

THE PRACTICE OF BENEFICIAL OWNERSHIP AND ITS LEGAL EFFECT ACCORDING TO INDONESIAN LAW

Rahmi Jened (Full Professor)¹
Betharia Noor Indahsari (Alumna)²
Faculty of Law, the University of Airlangga

Abstract

Just earlier last year, the President of Indonesia, Joko Widodo, issued Presidential Regulation Number 13 of the Year 2018 on the Implementation of Corporation Beneficial Owner Recognition Principle in the Framework of Prevention and Eradication of Money Laundering and Terrorist Financing Crime. How these laws affect the practice of BO and nominee arrangement in Indonesia there after and how their provisions connect to the provisions of the latest Presidential Regulation are the main topics that this paper aims to discuss.

This paper is in the area of business law, capital investment and corporate law. This research is normative and empirical legal research. Normative legal research is mainly library research which was conducted at the Law Faculty of Airlangga University, Indonesia. This research employed statutory approach and conceptual approach by using a number of selected books and international journals, international agreement and international convention. Whereas empirical legal research is conducted in Jakarta city to study in Heritage Hall (Balai Harta Peninggalan) and Directorate General Law Administration Affairs of Ministry of Law and Human Rights, where Shareholder and Director of Corporation registered.

There are several findings from the research. The practice of Beneficial Ownership (BO) has long been employed in Indonesia, by foreigners and natives alike, and usually, with the cooperation between the both sides regarding with Foreign Direct Investment (FDI) activities. BO utilizes a nominee clause arrangement where the beneficial owner appoints, or 'nominees', someone to act on their behalf. This nominee arrangement can be implemented in the form of tax treaty privilege, nominee in land and real property ownership, nominee director or nominee share holder. These practices can lead to various legal consequences, among others the nominee arrangement become "null and void".

Keywords: beneficial owner, nominee arrangement, capital investment law, limited liability corporation law, tax treaty, share holders, director

¹Rahmi Jened is a full professor at the Law Faculty of the University Airlangga, Indonesia. She has been a lecturer and researcher at the University for thirty years and has conducted more than 30 researches, either private or government-funded. Email Address: rahmijened@fh.unair.ac.id. Or jenedjened@yahoo.com Institution Address: Dharmawangsa Dalam Selatan, Gubeng, Surabaya, 60286, Indonesia. Institution Fax./ Ph. Numbers: (+62-31-5020454/5023151).

²Betharia Noor Indah Sari is an alumna of the Law Faculty of the University Airlangga, Indonesia. As a student, she assisted in various lecturers' research projects in term of data collecting. Email Address: bethariabetharia@gmail.com.

I. INTRODUCTION

Indonesia had ratified Agreement on Establishment on the World Trade Organization (WTO) through the Law Number 7 of year 1994 (Law No. 7/1994). As legal consequences Indonesia has to comply with all WTO Agendas¹. One of the WTO agenda is Agreement on Trade Related Investment Measures commonly known as TRIMs, WTO member have agreed to apply certain investment measures related to trade in goods that not restrict or distort trade. The TRIMs prohibit certain measures that violate national treatment and quantitative restriction requirements of the General Agreement on Tariff and Trade (GATT).²

WTO enforced by 3 (three) main principles that are:

1. National treatment;
2. Most Favored Treatment;
3. Transparency.

Having two different laws on investment, one for foreigner³ and the other for nationals,⁴ was an obvious violation of National Treatment principle, that led to the birth of Law No. 25 of 2007 on Capital Investment ⁵which govern primarily direct investment. Direct Investment which defined by *International Monetary Fund (IMF)* as:⁶

¹ There are 15 agendas of the WTO that :⁴There are 15 of the WTO agendas:1). Tariffs;2). Non Tariff Measures;3) Tropical Products;4)Natural Resources Based Products;5) Textile And clothing;6) Agricultural;7) GATT Articles; 8)Multilateral Trade negotiation Agreements/ Arrangements; 9) Subsidies and countervailing Measures;10) Dispute Settlement;11) trade Related Aspects of Intellectual Property Rights including Trade in Counterfeit Goods (TRIPs); 12) Trade Related Investment Measures; 13) Functioning the GATT System;14) Safeguards;15) Services. HATA, Perdagangan Internasional Dalam Sistem GATT dan WTO, Refika Aditama, Bandung, 2006.

² BOSSCHE, PETER VAN DEN, *The Law and Policy of the World Trade Organization, 2nd ed*, Cambridge Press, UK, 2008 and see also in INDONESIA AUSTRALIA SPECIALIZED TRAINING PROJECT(IASTP), *Ringkasan Eksekutif UUNo. 7/1994 dan WTO*, Jakarta 2000, h. 8-9.

³ Undang Undang Nomor 1 Tahun 1967 Tentang Penanaman Modal Asing (PMA)

⁴ Undang Undang Nomor 6 Tahun 1968 Tentang Penanaman Modal Dalam Neeri(PMDN)

⁵ Undang Undang Nomor 25 Tahun 2007 Tentang Penanaman Modal (UUPM)

⁶ <http://www.businessdictionary.com/definition/direct-investment> .

Investment that is made to acquire lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose being to have an effective voice in the management of the enterprise." In practice, this translates so an equity holding of 10 percent or more in the foreign firm. ...an investment made by a company or entity based in one country into a company or entity based in another country... Direct investment differs substantially from indirect investment such as portfolio flows where in overseas institution invest in equity listed on stock exchange

Aside from that, in the same year the government also issued Law No. 40 of 2007 on Limited Liability Company ⁷ (which replaced Law No. 1 of 1995 on the same matter). These two laws contain specific provisions on Beneficial Ownership (BO). Henry Campbell Black in Black's Law Dictionary defines BO as : “ Term applied most commonly to cestui que trust who enjoys ownership of the trust or estate in equity but not legal title which remains in trustee or personal representatives. Equitable as contrasted with legal owner”.⁸

In 2018, Presiden Joko Widodo, issued Presidential Regulation Number 13 of the Year 2018 on the Implementation of Corporation Beneficial Owner Recognition Principle in the Framework of Prevention and Eradication of Money Laundering and Terrorist Financing Crime. ⁹

If we look at the definition of beneficial owner and the object of the Presidential Regulation No. 13/2018 mentioned above, directly or indirectly it is related to the practice of nominee arrangement. Black 's Law Dictionary provides the definition stated that “The word "Nominee" comes from the Latin word meaning "by name of or under the name of designation of ...". and defined nominee clause as follows:¹⁰

*A person organization one who has been nominated or proposed for office
One designated to act or another in his/her place. A form of securities*

⁷ Undang Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas (UUPT)

⁸ HENRY CAMPBELL BLACK , *Black's Law Dictionary*6th ed), West Publishing, St Paul Minn, 1996, p.156.

⁹ Peraturan Presiden Nomor 13 Tahun 2018 (Perpres No. 13/2018) Tentang Prinsip Mengenali Pemilik Manfaat dari Korporasi dalam rangka Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang dan Tindak Pidana Pendanaan Terorisme.

¹⁰ HENRY CAMPBELL BLACK, see supra note, no.8, at p. 1050.

registration widely used by institutional investor to avoid cinereous requirements of establishing the right of registration by a fiduciary. Nominee trustee is an arrangement for holding title to real property under which one or more persons or corporation pursuant to a written declaration of trust, declare that they will hold any property that they acquire as trustees for the benefit of one or more undisclosed beneficiaries. A trust which the beneficiaries have the power to direct the trustee's actions regarding the trust property. 2. An arrangements for holding title to real property under which one or more persons or corporations, under a written declaration of trust, declare that they will hold any property that they acquire trustees for one or more undisclosed beneficiaries. Also termed realty trust.

Hence BO utilizes a nominee clause arrangement where the beneficial owner appoints, or 'nominees', someone to act on their behalf. This in itself can lead to various legal consequences.

II. PRESIDENTIAL REGULATION NO. 13 OF 2018 ON THE IMPLEMENTATION OF CORPORATION BENEFICIAL OWNER RECOGNITION PRINCIPLE IN THE FRAMEWORK OF PREVENTION AND ERADICATION OF MONEY LAUNDERING AND TERRORIST FINANCING CRIME

Basically this Presidential Regulation Number 13 of 2018 on Regarding with the Application of the Principle of Recognition Benefactors in order to Prevention and Eradication of Money Loundering and Criminal Acts of Terrorism Financing Regulation governs 7 Chapters namely:

1. General Provisions;
2. Determination of Beneficiaries of Corporate Benefits;
3. Application of Principles of Recognizing the Owners of Corporate Benefits;
4. Supervision;
5. Cooperation;
6. Transitional Rules;
7. Cover.

Pusuant to this regulation, in general terms the definition of 'a corporation' as a group of well-organized persons or property is a legal entity or non-legal entity that includes:

- a. limited liability company;¹¹

¹¹ As regulated in Act number 40 of 2007 (hereinafter as Undang- Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas UUPT).

- b. foundation¹²;
- c. association¹³;
- d. cooperative¹⁴;
- e. limited partnership¹⁵;
- f. firm fellowship¹⁰; and
- g. other forms of corporations¹⁶.

Pursuant to Article 4 Presidential Regulation No. 13/2018, the "beneficial owner" is defined as "an individual who may appoint or dismiss the board of directors of the board of commissioners, administrators, supervisors or corporate supervisors, has the ability to control the corporation, is entitled to and / or receives benefits from the corporation whether directly or indirectly is the true owner of the fund or shares of corporations and / or fulfills criteria as elsewhere in this regulation".

Then the "the beneficial owner" of a limited liability company is an individual who meets the following criteria:

- a. holds shares of more than 25% (twenty five percent) to a limited liability company as stated in the articles of association;
- b. has voting rights of more than 25% (twenty five percent) to a limited liability company as stated in the articles of association;
- c. receive a profit or profit of more than 25% (twenty five percent) of the profit or profit earned by a limited liability company per year;
- d. has the authority to appoint, supersede, or dismiss members of the board of directors and members of the board of commissioners;;
- e. has the authority or power to influence or control a limited liability company without having to obtain authorization from any party;
- f. receive benefits from a limited liability company; and / or;
- g. is the true owner of the fund for the ownership of shares of limited liability company.

¹² As regulated in Act number 28 of 2004 (herein after as Undang Undang Nomor 28 Tahun 2004 Tentang Yayasan)

¹³ Persekutuan As regulated in Code of Civil Law (hereinafter as Kitab Undang- Undang Hukum Perdata/ KUHPerdata or Burgerlijk Wetboek /BW).

¹⁴ As regulated in Act number 25 of 1992 on Cooperative (as Judicial Court Verdict on the Cancellation of Act Number 17 of 2012 on Cooperative and re-apply and re-enforce the previous law number 25 of 1992 on Cooperative.

¹⁵ Comanditaire Vennotschaap (CV) as regulated in Code of Commerce Law (herein after as Kitab Undang Undang Hukum Dagang/ KUHD Wetboek van Koophandel WVK).

¹⁶ As Vennotschaap onder Een Firma (Firma) as regulated in Code of Commerce Law (herein after as Kitab undang undang Hukum Dagang/ KUHD or Wetboek van Koophandel WVK).

These criteria identify or indicate a person having control in the corporation especially in the holding company¹⁷. Eventhough in legal perspective, one company is separate from one business to another, but in the economic business perspective it is one control to a unite interest between parent company and its subsidiaries.

Pursuant to Article 11 Presidential Regulation stated that Each Corporation shall determine the Benefit Owner of the Corporation based on information obtained through:

- a. articles of association including documents of amendment of articles of association, and / or deed of incorporation of the Corporation;
- b. documents of the establishment of the Corporation;
- c. documents of decision of general meeting of shareholders (AGM), document of organ meeting decision of foundation, decision document of board meeting, or member meeting meeting document;
- d. information of Authorized Agencies;
- e. information of private institutions receiving placements or transfer of funds in the framework of purchasing shares of limited liability companies;
- f. information of private institutions providing or providing benefits from the Corporation to Beneficiaries;
- g. statement of the members of the board of directors, members of the board of commissioners, supervisors, administrators, supervisors, and / or officials / Corporations that are accountable for their truth;
- h. documents owned by the Corporation or any other party indicating that the intended individual is the true owner of the fund for the ownership of the shares of the limited liability company;
- i. documents owned by the Corporation or any other party indicating that such natural person is the true owner of funds of other assets or participation in the Corporation and / or ;
- j. other information which is justifiable.

Supervision over the implementation of the principle of recognizing the Beneficiary is performed by the Authorized Agency to stipulate regulation or guidance as the implementation of this Presidential Regulation in accordance with its authority; to conduct an audit of the Corporation; and to hold other administrative activities within the

¹⁷ RUDH PRASETYA, *Kedudukan Mandiri Perseroan Terbatas 3rd ed*), Citra Aditya Bakti, Bandung, 2001, p.12-13. See also in SULISTIOWATI, *Aspek Hukum dan Realitas Bisnis Perusahaan Group di Indonesia*, Erlangga, Jakarta, 2010, p. 10-12.

scope of duties and responsibilities in accordance with the provisions of this Presidential Regulation.

Supervision by the Authorized Agency shall be conducted on the basis of the assessment of the risk of money laundering and criminal acts of financing of terrorism and shall cooperate with the Financial Transaction Reporting and Analysis Center.¹⁸

The most reason of “beneficial owner” in legal practice is to protect the identity of the owner, or to protect the off shore loan company, and also to get benefit of treaty forum shopping.¹⁹

III. BO IN TAX PRIVILEGE

Tax privileges is one of the incentive to attract of investor either domestic or foreign investor as stated in Article 18 Law No. 25 of 2007. It is common for the host country export capital investors and the host country to sign a bilateral investment treaty and a double tax avoidance treaty.²⁰ Philip Baker in his paper “Beneficial Owner: After Indofood Case” stated that :

The term “beneficial owner” is *therefore* not used in a narrow technical sense (*such as the meaning that it has under the trust law of many common law countries*), rather, it should be understood in its context, *in particular in relation to the words “paid ... to a resident”*, and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance”.²¹

The term BO has been used in Tax Treaties since the 1940s by Organization of Economic Cooperation and Development (OECD, United Nations (UN)) and US

¹⁸ Pusat Pelaporan dan Analisis Transaksi Keuangan (PPATK).

¹⁹ RAHMI JENED, “Implikasi TRIMs Terhadap Investasi dan Perdagangan Indonesia”, Sosialisasi UU No. 25/2007 Tentang Penanaman Modal, Badan Koordinasi Penanaman modal Jawa Timur Gresik, 20 Oktober 2009, h. 14, Also in RAHMI JENED, Teori dan Kebijakan Hukum Investasi, Kencana Prenada Media, Jakarta, 2016, p.11

²⁰ RA/HMI JENED, previous note no13, at....

²¹ PHILIP BAKER, “Beneficial Owner: After Indofood Case”, http://taxbar.com/wp-content/uploads/2016/01/Beneficial_Ownership_PB.pdf.

Model...”.²² According OECD) in the Commentary on Article 10 (Dividends) Model Tax Convention stated that:²³

The requirement of beneficial owner was introduced in paragraph 1 of Article 10 to clarify the meaning of the words “paid ... to a resident” as they are used in paragraph 1 of the Article. It makes plain that the State of source is not obliged to give up taxing rights over dividend income merely because that income was immediately received by paid direct to a resident of a State with which the State of source had concluded a convention. [the rest of the

*paragraph has been moved to new paragraph 12.1]*²⁴

Furthermore according to Baker:²⁵

This does not mean, however, that the domestic law meaning of “beneficial owner” is automatically irrelevant for the interpretation of that term in the context of the Article: that domestic law meaning is applicable to the extent that it is consistent with the general guidance included in this Commentary. For example, where the trustees of a discretionary trust do not distribute dividends earned during a given period, these trustees, acting in their capacity as such (or the trust, if recognized as a separate taxpayer), could constitute the beneficial owners of such income for the purposes of Article 10 notwithstanding that the relevant trust law might distinguish between legal and beneficial ownership.

Regarding to Tax Treaty the term of a “beneficial owner” is” an individual or an entity as a domestic tax subject of a State which is the true owner of income in the form of dividends and royalties originating from Indonesia, so that such person or entity shall be entitled to benefit from the provisions of the Treaty on Prevention of Double Taxation between Indonesia and the State where the private person or legal counsel is domiciled”.²⁶

In Indonesia’s perspective Tax Treaty similar to Agreement on Avoidance of Double Taxation).²⁷

²² BAKER See previos note no. 15.

²³ www.oecd.org/berlin/publikationen/43324465.pdf.

²⁴ 12.1 Since the term “beneficial owner” was added to address potential difficulties arising from the use of the words “paid to ...a resident” in paragraph 1, it was intended to be interpreted in this context and not to refer to any technical meaning that it could have had under the domestic law of a specific country (in fact, when it was added to the paragraph, the term did not have a precise meaning in the law of many countries).

²⁵ BAKER, see supra note no.15.

²⁶ <https://kemenkeu.go.id>. Accessed 26 June 2018.

²⁷ Perjanjian Penghindaran Pajak Berganda(P3B)<https://kemenkeu.go.id>. accessed 28 June 2018.

Normally this is regulated in taxation cooperation 2 (two) or more countries²⁸ called Tax Treaty. There are several bilateral agreements on Avoidance of Double taxation between Indonesia and other states, among others Indonesia and Singapore, Indonesia and Hongkong, Indonesia and Australia ect.

Tax Treaty is an international agreement on taxation between the two countries confer rights and impose obligations on the two contracting parties, but not on third parties such as tax payers. However tax treaties are obviously intended to benefit tax payers of contracting states.

Whether treaties do so or not depends on domestic law of each state. In some state treaties are self executing, that is, once the treaty is concluded, it confers rights on the residents of the contracting States. Where as in some others some additional action is necessary ,for example, the provisions of the treaty must be enacted into domestic law before benefits under a treaty can be given to residents of the contracting States

So tax treaties related to taxation policy of a state in order to avoid double taxation as not to impede the economies of the two countries on the principle of mutual benefit between the two countries and they implement it for their population involved.

The purpose of the Tax Treaty is to regulate the provision that avoids taxation on the income earned by the tax subject. Generally tax treaty regulated provisions on:²⁹

1. The scope of tax treaty concerning the type of tax and tax subject;
2. Definitions;
3. The substantive rights of taxation by the State;
4. The result of tax loss and elimination;
5. Prevention or anti-double taxation;
6. Other special rules;

²⁸ Treaties are agreements between sovereign nations. Article 2 of the Vienna Convention on the Law of Treaties,³ which applies to all treaties, provides: A treaty is an international agreement (in one or more instruments, whatever called) concluded between States and governed by international law. 4. Tax treaties are often called either "agreements" or "conventions." As Article 2 of the Vienna Convention indicates, the name used is not important. ..."

²⁹ <https://news.ddtc.co.id/apa-itu-tax-treaty-9578>. accessed 23 June 2018.

7. Provisions on the moment and the end of tax treaty.

Meanwhile, the tax object listed in the tax treaty generally consists of 15 types of income, namely:³⁰

1. income from fixed property or immovable property (income from immovable property)
2. income from business (business income or business profit)
3. income from shipping or air transport (income from shipping and air transport)
4. dividend (divident)
5. interest (interest)
6. Royalty (royalty)
7. profits from the sale of property (capital gains)
8. income from independent personal service (income from independent personal service)
9. income from dependent personal service
10. salary for director (director fees)
11. income of artists, artists and athletes (income earned by entertainers and athletes)
12. pension and social security payments (pension and social security payments)
13. income of government officials (income in respect of government service)
14. income of students and trainees (income received by students and apprentices)
15. other income (other income).

In Indofood case, the states parties of the Republic of Indonesia and the State of Mauritius have entered into bilateral treaty agreements for the Prevention of Double Taxation in which each State reciprocally provides such incentives to nationals of either Contracting State to receive a return of a portion of the tax payments already credited as part of the cost of production, profits and other expenses on the same goods and services, so as not to overcome the bargain burden for the same tax object Then Indofood case happened. Philip Baker in his paper “ Beneficial Ownership: After Indofood” has analyzed this case as follows:³¹

³⁰ <https://news.ddtc.co.id/apa-itu-tax-treaty-9578>, accessed 23 June 2018.

³¹ BAKER, see supra note no.15.

For case which has sought to clarify one of the key expression used in international taxation., what is surprising is that it was not technically a tax case. . It was a civil case brought between two parties to a loan agreement. The background is relatively complicated, but it can be simplified.

An Indonesian company wished to raise a loan for business purposes:if it had done so directly there would have been a 20% withholding tax on the interest it paid.Instead of raising loan directly, it established a Mauritius subsidiary which then issue the loanwith JP Morgan acting as trustee for the bondholders. Interest paid from the Indonesia- Mauritius Tax Treaty with a reduced tax 10% Interest paid from Mauritius for the benefit of the bondholders was not subject to any withholding tax... The identical amount of money was borrowed by Mauritian company as was then lent to Indonesian parent: The rate of interest on the loan to and from Mauritius was identical. Thus the court of Appeal seems to have considered that both in practice and according to the documentation, the Mauritian subsidiary was effectively obliged to pay on every dollar received from its Indonesia parent to the bondholders: none of the interest received could be retained by the Mauritian subsidiary. Then the Indonesia- Mauritius Tax Treaty was terminated .

If this case happened in Indonesia the Court verdict would be the same. In this case Tax Treaty as either of budgeting or regulation function is to protect their citizens from tax treatment that is not profitable by other countries or to secure their income as well as a means to attract investors from abroad and encourage economic growth.

IV.BO IN THE LAND AND REAL PROPERTY OWNERSHIP

Furthermore it is still within the framework of investment law, especially the provision of incentives for investors. Investor are granted land rights for factory or plantation extraction. Nominee arrangement in land and the real property is to protect the identity of the real owner or beneficiary.

This issue related to the prohibition of land ownership for foreigners (*gronds verponding verbod*) in the land Law in Indonesia which stipulated in Act number 5 of

1960 on The Basic Agrarian Law³² and Government Regulation number 40 of 1996³³ wherein foreign investors may only be granted land rights in the form of:³⁴

a. Building Use Rights (HGB)

HGB is the right to erect buildings on land which is not self-owned for a maximum period of 30 years (Article 33 UUPA). In view of the necessity and condition of the building, this right may be extended for 20 years (Article 35 Paragraph (2) of the Agrarian Law).

b. Cultivation Rights (HGU)

HGU is the right to operate land directly controlled by the state within 35 years (Article 29 UUPA) for the cultivation of agriculture, fishery or livestock (Article 28 Paragraph (1) Agrarian Law). The term can be extended for 25 years.

b. Right to Use (hak Pakai)

Right to use is the right to use and or to collect the proceeds of land controlled directly by the state or land owned by another person (Article 41 paragraph (1) of Agrarian Law). Usage rights may be granted: for a specified period of time or during which the land is still used for certain purposes and may be provided free of charge or with any payment or service provision (Article 41 Paragraph (2) of the UUPA).

Historically, BO had started even before Indonesia gained independence. Lands used to be owned by local people but then Dutch colonialism happened. With the establishment of the United East Indies Company (*Verenigde Oost-Indische Compagnie/* VOC) in 1602, the rich local land owners ‘cooperated’ with VOC and became the VOC’s ‘nominees’ for land ownership. Similar things happened during Japanese colonialism (Jened, 2016).³⁵ When Indonesia gained independence, then President, Soekarno, wanted an absolute independence from anything related to colonialism, which also included exiling the ‘nominees’. Then, in 1967 there were issued Law Number 1 of 1967 on Foreign Direct Investment, as well as Law Number 6 of 1968 on Domestic Direct Investment. This opened an opportunity for the previous beneficial owners, or their heirs, to seek what they claimed to once be theirs, and also for the nominees, or their heirs, to

³² herein after as UU No. 5/1960 Undang-undang Pokok Agraria (UUPA)

³³ hereinafter as Peraturan Pemerintah (PP No. 40/1996) Tentang Hak Atas Tanah

³⁴ RAHMI JENED, supra note no.13., at p.178.

³⁵ JENED, See Supra note no.13, p.175.

seek what they used to have control over on behalf of the beneficial owners. So the practice of BO continued.³⁶

In this case, realty trust is a nominal trust which is a "passive trust" which has the definition "A trust which has no duty other than to transfer the property to the beneficiary". While the nominator is often known as the beneficiary. Nominee represents the interests of the beneficiary and hence the nominee in performing the specific acts shall be in accordance with the contract and of course shall be in accordance with the order given by the beneficiary.³⁷ By looking at all the above understanding, it can be seen that in the nominee concept is known 2 (two) parties, namely nominee parties are recorded by law and beneficiary who enjoy every benefit and benefit from the acts done by legal party.

There is no regulations that expressly prohibit the practice of nominee arrangement for land and real property, but precisely because in the acquisition and possession of land rights there is a publicity element, foreign citizens should be more careful and cautious in determining someone who becomes "trust" by using his name as he is borrowed (nominee) because he is legally borrowed by name is recognized as the legal owner.³⁸

This is certainly not beneficial to the position of the real owner (genuine owner), especially if the nominee as the legal owner dies the deceased's statement can not necessarily be used as a basis for the reverse of the name to the person designated by the "genuine owner" remain by the consent and signature of all the heirs by signing a deed of transfer (whether it is a deed of sale or a deed of grant) made before the Land Authority Official³⁹ In a dispute between a foreign investor and a nominee, the nominee transaction

³⁶ JENED, see supra note no.13, p.176-177.

³⁷ HENRY CAMPBELL BLACK, Sse supra note no.6, at p. 1050.

³⁸ As some Court verdicts

³⁹ Hereafter as Pejabat Pembuat Akta Tanah/PPAT.

structure that was previously expected to be unknown to the public (with the intention of evading or avoiding restrictions or prohibitions on entry of foreigners), has become a concern of the government.

V. BO IN SHARE OWNERSHIP OF FDIC ORPORATION

The other practice of nominee arrangement in shares ownership related to the interests of foreign investors to meet the requirements contained in *the Negative List of Investment* and the latest as regulated in Presidential Regulation number 44 of 2016 on Closed Business Field and Open Business field with Requirement in capital Investment⁴⁰ which requires a certain percentage of stock ownership for certain business sectors, for example for the original film making facilities or printing and duplication of the original movie, foreign investor may owned maximum 49% when actually foreigners have mastered 100 in this film maker corporation.

Generally the name and identity of the party listed as the legal owner of the Share Holder certificate and Share holder List only the name and identity of the party nominee. The name and identity of the beneficiary do not appear in any form whatsoever in the certificate With the use of the name and identity of the nominee as a legal registered party, the beneficiary shall compensate in the form of nominee fee. The amount of the nominee fee shall be based on mutual agreement between nominee and beneficiary. Upon the conclusion of a collective agreement, the amount and method of payment of the nominee fee shall be set forth in the form of a written agreement signed by the nominee and beneficiary in a form of consent.

Pursuant to Article 33 Para (1), (2) and (3) of Law No. 25 of 2007 on Capital Investment regulates that:

⁴⁰ Keppres No. 44/2016 Tentang Bidang yang Tertutup dan Terbuka dengan Persyaratan dalam Penanaman Modal.

- (1) Both domestic and foreign investors, whose investment is in the form of Limited Liability Company, are prohibited from entering into any agreement and/or making any statement confirming share ownership in the limited liability company which is owned for-and-on behalf of another party.
- (2) In the event that both domestic and foreign investors enter into an agreement and/or make a statement as set forth in paragraph (1) above, such agreement and/or statement is legally null and void.
- (3) In the event that any investors, who run business based on agreement and/or work contract with the Government, commit a corporate crime in the form of tax crime, marking up the recovery cost or any other costs, in order to reduce profit that will inflict damage to the state, (*such a commitment is proven*) based on findings or audit by authorised personnel and on which a legally binding court decision has been made, the Government will terminate the agreement and/or work contract with such investors.

This provision clearly prohibits the practice of BO in capital investment, specifically one in the form of Limited Liability Company (LLC). In the Elucidation of Article 33 Para (1) it further states that, "This provision exists to prevent the establishment of an LLC that is by the law is owned by one person but in substance and actuality, the LLC belongs to another person."

In addition Article 48 Para (1) of Law No. 40 of 2007 regulate that: "The Company's shares are issued in the name of the owner". What is meant by this provision is that the Company is only permitted to issue shares in the name of its owner and the Company may not issue shares on designation.

Then these provisions are reaffirmed in several articles of Act number 40 of 2007 on Limited Liability as follows:

- a. Article 48
Company The Company's shares are issued on behalf of its owner".
- b. Article 92 Paragraph (1)
The board of directors run the company and in accordance with the purpose of objective of the company .
- c. Article 97 (1)
The board of directors responsible for the management of the company as referred to Article 92
- d. Article 97 Paragraph (2)
of such arrangement shall be carried out by each member in good faith.

VI. BO IN NOMINEE DIRECTOR

Nominee arrangement is to protect the identity of the owner . This similar to the motive of the beneficial owner that involved effort to hide the real owner who get the benefit. The most common form of nominee arrangement is appoint of the nominee director (s) of corporation as in Nazaruddin case who has been the nominee director of 36 affiliated companies which all belong to Democratic Party as the beneficial owner.⁴¹

The real owners or directors do not want their names appear in the Articles of Association of the company in the incorporation procedure. In this situation as in Nazarudin case that he or more persons agree to be listed in the Article of Association Incorporation to the nominee director is given general mandate for establishing all right, opening the account signing contract, full management of company.

The mandate can be given in the forms among others by a general power attorney, a director' resignation letter or a nominee director declaration. ⁴²A General Power of Attorney where the nominee secretly hand back all the control to that real owner. A Director' Resignation Letter where the nominee signs but left it undated and allows the real owner to drop the nominee. A nominee director Declaration where the nominee promises to do what the real owner tells him.⁴³ These documents used usually to protect beneficiary from civil fraud conducted by nominee director.

The structure used in the nominee concept is the existence of agreements made by and between nominee and beneficiary, known as the nominee agreement. In our statutory

⁴¹ <http://beritasatu.com/hme/55959-38-perusahaan-nazaruddin-lolos-daftar-hitam-lkpp.html> accessed 23 June 2018.

⁴² <https://www.theguardian.com/uk/2012/nov/25/offshore-trick-bvi-nominee> .accessed 29 June 2018.

⁴³ See previous note no. 34.

law which derived from the Civil Law tradition, there are two views on the subject,⁴⁴ On one side, the law-crippled agreement can still be binding on both parties, in which both parties voluntarily commit to the provisions set forth in the nominee agreement. On the other side, by law the nominee agreement can not be enforced because it is contrary to public order written and contained in positive law and also to take into account to the bonafide Third Party purchased as state in article 1977 Code of Civil Law.

In civil law, a doctrine of natural attachment is known. A natural engagement (*natuurlijke verbintenissen*) that can not be imposed by its legal instrument, but if the engagement is voluntarily fulfilled, it remains naturally born and binding without the need for coercive means.⁴⁵

Thus, a principle of freedom of contract is limited by the existence of applicable law, to other reasons namely morality and public order. From this example it can be concluded that the engagement is indeed born on the basis of the agreement, but the engagement does not give birth to a legal effect.

Therefore, the nominee agreement can be argumentatively argued as a natural engagement born of the wishes of both parties, but not supported by legal means and therefore can not be enforced law enforcement. The nominee agreement can only continue to live as a natural engagement if both sides are constantly in good faith and fulfill the rights and obligations of each party voluntarily.

⁴⁴ www.hukumonline.com. accessed 23 June 2018.

⁴⁵ A brief example of the concept of a natural engagement is in the case of debt collection in gambling. Article 1359 *Burgerlijke Wetboek* (Code of Civil Law) provides that payment can arise from the existence of a debt. If there is no debt, but there is a payment, then those who do not have the right to receive it have the right to return it again. In addition Article 1788 of Code of Civil Law provides that the law does not grant the right to prosecute in respect of a debt incurred by gambling. In this case, if there is a debtor owed, the creditor does not have the legal means to demand the fulfillment of such payment. A payment should be born out of a debt, but not in the context of gambling. Why? Because gambling in Indonesia is an act that is contrary to applicable law and public order.

In the event that one of the parties breaks the promise of its obligations, the nominee agreement has no power of enforceability before the law, and therefore there is no sanction of the coercive party to fulfill its obligations except moral sanctions.

Although there is no expressly prohibition in law to enter into agreement that provide benefit for the beneficial owner of company's activity .The reason because the arrangement to give benefit to the owner is part of freedom of contract (Article 1338 Code Civil) and privity of contract (Article 1324Code Civil) however the agreement must meet the requirements of the validity of the agreement.All parties shall adhere to or obey the legitimate conditions of an agreement as stated in Article-1320 of Codes of Civil Law namely:

1. parties' consent;
2. the parties' prowess;
3. Certain objects;
4. allowed causa.

The parties' consent or the parties' agreement and prowess (as first and second requirements) are the subjective requirements, whereas the certain object and allowed causa(as the third and fourth requirements) are objective and concern the validity of the agreement's requirements. When the agreement does not meet the subjective requirements of the agreement it can be canceled. When the agreement does not meet the objective requirements, then the agreement is null and void. In this point of view, since the nominee agreement from the beginning has not fulfilled the requirements of the validity of the agreement because it violates the law.⁴⁶

⁴⁶ R. SOEBEKTI, *Pokok –Pokok Hukum Perdata*, Balai Pustaka Jakarta, 1988, h. 44.

In addition there are some legal doctrines in the corporate law that should be concerned such as piercing the corporate veil (Article 3 Paragraph (1), fiduciary duty (Article 92 Paragraph (1) and Article 148 Paragraph (1), derivative action (Article 114 paragraph (6) business judgment and avoid of conflict of interest (article 97).

VII.CONCLUSION

Thus either act as beneficial owner or beneficiary in the nominee arrangements those are smuggling the law. Beneficial Owner and beneficiary in nominee arrangement party is like a coin with two sides of the coin. In order to benefit from the tax treaty, this person is referred to as the beneficial owner. Otherwise in the framework to address some incentives and privileges as well restrictive provisions in the capital investment law the same person is called beneficiary in the framework of nominee arrangement.

Regarding with the tax treaty once the nominee agreement is declared null and void, it obviously the beneficial owner will not get benefit from the tax treaty as stated in Indofood case.

The Presidential regulation number 13 of 2018 on The Application of the Principle of Recognition Benefactors in order to Prevention and Eradication of Money Laundering and Criminal Acts of Terrorism Financing is a complements nominee rules in Act No. 25 of year 2007 on Capital Investment Law and Act No. 40 of year 2007 on the Limited Liability Company law .

Before beneficial owner or beneficiary in the nominee arrangement regulated in those three regulation as mentioned above, the arrangement to establish the beneficial owner and beneficiary is considered as a natural arrangement (*naturlijk verbintenissen*)

but now with all three laws and regulations, the legal consequences are clearly :”null and void”. As a further consequences the benefit of tax treaty treatment also null and void.

The prohibition to practice nominee arrangement, the consequence is: every use nominee in arrangement to appoint nominee director, to register share or other property, the nominee is recognized as the legal owner. By the law, the legal owner is the rightful owner of the item or object , The nominee has the right to transfer, sell, overburden pledge and take any action on the object concerned while the beneficiary as the genuine owner not recognized as the legal owner due to all "counter document" is declared void in favor.

The party should think wisely before making nominee arrangement because a beneficiary or beneficial owner eventhough he is the actual owner can be defeated by his nominated party.