

## REVIEW OF INDONESIAN CONSTITUTIONAL COURT DECISION NUMBER 21-22/PUU-V/2007 BASED ON THE INCLUSIVE LEGAL THEORY

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### Abstract

*This Sovereignty and liberalization are often considered opposites. This resistance is caused by differences in the interests of the two instruments. The object of this research is the Constitutional Court Decision Number 21-22/PUU-V/2007 about judicial review of the UUPM. This study aims to review the Constitutional Court Decision based on The Inclusive Legal Theory. It addresses the research question: What is relevance of The Inclusive Legal Theory in analysing the Constitutional Court's Decision? This study uses normative legal research, which examines the Constitutional Court Decision and the UUPM. The results show that the Constitutional Court sought, in its decision, to bridge the gap between liberalization and sovereignty by returning to the interpretation of the 1945 constitution. The mechanism of legal proceedings in the Constitutional Court is still relevant to elements of the Inclusive legal theory.*

**Keywords:** *Constitutional Court, Investment, The Inclusive Legal Theory.*

### A. Introduction

Today, in many developing countries, state sovereignty and liberalization in investment is a subject of continuous debate. Stephen D. Krasner said, "sovereignty in developing countries is undermined, weakened, marginalized, or transmuted by globalization."<sup>2</sup> Globalization is a product of liberalization, accelerating liberalization in trade including investment. The combination of the two forces greatly influences the desire of the state to provide freedom of entry for foreign companies, the right of

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<sup>2</sup> Stephen D. Krasner, 'Globalization and Sovereignty' in David A. Smith, Dorothy J. Solinger and Steven C. Topik (eds), *States and Sovereignty in the Global Economy* (First published, Routledge 1999) 34.

establishment, and national treatment, as well as freedom for international financial transactions, deregulation, and privatization.<sup>3</sup>

The main problem in developing countries is that they find it difficult make investment laws that match the country's economic goals.<sup>4</sup> The country is confronted with two alternative legal choices in setting investment regulations: First, the state allows investment with the principle of liberalism; or Second, the state restricts investment to protect state sovereignty. Indonesia as a developing country, experiencing the same thing in investment law-making, which can be seen from the lawsuit for judicial review of Law Number 25 of 2007 concerning investment, before the Constitutional Court.<sup>5</sup>

UUPM is the main investment regulation in Indonesia.<sup>6</sup> The Constitutional Court decision examined several articles in the UUPM that were considered to conflict with the 1945 Constitution. However, overall the UUPM was considered to be constitutional. The decision of the Constitutional Court needs to be evaluated to make people understand this Court's holding. The Constitutional Court's holding is limited to determining the UUPM Articles' constitutionality but does not examine their compatibility with other instruments. This judicial review by the Constitutional Court is only based on arguments presented by the parties, witnesses, and judges' considerations on the implementation in the field.<sup>7</sup>

For this reason, this study tries to provide a supplementary understanding of this problem using the analysis of the Inclusive Legal Theory. This theory is a new legal theory that uses several elements in analysing problems, especially investment studies. These include openness with nonlinearity, fairness, freedom, religious aspects, international law studies, and is guided by the protection of marginal society.<sup>8</sup>

The research problem in this research is: What is the relevance of Inclusive Legal Theory to analysis of the Constitutional Court's Decision Number 21-22/PUU-V/2007?

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<sup>3</sup> United Nations Conference on Trade and Development, *Globalization and Liberalization: Development in The Face of Two Powerful Currents* (Report of The Secretary-General of Unctad To The Ninth Session of The Conference, 1996) 13.

<sup>4</sup> Erman Rajagukguk, 'Welfare State: Foreign Capital Controversy' paper presented at *Kritik Atas Arah Kecenderungan Supremasi Hukum Paska 1998 Terkait dengan Modal* (2008) 1.

<sup>5</sup> *Judicial Review of Law No 25 of 2007 on Investment in the Indonesian Constitution of 1945* (2007) 21-22/PUU-V/2007 232.

<sup>6</sup> Law No. 25 of 2007 on Investment.

<sup>7</sup> Erman Rajagukguk, *Loc. Cit.*, 1.

<sup>8</sup> Ben Senang Galus, *Mazhab Tamsis: Pemikiran Prof. Jawahir Thontowi, SH, Ph.D, tentang Hukum Inklusif Berkeadilan* (Pohon Cahaya 2016) xix-xxii.

## B. Research Method

This study uses the concept of normative legal research with a statutory and philosophical approach. This study was carried out by analysing UUPM and Constitutional Court Decision Number 21-22/PUU-V/2007 concerning judicial Review of UUPM. This study also uses a philosophical approach in exploring the norms and decisions of the Constitutional Court with philosophical instruments namely ontology, epistemology, and axiology of state sovereignty and investment.

## C. Discussion and Result

The discussion in this study justifies the research methodology. This study uses conceptual analysis to answer this research question. This study will address several issues, including:

### 1. The Inclusive Legal Theory

The inclusive legal theory was established by Jawahir Thontowi. This theory intends to fill the gap of the study of law from the perspective of problematic solutions. The Inclusive Legal Theory seeks to support the development of national law by critically analysing legal norms that contain elements of injustice. The injustice which originates from legal positivism makes justice "impossible to be implemented on earth."<sup>9</sup> Justice is one of the objectives of the law, in addition to legal certainty and utility of the law, among which objectives the purpose of justice is the most important of these ideals.<sup>10</sup> So far, legal positivism has established axiology in legal certainty, by observing formal sources, namely regulations.<sup>11</sup> Legal certainty cannot reflect justice in people's lives, even though justice is a necessity that never dies.

Legal positivism with *ius constitutum* takes law far away from the values of justice. In Indonesia, there are three legal systems that apply, namely, the Western legal system, the Islamic legal system, and the customary legal system.<sup>12</sup> This is a type of legal pluralism, where every law has different characteristics but has the same goals, which is justice, certainty, and utility of law. The Inclusive Legal Theory is characterized by incorporation of the existing concept of legal pluralism.

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<sup>9</sup> Jawahir Thontowi, 'Towards Equitable Legal Science' speech delivered at the Inauguration of Professor Jawahir Thontowi, SH, Ph.D (Bureau of Academic and Student Affairs UII, 2011) 5.

<sup>10</sup> Muhammad Erwin, *Filsafat Hukum; Refleksi Kritis Terhadap Hukum dan Hukum Indonesia: dalam Dimensi Ide dan Aplikasi* (PT RajaGrafindo Persada 2015) 290.

<sup>11</sup> Shidarta, *Hukum Penalaran dan Penalaran Hukum* (Genta Publishing 2013) 200.

<sup>12</sup> Ibid 227.

The Inclusive Legal Theory has a paradigm that deviates from the current established theory, however. The paradigm of the Inclusive Legal Theory is strongly influenced by the critical legal studies by Talcott Parsons and Roscoe Pound. Talcott Parsons states that law only functions as a means of social control. Talcott Parsons states, “This is where law comes in from a sociological point of view, law is significant, above all, as an institutional instrumentality of (social control).”<sup>13</sup>

Roscoe Pound states that the law controls change in society (law is the tool of social engineering).<sup>14</sup> Roscoe Pound articulates, “In such a conception of judicial decision as part of a larger process of social engineering, in a sense legislation and judicial decision are put on the same basis. Each is or may be creative. Each is and should be governed by principles of social utility.”<sup>15</sup>

Based on the influence of this paradigm, the Inclusive Legal Theory sees that law does not only function as a search for legal certainty solely by preventing and controlling members of society from actions that cause violations and crimes and resolving disputes in court but considers it as a legal justice.<sup>16</sup>

The Inclusive Legal Theory aims to return the law to the original idealism of justice, with five (5) frameworks, namely: non-linear, having long tradition of freedom, having religious values, national law is not independent but is subject to international law and the legal ideology, to protect those marginalized in society.<sup>17</sup>

In the early stages, the concept of the Inclusive Legal Theory was known as Fairness Inclusive Legal Theory with five important characteristics, namely: (i) The fairness under the law must be integrated with ontology, epistemology, and praxis; (ii) Fairness under the law must be of an inclusive character; (iii) Fairness under the law must have equality in differences in capacity; (iv) Fairness under the law shall be characterized by transplantation; and (v) Fairness under the law must be in line with special legal conditions.<sup>18</sup>

The Inclusive Legal Theory analysis is grounded in two parallel terms, inclusiveness and fairness. Inclusiveness is derived from the English word "Inclusive" which has the

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<sup>13</sup> Talcott Parsons, ‘Law as an Intellectual Stepchild’ (1977) *Sociological Inquiry*, 12.

<sup>14</sup> Linus J. McManaman, ‘Social Engineering: The Legal Philosophy of Roscoe Pound’ [1958] *St. John's Law Review*, 16-17.

<sup>15</sup> Roscoe Pound, ‘The Theory of Judicial Decision. III. A Theory of Judicial Decision for Today’ [1923] *Harvard Law Review*, 955.

<sup>16</sup> Jawahir Thontowi, *Loc. Cit.*, 6.

<sup>17</sup> Ben Senang Galus, *Loc. Cit.*, xix-xxii.

<sup>18</sup> Jawahir Thontowi, *Loc. Cit.*, 32-33.

meaning "included in it."<sup>19</sup> Inclusiveness is the antonym of exclusiveness, which means a way of thinking, which is textbook thinking with legal studies based on existing legal norms (linear). The Inclusive Legal Theory is an empirical legal study, which aims to expand the object of legal studies. The law is not static, but dynamically corresponds to the new era.

## 2. Liberalization versus Sovereignty

The debate between liberalization versus sovereignty began in the new era of globalization. Globalization supports the growth of liberalization. Liberalization and globalization are part of an economic reform program aimed at shaping new economic directions. Liberalization aims to reduce and eliminate state control over economic activity. Liberalization has two dimensions, internal and external liberalization.<sup>20</sup>

Globalization can thus be defined as "the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa."<sup>21</sup> Globalization, according to Anthony Giddens, has four dimensions. First is the world capitalist economy. The second is the nation-state system. If the nation-state is the main "actor" in the global political order, the corporation is the dominant agent in the world economy. The third is the world military order and the fourth is the global division of labour or international division of labour.<sup>22</sup>

The dimensions of globalization provide an overview of globalization supported by stakeholder from various backgrounds related to economic liberalization and an enterprise given the role as an agent in the economic order.

Economic liberalization is derived from the preference of liberal democracies.<sup>23</sup> Liberalism in the economic field is an understanding that is built from the concept of individualism, market mechanisms, and a limited role of the state.<sup>24</sup> The economic system of Liberalism originated from the idea of Adam Smith.<sup>25</sup> Adam Smith opined that economic activities are controlled by an "invisible hand." Economic activity is made

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<sup>19</sup> Ben Senang Galus, Loc. Cit., 484.

<sup>20</sup> Inakshi Chaturvedi, 'Globalization and Its Impact on State Sovereignty' [2012] *International Political Science Association*, 1.

<sup>21</sup> Anthony Giddens, *The Consequences of Modernity* (Polity Press 1991) 64.

<sup>22</sup> Ibid 70-71.

<sup>23</sup> Beth A. Simmons and Zachary Elkins, 'The Globalization of Liberalization: Policy Diffusion in the International Political Economy' [2004] *American Political Science Review*, 189

<sup>24</sup> Jonker Sihombing, *Investasi Asing melalui Surat Utang Negara di Pasar Modal* (PT Alumni 2008) 33.

<sup>25</sup> Jonker Sihombing, *Peran dan Aspek Hukum dalam Pembangunan Ekonomi* (PT Alumni 2010) 47.

autonomously by an individual for his own interests so that individuals and society must catch up on their respective interests (self-interest). This economic planning is given to an invisible mechanism, ultimately creating economic development that leads to equilibrium.<sup>26</sup>

Adam Smith's main idea about economics is the free market doctrine. This idea wants restrictions on government interference in regulating trade and is controlled by the laws of supply and demand.<sup>27</sup> The development of globalization<sup>28</sup> provides fertile space for liberalism and capitalism to develop in the world. Liberalism is growing in line with globalization to affect the global economic system. This influence is marked by the growth of free trade/free markets, respect for individual ownership, and world markets dominated by multinational companies.<sup>29</sup>

The practice of investment is controlled by Liberalism, which is the spearhead in promoting Capitalism.<sup>30</sup> The economic system of capitalism wants the function of the state to be limited. The state only functions as a night watchman. The state has a function to maintain and protect economic and social interests based on the principle of *laissez-faire*.<sup>31</sup> Literally, this term means “let go, let go, the world will continue to spin”. This slogan is then interpreted as “let people do as they like without government intervention”.<sup>32</sup>

The greatest influence of liberalization in economic politics is its resistance to the economic system of mercantilism. Mercantilism supports state economic regulations for national interests. Economic mercantilism states that national assets were the amount of gold are owned by the state and the state must restrict import and increase exports to increase gold ownership.<sup>33</sup>

The contradiction between liberalism and state sovereignty heightened in the era of economic nationalism. Economic nationalism emphasized policy arrangements that favour national interests, including international trade arrangements.<sup>34</sup> Theoretically, this debate is illustrated by Theodore H. Moran's theory about the relationship between economic

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<sup>26</sup> Ibid 50-51

<sup>27</sup> H.S. Kartadjoemena, *GATT dan WTO Sistem, Forum dan Lembaga Internasional di Bidang Perdagangan* (UI Press 2002) 24.

<sup>28</sup> Sentosa Sembiring, *Hukum Investasi* (CV Nuansa Aulia 2010) 1.

<sup>29</sup> Ign Gatot Saksono, *Keadilan Ekonomi dan Globalisasi* (Rumah Belajar Yabinkas 2008) 53.

<sup>30</sup> Basu Swastha D.H. and Ibnu Sukotjo W., *Pengantar Bisnis Modern* (Liberty 2001) 8.

<sup>31</sup> Jonker Sihombing, Op. Cit., 31.

<sup>32</sup> Ridwan Khairandy, *Iktikad Baik dalam Kontrak di Berbagai Sistem Hukum* (FH UII Press 2017) 42.

<sup>33</sup> Kenneth J. Vandeveld, 'Sustainable Liberalism and the International Investment Regime' [1998] *Michigan Journal of International Law*, 375.

<sup>34</sup> Ibid 378.

development and FDI. First, *the malign model of FDI and Development*.<sup>35</sup> Second, *the benign model of FDI and Development*.<sup>36</sup> Mohammed Al Sewilem added in one relationship model an *integrative school*.<sup>37</sup> A similar opinion was conveyed by Charles Hill, who was quoted by Taylor in giving a categorization of PMA theory. Charles Hill analyses these three theories in terms “*the free market view*” (*Classical Theory*), “*the radical view*” (*Dependency Theory*), and “*pragmatic-nationalism*” (*Middle Path theory*).<sup>38</sup>

The state has the absolute right to independence. It is stated that no country can interfere with the problems that happen in other countries, and no country is allowed to make war with other countries.<sup>39</sup> Therefore, international law is based on the principle of mutual territorial respect among nations, known as "sovereignty." Sovereignty in the traditional conception is divided into several parts. First, internal sovereignty is the highest sovereignty of the country, allowing it to regulate all people, the environment and everything in it to implement the laws and regulations that have been made by the government in the territory.<sup>40</sup> Internal sovereignty makes the country as *legibus soluta*.<sup>41</sup> *Legibus solutus* is derived from the Latin meaning "released from the laws" or in the language defined as 'of the emperor or other designated person not bound by the law.'<sup>42</sup>

Second, external sovereignty is the sovereignty of the state to defend its independence from attacks from other countries. External sovereignty means “As the absolute independence of one state as a whole with references to all other states”.<sup>43</sup> External sovereignty begins with the concept of state freedom to engage in relations with other countries without any control from the other country. This aspect of sovereignty comes from the recognition of the independence of a country, giving the independent state its reciprocal sovereignty. Essentially, a state must not interfere in the affairs of other

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<sup>35</sup> Theodore H Moran, *Foreign Direct Investment and Development; The New Policy Agenda for Developing Countries and Economies in Transition* (Institute for International Economics 1998) 19.

<sup>36</sup> Ibid 20.

<sup>37</sup> Mohammed Al Sewilem, *The Legal Framework for Foreign Direct Investment in the Kingdom of Saudi Arabia: Theory and Practice* (University of London 2012) 43.

<sup>38</sup> J. Michael Taylor, 'The United States' Prohibition on Foreign Direct Investment in Cuba— Enough Already' [2002] *Law & Business Review of the Americas*, 120.

<sup>39</sup> Huala Adolf, *Aspects of the State in International Law* (PT RajaGrafindo Persada 2002) 39.

<sup>40</sup> Hufron and Syofyan Hadi, *Ilmu Negara Kontemporer Telaah Teoritis Asal Mula, Tujuan dan Fungsi Negara, Negara Hukum dan Negara Demokrasi* (LaksBang Grafika 2016) 112.

<sup>41</sup> F. Isjwara, *Pengantar Ilmu Politik* (Putra A Bardin 1999) 108.

<sup>42</sup> Bryan A. Garner. (ed), *Black's Law Dictionary* (9<sup>th</sup> Ed., Thomson Reuters 2009) 982.

<sup>43</sup> Nkambo Mugerwa, 'Subjects of International Law' in Max Sorensen (ed), *Manual of Public International Law* (Palgrave Macmillan 1968) 253; C. F. Strong, *Modern Political Constitution an Introduction to the Comparative Study of Their History and Existing Form* (1<sup>st</sup> Ed., The English Language Book Society and Sidgwick & Jackson Limited 1966) 80.

countries. The state has jurisdiction over the territory exclusively in the form of independence and sovereignty but remains charged with an obligation to international agreements if the country agrees so that the state is bound and submits voluntarily to the agreement.<sup>44</sup>

Third, territorial sovereignty has two aspects. The first aspect is positive sovereignty, means that sovereignty is exclusively sovereign rights, and the state has the sovereign right to exploit and explore its territory. The second aspect is negative sovereignty. Negative sovereignty is the obligation of the state not to interfere with and respect the rights of other countries in carrying out governmental activities independently.<sup>45</sup>

Dusan Pavlovic divides sovereignty theory into two theories. The first theory is the classical theory of sovereignty. The classical theory views sovereignty as unlimited power. The classical view judges that there are three main elements of sovereignty, namely the element of unlimited power, the element of a sovereign is power the source of all rights, and the king is the only authority element as the keeper of sovereignty. The second is the constitutional theory about sovereignty. The constitutional theory views sovereignty as something which is final but must be limited in accordance with the constitution.<sup>46</sup>

The sovereignty of a country is not absolute but is limited with respect to the sovereignty of other countries. International law states that state sovereignty is relative.<sup>47</sup> International law considers that the sovereignty of the state must follow and respect international law, including respecting the sovereignty and territorial integrity of other countries. A contrary opinion was espoused by Hata, regarding the existence of state sovereignty in international law that there was no higher power than the state. This concept explains that the independence of the state to act cannot be limited by international law.<sup>48</sup>

Today, Sovereignty theory remains debatable, even where countries maintain good relationships with one another.<sup>49</sup> The debate about sovereignty has been influenced by globalization which created world integration physically and make individual countries

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<sup>44</sup> Jawahir Thontowi and Pronoto Iskandar, *Hukum Internasional Kontemporer* (PT Refika Aditama, 2006) 173.

<sup>45</sup> Huala Adolf, Op. Cit., 114.

<sup>46</sup> Dusan Pavlovic, *Rousseau's Theory of Sovereignty* (Central European University 1997) 5-6.

<sup>47</sup> Suryo Sakti Hadiwijyo, *Aspek Hukum Wilayah Negara Indonesia* (Graha Ilmu 2012) 103.

<sup>48</sup> Hata, *Hukum Ekonomi Internasional IMF World Bank WTO* (Setara Press 2016) 192.

<sup>49</sup> Nandang Sutrisno, *Using World Trade Law to Promote the Interests of Global South: A Study on the Effectiveness of Special & Differential Treatments*, translation by Susi Fauziah, *Pemajuan Kepentingan Negara-Negara Berkembang dalam Sistem WTO: Studi atas Mekanisme Perlakuan Khusus dan Berbeda dengan Referensi terhadap Indonesia* (The Institute for Migrant Rights Press 2012) xvii.



only small parts of the global world. Globalization transcends state boundaries both ideologically and politically due to advances in technology and communication, and transportation, including the international trade system. Globalization has one goal in international trade, namely: organizing nations for a common goal, removing trade barriers to facilitate the movement of trade products both in the form of goods and services, investment, currency, and information.<sup>50</sup>

James Bryce denies the existence of sovereignty theory. He said the theory of sovereignty is a "dusty desert of abstractions."<sup>51</sup> Sovereignty theory is stated as a fictional and imaginary theory. Therefore, sovereignty theory is considered a dangerous concept, giving rise to mere power-based governance, and sovereignty theory is a barrier to the growth of international trade.<sup>52</sup>

### **3. Meeting Point Between Liberalization and State Sovereignty: Implication of The Constitutional Court Decision Number 21-22/PUU-V/2007**

The Constitutional Court Decision Number 21-22 / PUU-V / 2007 concerning judicial review of UUPM has tested the existence of UUPM in view of the 1945 constitution. UUPM can be cancelled under the principle that a lower level legal regulation is void if in conflict with a higher level legislation (*lex superiori derogat legi inferiori*).<sup>53</sup> The registration of this judicial review generally was based on the allegations that the UUPM is more applicable to the principle of liberalization than to state sovereignty.

The Constitutional Court began legal considerations by explaining the interpretation of Article 33 of the 1945 Constitution, which became a key article in the implementation of the national economy and social welfare, including foreign investment in Indonesia. Article 33 must be read in its entirety. Understanding of this article must be based on the spirit that the 1945 Constitution is a living constitution. The use of historical context in understanding this article is needed but does not stop at historical facts. More importantly, it aims to find the purpose behind article 33, so that textual interpretation is supported by the contextual interpretation to understand article 33.<sup>54</sup>

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<sup>50</sup> Bernhard Limbong, *Ekonomi Kerakyatan dan Nasionalisme Ekonomi* (Margaretha Pustaka 2013) 151.

<sup>51</sup> Viscount James Bryce, *Studies in History and Jurisprudence* (Oxford University Press 1901) 504.

<sup>52</sup> F. Isjwara, Op. Cit., 106.

<sup>53</sup> Yuliandri. *Asas-Asas Pembentukan Peraturan Perundang-Undangan yang Baik* (RajaGrafindo Persada 2010) 50.

<sup>54</sup> *Judicial Review of Law No 25 of 2007 on Investment in the Indonesian Constitution of 1945* (2007) 21-22/PUU-V/2007 213.

This consideration shows the attitude of the Constitutional Court in support of broad statutory interpretation, namely: the purposes of the law in the future (prescriptive). The non-linear element used by the Constitutional Court justices in this interpretation, by offering interpretations that are not only textual but contextual. Open thought of its implementation is required to make these decisions more meaningful and fulfil the spirit of justice.

Article 33 has the ultimate goal of creating the greatest prosperity of the people. The phrase "the greatest prosperity of the people," in Article 33 the UUD 1945 must be understood, not only in physical context, but also in the dignity of the nation so that it is able to stand in line with other nations and able to become the authority in their own country.<sup>55</sup> Therefore, the state as the holder of the right to control the state is not meant to be owned by the state itself but is bound to the purpose in giving that right, to be used for the greatest prosperity of the people.

The principle of economic democracy in Article 33 which covers the principles of togetherness, fairness of efficiency, sustainability, environmentalism, independence, and the balance of progress and national economic unity must also be interpreted as an economic democracy that continues to change and develop so that economic democracy must not only be bound at a certain time. This interpretation was used by the Constitutional Court in interpreting the articles in the UUPM.

In general, decisions regarding state sovereignty are interpreted broadly, so long as the government is still in control of investment. This statement is proven by regulation, among others, first, "by still taking into account national interests," and second, the state statement determines what is permissible, and not merely the will of the capital owner. Third, there are a number of obligations and responsibilities imposed on investors. Fourth, there is a provision that the Government can stop or cancel the granting and extension of land rights. Fifth, there are provisions in which the Government, based on the law, is possible to carry out acts of nationalization or expropriation of ownership rights. Sixth, there is a provision that the Government can terminate the agreement or contract of cooperation. This is the standard of state sovereignty explained by the constitutional court in its decision.

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<sup>55</sup> Ibid 274.

The problems of liberalization and state sovereignty raised in this Constitutional Court decision include equalizing FDI and Domestic Direct Investment (DDI).<sup>56</sup> This regulation is alleged to contain elements of liberalism that emphasize the principle of non-discrimination between FDI and DDI. This equal position, however, is contrary to state sovereignty. Legal considerations related to this equality action are considered by the Constitutional Court not to contradict the UUD 1945 due to several reasons. First, the principle of accountability. This principle that orders companies to be accountable for their business activities, encapsulated in the phrase "keep in mind national interests," the existence of closed or open business field instruments with requirements, obligations and responsibilities of the company, and stopping or cancelling the grant of rights to land, and supported by the principles of economic democracy as a form of state obligation to provide protection for people's rights.<sup>57</sup> Additionally, the Court invoked the principle of equality in business and the principle of economic democracy.<sup>58</sup> This is the contextual interpretation applied by the Constitutional Court, interpreting sovereignty by not being bound in one legal term, but must be considered in its entirety.

Second, the Court considered the freedom to transfer assets,<sup>59</sup> the right to transfer, and repatriation of assets in foreign currencies.<sup>60</sup> These privileges will provide uncertainty in guarantee of employment and continuation of the business.<sup>61</sup> The Constitutional Court believes that protection of human rights is absolutely necessary. The state cannot prohibit the ownership of one's assets, including legal entities. Otherwise, it will conflict with human rights. This provision is controlled by the obligation to report and fulfil the state's rights to taxes and royalties, the implementation of laws that protect creditors' rights, and the implementation of laws to avoid state losses.

Third, all types of businesses are exposed.<sup>62</sup> UUPM is deemed to have the spirit of openness. Thus after that state has made exceptions, the state should regulate, and start to establish businesses.<sup>63</sup> The Constitutional Court held that there is no problem of

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<sup>56</sup> Law No 25 of 2007 on Investment, art. 4 (2).

<sup>57</sup> *Judicial Review of Law No 25 of 2007 on Investment in the Indonesian Constitution of 1945* (2007) 21-22/PUU-V/2007 219-220.

<sup>58</sup> *Ibid* 220-221.

<sup>59</sup> Law Number 25 of 2007 on Investment, art. 8 (1).

<sup>60</sup> *Ibid* art. 8 (3).

<sup>61</sup> *Judicial Review of Law No 25 of 2007 on Investment in the Indonesian Constitution of 1945* (2007) 21-22/PUU-V/2007 225.

<sup>62</sup> Law No. 25 of 2007 on Investment, art. 12 (1).

<sup>63</sup> *Judicial Review of Law No 25 of 2007 on Investment in the Indonesian Constitution of 1945* (2007) 21-22/PUU-V/2007 230.

unconstitutionality in the formulation of norms for opening business fields because the term “controlled by the state” does not always mean “owned by the state”. An important issue in this problem is the principle of “openness of the business sector”. The government requires a lot of legislation to cover certain business fields including its arrangements in the DNI. Similarly, if the closed principle is prioritized, the government needs a lot of rules to open its markets. The essence of this problem is the mechanism of government oversight of investment. With the open principle, the government does not focus on supervising investments made, but with the principle of “closure”, it will make the government focus more on regulations that opening its markets to foreign investment. This regulation of openness and closure also has an impact on state sovereignty as stated in the Constitution of 1945, even though the Constitutional Court states that it is not.

Fourth, the Court considers the facilitation of FDI.<sup>64</sup> The state should provide convenience to the people who are engaged in the real sector who carry out the social economy. The state must provide protection for the rights of marginalized groups.<sup>65</sup> The Court argued that the arguments given did not show evidence that these norms could cause a loss of protection for marginal communities, But the arguments gave only statements or assumptions. Even though other articles support the protection of the people, the Court stated that this article was not in conflict with the Constitution of 1945.

The provision of facilities created by the government aims to attract a lot of investment into this country. Provision of facilities is considered reasonable because it will get multiple advantages. The provision of facilities should not eliminate the spirit of competing in a healthy manner of creating a dignified business. Provision of facilities is reasonably considered good if it does not exceed and damage the principle of business competition. Even though it does not contradict the Constitution of 1945, the provision of facilities made by the government on investment should not hurt the feelings of the people who should obtain and need these facilities. The principle of protection of marginal communities must be a record in the provision of facilities to investors.

Fifth, ease of service for land rights.<sup>66</sup> Provision of land rights is longer than the UUPA, with a statement “extended at once.” This will eliminate people's rights to land.<sup>67</sup>

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<sup>64</sup> Law No. 25 of 2007 on Investment, art. 18.

<sup>65</sup> *Judicial Review of Law No 25 of 2007 on Investment in the Indonesian Constitution of 1945* (2007) 21-22/PUU-V/2007 245.

<sup>66</sup> Law No. 25 of 2007 on Investment, art. 21-22.

<sup>67</sup> *Judicial Review of Law No 25 of 2007 on Investment in the Indonesian Constitution of 1945* (2007) 21-22/PUU-V/2007 252.

The Constitutional Court believes that the use of the phrase “extended at once” is of value contrary to the Constitution of 1945. This principle must be determined by the government in implementing investment, since giving facilities that exceed the fairness will result in the loss of state sovereignty.

#### **4. Relevance of the Inclusive Legal Theory in the Constitutional Court's Decision Number 21-22/PUU-V/2007**

The Constitutional Court's decision can be analysed based on the elements in the Inclusive Legal Theory. The explanation of the relevance of this decision with the elements can be explained as follows.

Based on the non-linear principle, the Constitutional Court has adjudicated the judicial review law of 25 of 2007 using open and comprehensive legal observations. This can be seen from the commitment in the decision which states that it will use the interpretation of the constitution not only in a textual manner but also in a contextual manner so that the constitution stay “alive.” The Constitutional Court not only conducts hearings by listening to the arguments of the Petitioners, expert statements submitted by the Petitioners, statements of legislators, expert statements submitted by the Government, but this Statement is then returned to the question of interpretation of the basic principles of the economic system adopted by The Constitution of 1945, as its basic provisions are regulated in Article 33 of the Constitution of 1945. Principles are in line with long tradition of freedom. This principle emphasizes justice in this decision. The Constitutional Court has fulfilled the obligation to listen to the arguments and statements of the parties carefully, even the trial trip is considered to be long enough so that the debates of the parties are facilitated by the Court properly. The principle of religious values. This principle reflects the values adopted by the Indonesian people. In this ruling, the Constitutional Court multiplies the living law that lives in society as one source of unwritten law.

National law principle is not independent but is subject to international law. This decision is closely related to the agreement made by the Indonesian people with the GATT agreement. The Constitutional Court still respects the agreement in its decision. The legal ideology principles to protect marginal society. The Constitutional Court does not direct protection on one party but protects all parties, especially the people of Indonesia. This protection is given in the form of actual decision making.

Related to the implementation of decision making or procedural law, the decision of the Constitutional Court is considered still relevant or in line with the Inclusive Legal Theory. However, in this study related to decision material, the principle of the Inclusive Legal Theory was used in decision making. It is seen that the constitutional court ignore the problem of the impact caused by capital liberalization. This aspect escapes the ruling of decisions in the constitutional court ruling. Even though this aspect is important to explore by the Constitutional Court, the Constitutional Court should not stop in matters of dialectics and logic alone but must explore the real values that occur in society, even though it is casuistic and has no broad impact. The principle of the Inclusive Legal Theory is to explore the truth and real justice so that legal problems can be found in long-term solutions.

#### **D. Conclusion**

Based on the formulation of the problem, this study concludes that the conflict between liberalization and sovereignty in Investment Law is bridged by the Constitutional Court by giving a ruling that state sovereignty is still maintained. This decision provides for the preservation of state sovereignty with some supporting elements stipulated in this law.

The decision of the constitutional court in the views of the inclusive legal theory is still relevant to the elements of the inclusive legal theory. This can be seen from the legal procedures used by the judge in giving decisions. However, there are other elements that have not been applied by the judge in considering the impact of foreign investment. Judges are still passive, making this ruling have some problems in a good effort to create legal justice.

It is suggested that the Inclusive Legal Theory give practical improvements to be used by legal development actors in practical areas, such as judges, lawyers or other law enforcers. It also needs theoretical improvement through the study of legal philosophy by academics to make a better Indonesian legal condition.

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