.

The above lengthy quote from the Constitutional Court's decision is relevant to the question at hand, namely whether foreign share ownership exceeding 50% (fifty percent) is against the notion of "controlled by the state" as stated in Article 33 paragraph (2) of the 1945 Constitution, then the answer to that question will determine whether the state can continue to maintain control by transferring more than 50% of shares to foreign parties. If the answers is "yes," then controlling more than 50% of shares by foreign parties is permissible and does not violate the 1945 Constitution, particularly Article 33. (2). The 1945 Constitution, particularly Article 33 paragraph (2), forbids foreign ownership of shares above 50%, hence it is not conceivable if the answers to these questions is no.

An individual may object, arguing that the provision that governs the extent of ownership or control of shares by foreign parties in the air transportation sector is a Presidential Regulation (*Perpres*) Number 10 of the Presidential Regulations of 2021. Suppose the provision regarding the maximum number of shares that foreign parties may own is altered to exceed 50%. In that case, Presidential Regulation Number 49 of 2021 concerning Amendments to Presidential Regulation Number 10 of 2021 concerning Investment Business Fields will remain in effect,<sup>50</sup> vit cannot be tested at the Constitutional Court because the Constitutional Court does not have the authority to test the constitutionality of laws and regulations under the law; and, although the Supreme Court (MA) has the authority to test laws and regulations under the law, <sup>51</sup>the benchmark for testing is not the contradiction of laws and regulations under the law against the basic law but against the law? So, as long as the *Perpres* is not proven to contradict a law on which it is based, there is no need to worry about it. At first glance, this argument seems plausible, although it is actually very risky.<sup>52</sup>

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<sup>50</sup> Qingqing Tang, En Xie, and K S Reddy, 'Global Production Aspirations and Internationalization by State-Owned Enterprises: A Co-Evolutionary View of State-Driven Industrialized Economy', *International Journal of Innovation Studies*, 6.4 (2022), 276–85 <https://doi.org/https://doi.org/10.1016/j.ijis.2022.08.003>

<sup>51</sup> Maruarar Siahaan, 'Integrasi Konstitusional Kewenangan Judicial Review Mahkamah Konstitusi Dan Mahkamah Agung', *Jurnal Konstitusi*, 17.4 (2020), 729–52 <https://doi.org/https://doi.org/10.31078/jk1742>.

<sup>52</sup> Saiful Bahri and Muhammad Ramaditya, 'Innovation of the Finished Banknotes Business Model Changes in Indonesian Banknotes Printing', *Journal of Open Innovation: Technology, Market, and Complexity*, 10.3 (2024), 100323 <https://doi.org/https://doi.org/10.1016/j.joitmc.2024.100323>



It is considered logical because it is accurate that the Constitutional Court does not have the explicit authority to review laws and regulations that violate the 1945 Constitution. Nevertheless, this line of reasoning is fraught with risk, as it is essential to remember that the law under which the *Perpres* was issued is still subject to constitutional challenge in the Constitutional Court. Consequently, a party may also submit a petition to the Constitutional Court to dispute the *Perpres* in the court under which it was issued if it is concerned that the Supreme Court will reject its petition to review the *Perpres*. In this scenario, Article 55 of the Law on the Constitutional Court's provisions will be enforced, which stipulates that "the Supreme Court must cease the examination of laws and regulations under the law if the law on which the laws and regulations are based is in the process of being tested at the Constitutional Court until a judgment is rendered by the Constitutional Court."<sup>53</sup>

Consequently, the Supreme Court's consideration of the *Perpres* in question will be automatically influenced if the Constitutional Court determines that the statute upon which the *Perpres* is based conflicts with the 1945 Constitution. In this case, the Constitutional Court's decision regarding the legality of the *Perpres* underlying statute is binding on the Supreme Court.<sup>54</sup>

#### 4. Conclusion

Due to this discussion, Indonesia and China related the investment in air transportation services. This discussion was initiated by the Indonesian government, which issued amendments to the *Perpres*. These amendments, which include airport services, are considered unconstitutional. The amendment eliminates the maximum limit on the previously specified foreign investment percentage. Consequently, foreign investment can participate in Government Cooperation with Business Entities on air transportation infrastructure projects without a percentage limit. Secondly, the Indonesian Constitution mandates that the state should be responsible for the ownership of air transportation. This is a lesson learned from China, which tends to overly rely on foreign investors in the aviation service sector, resulting in high aircraft ticket prices that negatively impact consumer welfare. This feature mandates that all state activities be organized according to the Constitution, specifically the 1945 Constitution. It is crucial to convey this concise note as a conclusion about the topics discussed in this article, as the description above elucidates the second task of the Constitutional Court's constitutional review function in embodying the concept of the rule of law. Citizens' constitutional rights must be safeguarded, specifically economic and social rights. The 1945 Constitution, particularly Article 33, mandates that the state guarantee the fulfillment of these rights. The government should consider eliminating regulations regarding the maximum requirements for the involvement of foreign shareholders in state-owned enterprises. This can be achieved by implementing the necessary policy measures, allowing the state to maintain control by transferring under 50% of its shares to foreign parties.

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<sup>53</sup> Anna T Falentina and Budy P Resosudarmo, 'The Impact of Blackouts on the Performance of Micro and Small Enterprises: Evidence from Indonesia', *World Development*, 124 (2019), 104635 <https://doi.org/https://doi.org/10.1016/j.worlddev.2019.104635>

<sup>54</sup> Aluisius Hery Pratono and Ari Sutanti, 'The Ecosystem of Social Enterprise: Social Culture, Legal Framework, and Policy Review in Indonesia', *Pacific Science Review B: Humanities and Social Sciences*, 2.3 (2016), 106–12 <https://doi.org/https://doi.org/10.1016/j.psrb.2016.09.020>

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