Boards of Commissioners in Indonesia: an Empirical Study of Board of Commissioners of Indonesia’s State-Owned Enterprises

Abstract:

By undertaking document analysis and interview methods, this paper examines the determining factors that shape the face of the boards of commissioners of Indonesian non-listed enterprises (SOEs) by researching and investigating the prevailing laws, regulations, self regulations and practices of commissioners in six selected SOEs. This study found that public servant, businessman, pensioner, academic and big fish commissioners are five types of commissioners of Indonesia non-listed SOEs. Moreover, the commissioners’ legal position tells us that the government has full power to two companies’ organs, commissioners and directors. Seen from the agency theory, the appointment and dismissal of boards by the government, the boards are agents to the government. This is also discovered that there is no a fit and proper test process for electing SOEs’ commissioners. Rather, the election has been done through a political process in which the President is a chair of the selection team.

Keywords: Board of Commissioners, State-owned Enterprises, and Indonesia

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Chapter Five

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5.1 INTRODUCTION

As scholars, company boards (called the board of directors in the single-tier board system or the supervisory board in the two-tier board system) can be considered to be a key factor in the discussions of corporate governance in addition to company law, monitoring by large owners, the threat of hostile takeovers, managerial incentives, creditor monitoring and product market competition issues.¹ Quoting Jensen,² Andres et al., 'in recent years, the debate has focused on the activity of the board of directors, the most outstanding governance mechanism of the internal control system'.³ Indeed, as stated by Thomsen, for some scholars the two concepts (board and corporate governance) are more or less identical.⁴

A large numbers of studies of boards within the single-tier board system framework. Conyon and Peck⁵ examine the role of board control and the remuneration committee

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³ Pablo de Andres, Valentin Azofra and Felix Lopez, 'Corporate Boards in OECD Countries: Size, Composition, Functioning and Effectiveness' (2005) 13(2) Corporate Governance 197
of publicly traded UK companies. McNulty and Pettigrew\(^6\) review the contribution to strategy by chairmen and non-executive directors in large UK firms. Weisbach\(^7\) deals with the relationship between the monitoring of CEOs by inside and outside directors and CEO resignation, and by using meta-analyses Deutsch\(^8\) studies the systematic relationship between board composition and agency theory, to name a few.

In contrast, an examination of the board in the context of dual boards system, especially looking at the board’s focus, is quite rare. Scholars such as Aste,\(^9\) Scheineder-Lenne,\(^10\) Andre, Jr.,\(^11\) du Plessis,\(^12\) Empel,\(^13\) have considered this subject but their studies do not focus on the supervisory board. The reason why this needs to be addressed is that studies on supervisory boards and their two-tiered boards are imperative nowadays since no modern corporation’s system is free from the influence of the supervisory board and the two-tier board principles. This point can be substantiated by du Plessis who argues that employing non-executive directors, senior executive directors and independent non-executive directors effectively creates a division between management and supervisory functions. Anglo-Saxon countries have effectively adopted the two-tier board model.\(^14\)

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\(^6\) Terry McNulty and Andrew Pettigrew, 'Strategists on the Board' (1999) 20(1) Organization Studies


\(^12\) Jean J. Du Plessis, 'Corporate Governance: reflections on the German two-tier board system' (1996) 20 Journal of South African Law 22


A small number of academic studies on boards in the two-tier board system (supervisory board) can be traced. For example, through a string of interviews, Xiao et al., look at the role of the supervisory board Chinese listed companies. This study concludes that there are four types of supervisory board in Chinese listed companies, consisting of honoured guest, friendly advisor, censored watchdog and independent watchdog.\(^{15}\) In addition, still in the Chinese’s two-tier board setting, Dahya et al. examine the usefulness of the supervisory board reports in China.\(^{16}\) Moreover, Regar undertook a literature study of Indonesian supervisory boards.\(^{17}\) Hence, this current study attempts to fill the existing gap in the literature on supervisory boards.

This paper examines the determining factors that form the face of the boards of commissioners of Indonesian non-listed or pure state-owned enterprises (SOE) by researching and investigating the prevailing laws, regulations, self-regulations and practices of commissioners in six selected firms. Though this paper focuses on Indonesian SOEs, its findings could be applied to other countries where pure SOEs exist. The paper’s results are mainly threefold: (1) The commissioners in the six researched companies are busy people and have additional positions apart from their position as commissioners in the companies. The terms ‘public servant commissioners’, ‘businessman/skilled worker commissioners’, ‘academic commissioners’, ‘pensioner commissioners’ and ‘big fish commissioners’ are used to describe the findings of this paper; (2) It is found that existing law and regulation allow an SOE’s commissioner to have other position in other institutions; (3) Other findings of the study include the absence of fit-and-proper testing and the dominance


\(^{17}\) Moenaf H. Regar, Dewan Komisaris: Peranananya Sebagai Organ Perseroan (2000)
of political decisions and influence in appointing members of SOEs’ commissioners. The decision about whether or not a person can be elected or become a commissioner is subject to the benevolence of the President of the Republic of Indonesia through the Final Assessment Team (in Indonesian this is abbreviated to TPA).

The reminder of the paper is divided as follows. Section 2 discusses the theoretical framework and looks at the theoretical literature on boards and two-tier board system. It considers the legal position of Indonesian supervisory boards, including boards that are agents to shareholders and commissioners, and the suspension rights on boards of directors, the commissioners’ liability and the role of the government as acting shareholder. Section 3 presents and analyses the empirical study outlining the methods of data collection used in this paper, the data and the results. Section 4 presents the conclusions of the study.

Table 4: Indonesian state-owned enterprises’ types and assets (2007)

<table>
<thead>
<tr>
<th>Types</th>
<th>No. of SOEs</th>
<th>Percentage of SOEs’ numbers (%)</th>
<th>SOEs’ assets (trillion rupiah)</th>
<th>Percentage of SOEs’ assets (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Listed Limited Liability Companies (Tbk)</td>
<td>11</td>
<td>7.91</td>
<td>840,479,344</td>
<td>48.817</td>
</tr>
<tr>
<td>Non-listed Limited Liability Companies (PERSERO)</td>
<td>115</td>
<td>82.73</td>
<td>852,823,935</td>
<td>49.534</td>
</tr>
<tr>
<td>General companies (PERUM)</td>
<td>13</td>
<td>9.35</td>
<td>28,383,236</td>
<td>1.648</td>
</tr>
<tr>
<td>Total</td>
<td>139</td>
<td>100</td>
<td>1,721,686,515</td>
<td>100</td>
</tr>
</tbody>
</table>

5.2 THEORETICAL FRAMEWORK

5.2.1 Theoretical literature on boards and two-tier board system

Two main forms of corporate board systems for the control of corporate management exist in the world — the unitary board and its two-tier counterpart. The former is used by common-law countries such as the United States, Australia and the United Kingdom; the latter is found in civil law countries such as Germany, the Netherlands,
and following its colonial model, Indonesia. This paper therefore focuses on the board within the scope of two-tier board systems.

### 5.2.2 Board as a company’s internal control

Dispersed ownership is considered to be the main characteristic of a contemporary company, which can create governance problems. Because the shareholders are dispersed, they are not able to directly control their assets in the company. This is often exemplified as a common instance of an agency relationship in a company. He and Sommer state that there are two control mechanisms, internal and external, which deals with agency problems between managers and owners of corporations. The internal control instruments consist of a natural process of monitoring from higher to lower levels of management including mutual monitoring amongst managers, and the board of directors. Examples of external control instruments include the outside labour market; monitoring from the capital market by financial analysts, institutional shareholders and block shareholders; and the takeover market.

As one of the internal control instruments, a company board is needed as an intermediary body in a company to remedy problems between the company’s owners and managers. The dispersed owners require the board to resolve the problems

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19 The issue on the dispersed of ownership and contemporary corporation can be learned from Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (1932)
20 Enya He and David W. Sommer, 'Separation of Ownership and Control: Implications for Board Composition' (2010) 77(2) *The Journal of Risk and Insurance* 269
21 Ibid
23 Thomsen, above n 4, 78
between themselves and the hired managers who run day-to-day company activities.\textsuperscript{24} Fama and Jensen point out that the board is a company device deliberately set up to perform monitoring functions\textsuperscript{25} and to provide contributions to internal directors\textsuperscript{26} when agency problems exist as a result of the separation of ownership and control. Further, as has been widely quoted, Fama\textsuperscript{27} and Fama and Jensen\textsuperscript{28} state that the board is considered as the “ultimate internal monitor and the common apex of the decision control systems of organizations, large and small, in which decision agents do not bear a major share of the wealth effects”.\textsuperscript{29} In other words, as Hermalin and Weisbach state, “the theoretical literature on boards will derive the board as part of the equilibrium solution to the contracting problem between diffuse shareholders and management”.\textsuperscript{30}

In terms of the board’s function, Williamson argues that protecting the interests of shareholders by way of monitoring of company’s managers is the key role of board.\textsuperscript{31} Moreover, as Johnson et al. note, from the legal-theory perspective, scholars state that the crucial task of the board is as a fiduciary charged with monitoring management for the sake of the corporation.\textsuperscript{32} It is true in practice where the monitoring function is implemented by giving the board right to hire and fire the company’s management.\textsuperscript{33}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{24}] Benjamin E. Hermalin and Michael S. Weisbach, 'The Effects of Board Composition and Direct Incentives on Firm Performance' (1991) 20(4) \textit{Financial Management} 101
\item[\textsuperscript{25}] Eugene F. Fama and Michael C. Jensen, 'Agency Problems and Residual Claims' (1983) 26(2) \textit{Journal of Law and Economics} 328
\item[\textsuperscript{26}] Jonathan L. Johnson, Catherine M. Daily and Alan E. Ellstrand, 'Boards of Directors: A Review and Research Agenda' (1996) 22(3) \textit{Journal of Management} 409-410
\item[\textsuperscript{27}] Fama, above n 22
\item[\textsuperscript{28}] Fama and Jensen, above n 22
\item[\textsuperscript{29}] He and Sommer, above n 20, 269
\item[\textsuperscript{30}] Benjamin E. Hermalin and Michael S. Weisbach, 'Board of Directors as an Endogenously Determined Institution: As Survey of the Economic Literature' (2003) 9(1) \textit{Economic Policy Review} 10
\item[\textsuperscript{31}] Oliver Williamson, 'Corporate Governance' (1984) 93(7) \textit{The Yale Law Journal} 1219
\item[\textsuperscript{32}] Johnson et al., above n 26, 412
\item[\textsuperscript{33}] Ibid
\end{itemize}
\end{footnotesize}
In the one-tier board, there are two forms of board members, consisting of internal and external directors. “Inside directors have generally been defined as those directors also serving as firm officers, outside directors being classified as all non-management members of board”.

Jonson et al. state that such inside director constitutes an ineffective internal control device for a corporation. As company officers, inside directors might find themselves in a difficult position when they have to evaluate the performance of their boss, the company’s CEO. Moreover, insider directors’ loyalty to the CEO may reduce their capacity to undertake objective and reasonable assessments. Also, inside directors may face conflicts of interest because they are charged with managing several important issues such as executive-level compensation, the adoption of anti-takeover provisions and executive succession.

However, the existence of inside directors is necessary to provide outside directors with valuable information.

In contrast, outside directors have been credited as being effective instruments to monitor a company’s management. Their employment status, which is *independent* from the CEO and the organisation, is the main underlying principle of such an assumption, but some scholars, such as Bainbridge, Daily and Dalton, and Karmel question such independence and speculate on how independent the outside directors really are or can be from the company and its management. Hence, Johnson

34 Ibid
36 Ibid
37 Ibid
38 Ibid
et al. suggest that board members who are outside directors with no personal or professional relationship with the company and its executive will be more effective in performing their monitoring role than those who have such connections.42

Apart from the examples above, Thomsen characterises the board of directors “as a partially internalised, non-hierarchical corporate institution based on collective decision-making”.43 Moreover, quoting McNulty and Pettigrew, Thomsen distinguishes the board of directors from the company’s executive. Given this, the term directors refer to non-executive directors who are remunerated by the company, who are elected by shareholders and who are not working fulltime at the company.44

5.2.3 Board in the two-tier board system

As Velte, from Tirole’s two-tier principal agent theory,45 states, 'the supervisory board is in the position to act as a principal of the management board and as an agent of the shareholders simultaneously'.46 Put differently, the supervisory board is considered as the principal of the management board and the agent of shareholders for its actions, representing the interests of shareholders in supervising the company activities carried out by the board and management. The existence of the supervisory board derived from the history of the establishment of the Committee of Nine in 1623 by the government of the Netherlands, whose task was to solve the governance problem of

42 Ibid, 418
43 Thomsen, above n 4, 77
44 Ibid
Dutch Verenigde Oostindische Compagnie (V.O.C). This has been credited as a landmark in the development of the concept of supervisory board around the globe. The committee had five main duties: providing advice to the company’s management, approving the company’s annual report, controlling the company’s managers’ competence, holding board meetings and inspecting the company’s premises and documents.

Germany is one civil law country which applies the supervisory board system, and has been widely used as an example of the application of the model. Under the German two-tier or dual board system that came into existence in 1870, two company organs exist. These are the company’s watchdog called as Aufsichtsrat (supervisory board) and the company’s executive body described as Vorstand (management board).

While the former company instrument has the main role of overseeing and giving advice to the company’s executive, the latter has duty to run the company autonomously and represents the firm in its commercial transactions as well as in legal action before a court. As stated in the German laws of co-determination, the members of the supervisory board can be either representatives of shareholders or employees.

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47 Klaus J. Hopt and Patrick C. Leyens, 'Board Models in Europe - Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy' (2004) 1(2) European Company and Financial Law Review 137
48 Ibid
49 Ibid
50 Theodor Baums, 'Corporate Governance in Germany: The Role of Banks' (1992) 40 The American Journal of Comparative Law 504
53 Wikipedia (http://en.wikipedia.org/wiki/Co-determination) states that “co-determination is a practice whereby the employees have a role in management of a company”
representative of employees\(^{54}\) since under the Germany method of co-determination
'the members of the supervisory board are not elected or appointed by the shareholders only'.\(^ {55}\)

Under the German dual board system, the key characteristic of the two-tier board system is that the company’s executive and supervisory functions are clearly. In other words, under the two-tier system it is not permitted for a member of supervisory board to be a member of management board or vice versa at the same time.\(^ {56}\) Consequently, the supervisory board with key duties include electing and discharging members of management board\(^ {57}\) is not allowed to involve itself in day-to-day company activities.\(^ {58}\) The board, however, is granted the right to approve certain company transactions undertaken by the board of management.\(^ {59}\) In practice, the management board can be asked by the supervisory board for any information about the company.\(^ {60}\) Also, the board of management’s decisions can be commented on by the supervisory board.\(^ {61}\)

Indonesia is one of the civil law system’s followers, as defined in Law No. 40 of 2007 regarding limited liability companies, and applies the concept of the two-tier board to all limited liability companies in Indonesia. This means that the two-tier board structure is mandatory for all Indonesia’s limited liability companies, including

\(^{54}\) Carsten Jungmann, 'The Effectiveness of Corporate Governance in One-Tier and Two-Tier Board Systems - Evidence from the UK and Germany' (2006) 3 (4) European Company and Financial Law Review 432

\(^{55}\) Baums, above n 50, 504-505

\(^{56}\) Ibid

\(^{57}\) Ibid


\(^{59}\) Hopt and Leyens, above n 47, 141

\(^{60}\) Shi, above n 58, 201

\(^{61}\) Ibid
limited liability SOEs, irrespective of their types. As in other civil law countries, the main reason for implementing the two-tier board structure in Indonesia is to provide checks and balances on the separation of executive and oversight powers.

While the term board of directors is used to describe the company’s executive management, the term board of commissioners refers to the company’s oversight body. Article 1 (3) of Law No. 40 of 2007 shows that the essential core duties of board of commissioners are to supervise and advise the board of directors. In the application of the core duties, the law elaborates on several roles of board of commissioners including:

- to receive, analyse and approve an annual plan
- to analyse and to sign an annual report
- to approve interim dividends
- to call shareholders for holding a general meeting
- to decide on the board of directors’ remuneration
- to represent the company in court
- to suspend members of board of directors
- to give written approval or assistance to the board of directors
- to carry out a particular action to organize the company in a particular condition and time
- to approve drafts of the merger of company
- to approve the takeover of the company.

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5.3 INDONESIAN SUPERVISORY BOARDS

5.3.1 Agents to shareholders

Indonesian company law dictates that members of both the board of directors and the board of commissioners are to be appointed and dismissed by the company’s shareholders at a general meeting. Eisenhardt argues that, by and large, agency theory deals with the delegation of work by a principal to an agent who has responsibility to perform the work for the principal’s interest. In other words ‘agency theory attempts to describe this relationship using the metaphor of a contract’\(^4\) where the agents bind themselves through a written or unwritten contract to perform work given by the principal. Thus, from the perspective of agency theory, the two boards are considered as the shareholders’ agents; while a commissioner is an agent in terms of monitoring function, a director is an agent by directly running the company. This occurs as the Indonesian two-tier board system does not recognise the co-determination concept.

However, this is not the case in the German dual board system. As Baums observes ‘the members of the supervisory board and the management board are considered to be agents of all stakeholders in the firm rather than of the shareholders only’,\(^5\) because, as mentioned earlier, Germany applies the concept of co-determination. In large German companies, for instance, those that employ more than 2000 workers will have half of the supervisory board members elected by the trade union, as regulated in the Management Relation Act 1952 and the Co-determination Act 1976.\(^6\) As a result, under the German two-tier board system the shareholders’ authority governs only half

\(^4\) Kathleen M. Eisenhardt, 'Agency Theory: An Assessment and Review' (1989) 14 Academy of Management Review 58
\(^5\) Baums, above n 50, 505
\(^6\) Grit Tügler, 'The Anglo-American Board of Directors and the German Supervisory Board - Marionettes in a Puppet Theatre of Corporate Governance or Efficient Controlling Devices?' (2000) 12(2) Bond Law Review 234
the supervisory board. Thus shareholders do not have an absolute power over the supervisory board.

5.3.2 Suspension right

Indonesian company law authorises a board of commissioners to suspend the management board, in addition to other roles mentioned earlier. This suspension right is the board of commissioners’ authority to temporarily sack directors by stating the reason for the suspension and by ensuring that within 30 days of the suspension date a particular general meeting of shareholders is held. However, it has been noted that although a board of commissioners has the authority to suspend a member of the board of directors, the board of commissioners is not superior to the board of directors. Rather, both boards hold equivalent positions, meaning there is no order or hierarchy among the boards.

This is in strong contrast, for instance, to Germany’s two-tier board concept. As mentioned earlier, in Germany the main task of the supervisory board is to appoint and dismiss the management board, in addition to other duties such as monitoring the work of management, approving the annual report and intervening if a company has been seriously affected.

Because the board of commissioners does not have the right to elect and dismiss members of the board of directors, this power is then placed in the hands of the

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67 Kamal, above 63, 348
68 Article 106 of Law No. 40 of 2007
70 Kamal, above n 63, 352
71 Jungmann, above n 54, 433
shareholders unlike in Germany, where a company’s shareholders do not have direct authority over the board of directors. In Germany, the shareholders’ power is given to the board of commissioners, as the appointment of the board of directors’ members is considered part of the authority delegated by shareholders to the commissioners as the shareholders’ agent.

5.3.3 Commissioners’ liability

Indonesian company law regulates commissioners’ liabilities, both internally and externally. Internally, commissioners report their own activities in monitoring and advising the board of directors to the annual general meeting of shareholders. From an external perspective, commissioners are liable to third parties for negligence in carrying out overseeing functions that result in the company suffering loss. For instance, an external commissioner would be one who gave an approval to the board of directors to enter into a contract business that they knew would cause losses for the company. Thus commissioners are not free from legal liability for the approval they give to directors.

5.4 GOVERNMENT AS ACTING SHAREHOLDERS

According to Indonesian SOE law, a business entity can be categorised as an SOE when all or most of its capital is owned by the state or else results from direct participation with state property. Limited liability companies and general companies (hereinafter 'PERUM') are two types of Indonesian SOEs. The former is split into two types, namely listed limited liability companies (hereinafter 'listed SOEs') and non-listed limited liability companies (hereinafter 'pure SOEs'). While listed SOEs’ shares

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72 Tumbuan, above n 69, 29
73 Article 1, paragraph 1, Law No. 19 of 2003
are widely dispersed, pure SOEs’ and PERUMs’ stocks are concentrated in the hands of the government, represented by the Minister for SOEs as acting shareholder.\textsuperscript{74}

With regard to the pure SOEs, the Indonesian government has power over them in two ways. Firstly, since a pure SOEs’ shareholder is a sole institution, the government as represented by the Minister for SOEs constitutes a general meeting of shareholders. Consequently, the government has full power to take any action at any time with respect to the company. Secondly, as the law gives full authority to the government as the sole acting shareholder to elect and dismiss the board of directors and board of commissioners, the government can take any action against the two bodies, including dismissing them at any time. Therefore, it is reasonable to be concerned about the possibility of political interference with the operations of pure SOEs. Political interference occurs because the government’s power over the pure SOEs is free from scrutiny. Public choice theory suggests that ‘the behaviour of government is best explained by the idea that political actors selfishly seek to maximize their own welfare, rather than selflessly furthering the public interest’.\textsuperscript{75} Public choice theory is a concept that is often used to criticise the failure of governments in managing their SOEs in many countries. Practically speaking, managers who are appointed by the government as sole acting shareholders are typically bureaucrats and politicians who tend to use their authority for personal benefit rather than benefitting the company.\textsuperscript{76}

\textsuperscript{74} The Government Regulation No. 41 of 2003 concerning the devolution of position, duties and authority of Minister for Finance on limited liability SOEs (PERSERO), public companies (PERUM), and PERJAN to the Minister for SOEs.

\textsuperscript{75} Michael J. Whincop, \textit{Corporate Governance in Government Corporations} (2005)

\textsuperscript{76} Mary M. Shirley, ‘Bureaucrats in business: The roles of privatization versus corporatization in state-owned enterprise reform’ (1999) 27(1) \textit{World Development}
5.5 EMPIRICAL STUDY

5.5.1 Methods of data collection

Methods, by definition, are the means utilised to collect and examine data.\textsuperscript{77} When using a social science approach, several methods are available. These include questionnaires, case studies, interviews, document analyses, narratives, interpretative methods and focus groups,\textsuperscript{78} to name a few. For this paper, which seeks to undertake qualitative research, document analysis and interview were the two methods used to gather data.

5.5.1.1 Document analysis

The document analysis was carried out by examining relevant Indonesian laws governing both boards of commissioners and state-owned enterprises such as \textit{Law No. 40 of 2007} on Company Limited Liability and \textit{Law No. 19 of 2003} on State-owned Enterprises.

In addition to these laws, relevant regulations were analysed including the Government Regulation No. 45 of 2005 on the Establishment, Management, Supervision and Liquidation of State-owned Enterprises, Presidential Instruction of Republic of Indonesia; No. 8 of 2005 on the Appointment of Members of Board of Directors and Board of Commissioners of State-owned Enterprises (revised by Presidential Instruction of Republic of Indonesia No. 9 of 2005); and the Decree of the Minister for State-owned Enterprises No. KEP-117/M-MBU/2002 regarding the Implementation of Good Corporate Governance on State-owned Enterprises.

\textsuperscript{77} John H. Farrar, 'In Pursuit of an Appropriate Theoretical Perspective and Methodology for Comparative Corporate Governance' (2001 ) 13 \textit{Australian Journal of Corporate Law} 4

\textsuperscript{78} Ibid 5
Analysis of the researched companies’ self-regulations, such as their annual reports, corporate governance codes, board manuals, codes of conduct and company by-laws was also undertaken as part of this study. This study also examines the curriculum vitae of members of the researched companies’ boards of commissioners. Furthermore, this paper also looks at the online documents of the researched companies, with the most recent online document to be analysed being downloaded on 11 December 2009.

5.5.1.2 Interview method
A series of interviews was undertaken in Jakarta from February to May 2009. A short list of questions was utilised for each interview, consisting of open questions in order to maintain consistency across all interviewees.

Interviewees gave their consent before interviews were carried out. All of the interviews were conducted in Indonesian, and were each approximately one and half to two hours in length. A recording device was used to document each interview which was then transcribed. A total of 27 participants were interviewed, 18 of whom were from six Indonesian non-listed SOEs and are members of boards of commissioners, boards of directors and presidents of such companies’ trade unions.

The researched companies are denoted as M, A, C, Q, K and L and are pure Indonesian SOEs. The companies are represented by initials in order to meet the research ethics requirements of Macquarie University and according to the interviewees’ requests. Table 5 highlights the researched companies’ profile and participants.
The other nine interviewees comprised of Indonesian corporate governance expert, an economic and political expert, a former of board of commissioners’ member of an Indonesian SOE, a vice-chairman of the Corruption Eradication Commission of Indonesia, a chairman of the National Committee on Governance, a coordinator of Indonesian Corruption Watch, a politician, and the chief of a corporate governance institution. Unlike interviewees in the researched companies, the nine interviewees were comfortable with having their names published in this paper.

Table 5: The researched companies’ profile and participants

<table>
<thead>
<tr>
<th>Companies</th>
<th>Established</th>
<th>Companies’ business sector</th>
<th>Companies’ asset in 2007 (Trillion rupiah)</th>
<th>Company’s size (Big = ≥ 100 T, Medium = 1-100 T, Small = ≤ 1 T)</th>
<th>Participants</th>
<th>Number of participants</th>
</tr>
</thead>
<tbody>
<tr>
<td>M</td>
<td>1957</td>
<td>Mining</td>
<td>253,551,191</td>
<td>Big</td>
<td>A member of board of commissioners (M.1), a member of board of directors (M.2) and president of the company’s trade union (M.3).</td>
<td>3</td>
</tr>
<tr>
<td>A</td>
<td>1945</td>
<td>Energy</td>
<td>272,502,808</td>
<td>Big</td>
<td>President of the company’s trade union (A.3).</td>
<td>1</td>
</tr>
<tr>
<td>C</td>
<td>1984</td>
<td>Airport</td>
<td>7,476,187</td>
<td>Medium</td>
<td>A member of board of commissioners (C.1), a member of board of directors (C.2) and president of the company’s trade union (C.3-a, and C.3-b).</td>
<td>4</td>
</tr>
<tr>
<td>Q</td>
<td>1977</td>
<td>Insurance</td>
<td>61,383,427</td>
<td>Medium</td>
<td>A member of board of commissioners (Q.1), a member of board of directors (Q.2) and president of the company’s trade union (Q.3-a, and Q.3-b).</td>
<td>4</td>
</tr>
</tbody>
</table>
Table 2 shows that with total assets of 596,252,506 trillion rupiah, the researched companies’ assets make up almost 70% of the pure SOEs’ total assets and more than 34% of SOEs’ total assets. Table 5 also reveals that the researched companies represent a variety of business sectors: mining, energy, airport, insurance, trading and plantation. Moreover, Table 5 categorises the researched companies according to capital, where companies M and A are categorised as big companies with capital over 100 trillion rupiah, companies C and Q are medium-sized companies with capital of 1 to 100 trillion rupiah, and companies K and L are small companies with capital of less
than 1 trillion rupiah. The average numbers of commissioners within these researched companies are between three and seven, as seen in Table 6.

5.6.2 Types of commissioners

The research in this study indicates five types of commissioners within the researched companies. These are: public servants, businessmen/skilled workers, academics, pensioners and big fish commissioners.

Table 6: Commissioners’ types

<table>
<thead>
<tr>
<th>Companies</th>
<th>Number of Commissioners</th>
<th>Public Servants</th>
<th>Businessmen/ Skilled workers</th>
<th>Academics</th>
<th>Pensioners</th>
<th>Big Fish</th>
</tr>
</thead>
<tbody>
<tr>
<td>M</td>
<td>7</td>
<td>4</td>
<td>2</td>
<td>-</td>
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The largest numbers of the researched companies’ commissioners (45.16% of the commissioners) are public servants. Businessmen/skilled workers and pensioner commissioners are the second largest type of commissioner (19.35%). In addition, figure 3 shows that the researched companies’ commissioners are academics (9.67%) and big fish (6.45%).
5.6.2.1 Public servant commissioners

Public servant commissioners are members of SOEs’ boards of commissioners whose primary job is to be a government official, for example, being a high ranking official in a government department. A government minister who serves as an SOE commissioner is also categorised as a public servant commissioner.

This study found that company M has four public servant commissioners out of the seven commissioners on its board. Two of these four are people who have a job equivalent to a ministerial position and the two others work for the Vice-President’s office and the Department of Energy and Mineral Resources of Indonesia. In company A there is one public servant commissioner who is an elite staff member of the Department of Finance. In company C there are three public servant commissioners: one commissioner from the Audit Board of the office of the Republic of Indonesia, one commissioner from the Department of Transportation and another is a Deputy Secretary of Economy to the Vice-President of the Republic of Indonesia.
In company Q, one of their commissioners is a Director General of the Treasury at the Department of Finance. In company K there are three public servant commissioners who are: the Head of the National Agency for Export Development at the Ministry for Trade, the Assistant to the Deputy of Business and Miscellaneous Industries and Deputy of Other Business Services of the Ministry for State-owned Enterprises, and a high ranking official at the Coordinating Ministry for Economics, Finance and Industries. There are two public servant commissioners in company L: a Plantation Revitalisation Team Leader at the office of the Ministry for Agriculture and a Head of Plantation Unit at the office of the Ministry for State-owned Enterprises.

5.6.2.2 Businessman or skilled worker commissioners

A businessman/skilled worker SOE commissioner can be defined as an individual who has their own business or undertakes work separate to being a director (executive management) or board of commissioners’ member. Two businessmen / skilled workers work for company M, both from oil companies. In company A there is a businessman / professional worker who is a Project Manager of a private company. Company K also has two businessmen /s killed workers who have commissioner roles.

5.6.2.3 Academic commissioners

Academic commissioners are university lecturers who serve as SOE commissioners. There are three academics working for company A: one from the Institute of Technology Bandung and two academics from the University of Indonesia.

5.6.2.4 Pensioner commissioners
Retired government officials who serve as commissioners of an SOE are labelled *pensioner commissioners*. The numbers of pensioner commissioners in the researched companies are quite large, making up 6 of 31 commissioners. Company M has one pensioner commissioner who was a General Secretary to the Ministry for Energy and Mineral Resources of Indonesia. Company A has a pensioner commissioner who was a Minister for Manpower and Transmigration of Indonesia. In company C there are two pensioners who serve as commissioners, and they are retired Air Force and Army Staff. Company Q has a former Minister for Finance of Indonesia now serving as a commissioner. Company L has one pensioner commissioner, formerly a Governor of one of the Indonesia’s provinces.

**5.6.2.5 Big Fish Commissioners**

The *Oxford Dictionary* defines a ‘big fish’ as an important individual in a small community. Thus a big fish commissioner can be understood to be an individual who has influence in his or her limited community and is considered useful in securing company business through community pressure. Company Q employs two big fish commissioners who are leaders of workers’ associations. Thus Table 3 indicates two major points: firstly, the position of an SOEs’ commissioner is a part-time rather than full-time job; and, secondly, SOE commissioners are busy people. The former can be seen in the rules governing the dual positions of an SOE commissioner wherein a commissioner can have other employment, provided this is allowed by the shareholders and is not a cause of conflict of interest. The latter assessment is formed according to laws and regulations in which SOE commissioners are considered to be carrying out their duties well if they hold a meeting once a month.
5.6.3 Dual positions

Dual positions appear in article 33, paragraphs 1, 2, and 3 of Law No. 19/2003 and article 54 Paragraph 1 of the Government Regulation No. 45 of 2005, generally stating that a commissioner may hold other positions unless it is as a member of the board of directors (executive management position) at state-owned enterprises, regional-owned enterprises or private companies. This allows for SOE commissioners to be public servants, retired persons, academics or big fish. Company M’s code of corporate governance does not provide any regulation regarding dual positions. However, company A’s code of corporate governance holds that SOE commissioners are allowed to have other jobs in so far as the general meeting of shareholders grant them. The dual position is not allowed when it might cause, directly or indirectly, a conflict of interest or when it is against existing laws and regulations. Company C’s code of corporate governance indicates that a double position is prohibited, to prevent a conflict of interest, except when the position is approved and validated by company C’s general meeting of shareholders. Company L prohibits its members of the board of commissioners to be a member of a board of directors in other state-owned enterprises, regional-owned enterprises or private companies. In addition to this prohibition, company L’s commissioners are not allowed to have a position that might cause a conflict of interest. However, company L’s commissioners are not prohibited from being commissioners in two other companies.

79 Article 33, paragraphs 1, 2, and 3, Law No. 19 of 2003 and Article 54, paragraph 1, points a, b, and c, the Government Regulation No. 45 of 2005.
80 Company C’s Code of Corporate Governance (2007) 16
81 Company L’s Code of Corporate Governance (2006) 15
This study shows that the laws, regulations and self-regulations of the researched companies prescribe that an SOE commissioner is free to hold more than one position at the same time as long as they have the general meeting of shareholders’ permission and the position does not cause a conflict of interest. However, an SOE commissioner is not allowed to be a company’s director (company’s executive).⁸² Despite this finding, in practice we can see these laws being contravened. In fact, one of the company M’s commissioners is a chairman of an Indonesian company.⁸³ Likewise, two company Q commissioners are serving as President Director in private companies.⁸⁴

5.6.4 The holding meeting

The Minister for State-owned Enterprises’ decree No KEP-117/M-MBU/2002 refers to the issue of how often SOEs’ boards of commissioners hold meetings. Article 11, paragraph 1 of the decree indicates that board of commissioners meetings should be held at least once a month.⁸⁵ In line with the Minister’s decree, companies M,⁸⁶ A⁸⁷ and L’s⁸⁸ board manuals and the researched companies’ by-laws hold that the board of commissioners meetings should be held at least once a month to discuss matters relating to their duties and responsibilities. Company C’s code of corporate governance goes as far as to state that the meeting should be held at least twice a

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⁸² Even though the law, regulations and the researched companies’ self-regulations prohibit an SOE commissioner from being a company director, it transpires that one of company M’s commissioners is a chairman of a private company. Also, company Q has two commissioners who have executive positions in other private companies.
⁸³ Company M’s Curriculum Vitae collection
⁸⁴ Company Q’s Curriculum Vitae collection
⁸⁵ Article 11, Paragraph 1, the Minister for State-owned Enterprises’ decree No KEP-117/M-MBU/2002
⁸⁶ Company M’s Board Manual, point 2.3.1
⁸⁷ Company A’s Code of Corporate Governance, Letter C, point 1098
⁸⁸ Company L’s Code of Corporate Governance, 15
month.\textsuperscript{89} In practice, however, the frequency of holding of meetings for the researched companies’ board of commissioners differs from one to the other. For instance, M.1 states that their commissioner meeting is held once a week.\textsuperscript{90} There are also organisational differences as C.1 indicates in an interview, stating that:

\begin{quote}
Formally, the board's internal meeting is held once a week, while a meeting with the board of directors is conducted once a month and if necessary a meeting could be more often than that.\textsuperscript{91}
\end{quote}

Nevertheless, Q.1, K.1, C.2 and Q.2 state that their commissioner meetings are held at least once a month.\textsuperscript{92} K.1-b explains the reason why this is so:

\begin{quote}
The monthly meeting conducted along with monthly reports submitted by directors, so we evaluate the monthly report. At the monthly meeting we assess or discuss the company's performance and other matters such as examining the development of assets, human resource development and product development.\textsuperscript{93}
\end{quote}

In practice, company L’s commissioner meetings are divided into two categories, namely internal meetings and meetings with the directors. The former is held once a month while the latter is conducted once every three months, as reflected in interviews with L.1:

\begin{quote}
Meetings of commissioners shall be conducted once a month at the commissioner level. In the monthly meetings we study the monthly reports submitted by the directors and after that we discuss it with the board of directors in the quarterly meeting.\textsuperscript{94}
\end{quote}

Simply put, while the government rules that a meeting of commissioners must be held at least once a month, this study reveals that the frequency of holding these meetings differs in each of the researched companies’ according to their own self-regulation.

\begin{footnotes}
\item[89] Company C’s Code of Corporate Governance, Letter G, point 1
\item[90] Interview with M.1 (Jakarta, 4 March 2009)
\item[91] Interview with C.1 (Jakarta, 15 April 2009)
\item[92] Interview with Q.1 (Jakarta, 18 May 2009)
\item[93] Interview with K.1-b (Jakarta, 15 May 2009)
\item[94] Interview with L.1 (Jakarta, 22 April 2009)
\end{footnotes}
5.6.5 Appointment procedure

The appointment procedure of SOE boards of commissioners can be found in Law No. 40 of 2007, Law No. 19 of 2003, Government Regulation No. 45 of 2005, and Presidential Instruction No. 8 of 2005. Articles 108–121 of Law No. 40 of 2007 regulate that a company’s board of commissioners is also included within the category of non-listed limited liability SOE boards of commissioners. In terms of the appointment procedure, article 111 (1) holds that members of a board of commissioners are appointed by a general meeting of shareholders. No further explanation is provided.

References to SOE boards of commissioners can also be found in articles 27–34 of Law No. 19 of 2003. Article 27, paragraph 1 and article 30 of this law govern the appointment of a board member. The former holds that the appointment and dismissal of a commissioner is undertaken by a general meeting of shareholders; the latter states that any further regulation of the requirements and the appointment and dismissal mechanism of a commissioner would be regulated by a minister’s decree. As with article 111 (1) of Law No. 40 of 2007, there is no further explanation provided in the articles mentioned above.

Furthermore, the President of the Republic of Indonesia enacted a particular instruction on the appointment of both members of a board of directors and/or a board of commissioners/supervisory board of state-owned enterprises. This is the Presidential Instruction No. 8 of 2005 that was amended under the Presidential Instruction No. 9 of 2005.

95 Article 111, paragraph 1, Law No. 40 of 2007
96 Article 27, paragraph 1, Law No. 19 of 2003
97 Article 30, Law No. 19 of 2003
The fourth instruction of the regulation states that the appointment of members of a board of commissioners by the minister for state-owned enterprises is carried out based on the result of an assessment of a Final Assessment Team (in Indonesian known as *Tim Penilai Akhir*, hereinafter 'TPA'), which consists of the President (Chairman), the Vice-President (Vice-Chairman), the Minister for Finance, the Minister for State-owned Enterprises and the Cabinet Secretary (Secretary). As a result, there is no particular law or regulation, which prescribes that a formal specific test should be undertaken when electing a member of an SOE board of commissioners. Rather, the ultimate decision lies with the TPA’s decision.

This practice differs from the procedures for the appointment of an SOE member of a board of directors as stipulated in Article 16, paragraph 2 of *Law No. 19 of 2003* and Article 16, paragraph 1 of Government Regulation No. 45 of 2005. According to these laws, the election of a member to an SOE board of directors must involve a fit-and-proper test, conducted by a special team established by the Minister for SOEs or a professional agency appointed by the minister.

These laws state that while the election of a member of a board of commissioners should be carried out in three phases, the appointment process for a board of directors’ member should occur in four stages as shown in Figure 4. The three stages of a commissioner’s election are informal, political and pro forma processes.

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98 Fourth Instruction of the Presidential Instruction No. 8 of 2005
99 Third Instruction of the Presidential Instruction No. 8 of 2005
100 Article 16, paragraph 2 of Law No. 19 of 2009 and Article 16, paragraph 1 of Government Regulation No. 45 of 2005
The informal process is a stage where the Minister for State-owned Enterprises receives input from parties such as related minister of the particular SOE to propose potential commissioners. The law does not clearly set a special requirement such as who is entitled or may submit the potential commissioners to be elected at the stage. However, this is the Minister for SOEs’ chance to choose potential candidates to be submitted or proposed to the TPA. The political process is the process of selecting candidates of commissioner by the TPA from those submitted or proposed by the Minister for SOEs, while the pro forma process refers to the stage where the minister for SOEs endorses the elected or approved candidates in the official general meeting of shareholders.

Regarding the board of directors’ election, the four stages consist of pre-process, technical, political and pro forma. The Minister for SOEs shapes a fit-and-proper test team or appoints a professional consultant at the pre-process stage. At stage 2, the appointed team or consultant will conduct a fit-and-proper test to candidates.

The third stage is the process by which political decisions will be taken by the TPA, in choosing the elected candidates on the basis of a technical process carried out by the professional team formed by the Minister for SOEs. As the board of commissioners’ election process, the fourth and final process is an endorsement phase carried out by the Minster for SOEs in an official general meeting of shareholders.
The content of the researched companies’ codes of corporate governance regarding board members’ appointments varies considerably. Company M’s code of corporate governance does not have a specific procedure governing the board of commissioners’ appointment. However, codes of corporate governance for three other companies (A, C and L) provide procedures for appointing members to a board of commissioners.

Company A’s code states that a member of a board of commissioners is elected and appointed by a general meeting of shareholders following a series of independent and transparent selection and nomination processes by a nomination committee or corporate governance committee.¹⁰¹ Company C’s code of corporate governance also prescribes a transparent selection and nomination process in electing a candidate to a board of commissioners.¹⁰² In addition, company C’s code of corporate governance states that a candidate would be appointed as a member of a board of commissioners.

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¹⁰¹ Company A’s Code of Corporate Governance (2003) 41
¹⁰² Company C’s Code of Corporate Governance (2007) 18
if she or he passes a fit-and-proper test conducted by a particular committee.\textsuperscript{103} Similarly, company L’s code indicates that one of the requirements to become a member of a board of commissioners is for the candidate to pass a fit-and-proper test process.\textsuperscript{104}

However, M.1\textsuperscript{105} states that there was no formal test to be a commissioner in company M. M.1 was elected as a commissioner without undertaking a fit-and-proper test. M.1, however, received a Minister for State-owned Enterprises’ decree to be appointed commissioner.\textsuperscript{106} M.1’s testimony was confirmed by M.3,\textsuperscript{107} who said that no fit-and-proper testing has been done when electing a member of a board of commissioners in the company.\textsuperscript{108}

Likewise, although company C’s code of corporate governance clearly states that a fit-and-proper test should be done when electing a member of a board of commissioners, this has not been applied in practice. This is reflected in an interview with C.1:\textsuperscript{109}

\begin{quote}
I was called by the Minister for SOEs as the position of the company President Commissioner was vacant. From the Minister I knew that I was asked to become chairman because my personal background is suitable to the company. I have experience in this field, so I will be able to work without a hitch. On that occasion I was also asked by the Minister to give direction on existing corporate problems. The minister trusted me and that is why I was appointed to be chairman of the commissioners of this company.\textsuperscript{110}
\end{quote}

\begin{flushright}
\textsuperscript{103} Ibid 16
\textsuperscript{104} Company L’s Code of Corporate Governance (2006) 13
\textsuperscript{105} M.1 is a member of M’s board of commissioners
\textsuperscript{106} Interview with M.1 on 4 March 2009
\textsuperscript{107} M.3 is a President of M’s trade union
\textsuperscript{108} Interview with M.3 (Jakarta, 26 February 2009)
\textsuperscript{109} C.1 is a President of C’s board of commissioners
\textsuperscript{110} Interview with C.1 (Jakarta, 15 April 2009)
\end{flushright}
C.2\textsuperscript{111} confirms C.1’s statements, stating that the appointment of a member to a board of commissioners is the right of shareholders and should not involve a fit-and-proper test mechanism. However, this practice only applies in regard to a board of directors (company management).\textsuperscript{112}

From an interview with Q.1\textsuperscript{113} it can be learned that the appointment of an SOE member of a board of commissioners has been held on an informal basis. Q.1 says that he was interviewed by the Minister for Finance before he was appointed as a member of Q’s board of commissioners.\textsuperscript{114} This interview was assumed to be a part of a fit-and-proper test. Q.3\textsuperscript{115} supports Q.1’s statement that there is no fit-and-proper test when appointing company Q’s members of the board of commissioners. He states that:

\begin{quote}
There is a simple procedure which consists of an administrative selection and interview when electing a member of a board of commissioners. This was not like the fit-and-proper test that was done when selecting members of Q’s board of directors.\textsuperscript{116}
\end{quote}

K.1\textsuperscript{117} discloses that he was called by the Minister for Trading and asked to be a President of company K’s board of commissioners. For K.1, the Minister’s call was seen as a fit-and-proper test process to be a commissioner. As he described in an interview:

\begin{quote}
I was contacted by the Minister for Trading and she asked about my willingness to help an SOE. I agreed to be an adviser. But then I decided to be a chief of commissioners and was processed through a fit-and-proper test.\textsuperscript{118}
\end{quote}

\textsuperscript{111} C.2 is a member of C’s board of directors
\textsuperscript{112} Interview with C.2 (Jakarta, 23 March 2009)
\textsuperscript{113} Q.1 is a member of Q’s board of commissioners
\textsuperscript{114} Interview with Q.1 (Jakarta, 18 May 2009)
\textsuperscript{115} Q.3 is a President of Q’s trade union
\textsuperscript{116} Interview with Q.3 (Jakarta, 24 March 2009)
\textsuperscript{117} K.1 is a President of K’s board of commissioners
\textsuperscript{118} Interview with K.1-a (Jakarta, 15 May 2009)
However, according to K.3 there is no fit-and-proper test procedure when appointing a member of a board of commissioners in the company.\textsuperscript{119}

From the above points, it can be summarised that there is a large difference between government laws and the researched companies’ self-regulation with regard to the election process of a member of a board of commissioners. The law states that there is no mandatory fit-and-proper test required in the board of commissioners’ election; however the researched companies’ self-regulation stipulates that it must be undertaken.

Nevertheless in practice, shareholders have not held a fit-and-proper test when electing a member of a board of commissioners. This indicates that shareholders follow the law rather than their own self-regulations. It is realised that under Indonesia’s hierarchy of law, self-regulation is not recognised and therefore companies are not obliged to follow it.\textsuperscript{120} In other words, a code of corporate governance is not a binding rule.

5.7 ANALYSIS AND FINDINGS

From what has been discussed in this paper it can be seen that existing laws put absolute power in the hands of shareholders in regards to electing and dismissing a board of commissioners and directors through a general meeting of shareholders. In the pure SOE context, the government as represented by the Minster for SOEs

\textsuperscript{119} Interview with K.3 ( Jakarta, 15 May 2009)

\textsuperscript{120} Under \textit{Law No. 10 of 2004} concerning the establishment of laws and regulations there are six laws and legislations that must be followed and the lower law must not conflict with the higher one. They are the 1945 constitution, law, government regulation in lieu of law, government regulation, presidential regulation and local rule.
constitutes an SOE’s shareholder and thus a general meeting of the shareholder. Consequently, pure SOEs operate under the control of one hand as Indonesia’s two-tier board structure does not apply a co-determination concept like Germany’s two-tier board structure, where up to half of a board of commissioners’ members are elected and dismissed by the trade unions. It can be argued that political interference necessarily arises in absolute power situations. Moreover, such political interference is authorised by Presidential Instruction No. 8 of 2005 (amended under the Presidential Instruction No. 9 of 200), which states that all SOE board of commissioners members are selected by the TPA chaired by the President, Vice-President as vice-chairman, Cabinet Secretary as team secretary with the Minister for Finance and the Minister for SOEs as members. All of the TPA’s members are politicians who, arguably, are inclined to make decisions on the appointment and dismissal of members of the board of commissioners based on political considerations rather than professional considerations.

The dismissal of Dr Rizal Ramli from his post as President Commissioner of the PT Semen Gresik Group, an Indonesian SOE, is a prime example of political interference in SOEs. Dr Ramli was dismissed from the SOE following his actions to refuse the government’s raising of the fuel price. This dismissal came despite the fact that, at the time, under the supervision of Dr Ramli as a President Commissioner, PT Semen Gresik Group had a good performance rating.121 With regard to political interference, the chairman of the Indonesian Governance Committee (Mas Achmad Daniri) has admitted that there is a trade-off between political and professional interests when electing SOE commissioners. Hence, for the good of the SOEs, Daniri proposes

political insulation. Political insulation means SOEs should be kept away from the influence of ruling parties’ interests by allowing SOEs to run their business to fulfil the communities’ needs as the SOEs’ ultimate owner.

The appointment and dismissal process of SOE commissioners also raises agency problems. According to Eisenhardt, there are typically two types of agency problems. The first “is the agency problem that arises when (a) the desires or goals of the principal and agent conflict and (b) it is difficult or expensive for the principal to verify what the agent is actually doing”. Second “is the problem of risk sharing that arises when the principal and agent have different attitudes toward risk”. That is, agency problems occur in SOEs when government actions do not seem to reflect public concerns.

In the Indonesian non-listed SOE situation, the problem does not appear on the level where the government is the principal and the commissioner is the agent. However, it appears on other levels where the public acts as an SOE’s principal, with the government as the public’s agent. With election and dismissal rights in the government’s hands through the TPA, the government has effectively blocked public scrutiny of their actions when managing SOEs. An interview with an Indonesian political economist indicated that there should be moves to resolve the existing agency problem. According to him, the agency problem regarding the appointment of

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122 Interview with Mas Ahmad Daniri, Chairman of the National Committee on Governance, (Jakarta, 24 February 2009)
123 Eisenhardt, above n 64 58
an SOE’s commissioners could be resolved by creating an independent team; independent meaning the team would not contain politicians or bureaucrats.

From the six researched non-listed SOEs’ results it can be understood that board positions are considered less important than director positions. Evidently, in the six researched companies the largest numbers of commissioners (45.16%) are public servants followed by businessmen/skilled workers (19.35%), pensioners (19.35%), academics (9.67%) and big fish (6.45%). All of these groups contain busy people who have pressing work in their home institutions: public servants have the primary duty of managing the government of a particular department, businessmen/skilled workers have their own businesses or private company roles, pensioners often have a variety of activities, such as taking care of foundations, that consume their time, while academics have a primary responsibility for teaching in their university, and the big fish have community roles. These other responsibilities complicate the abilities of these members to fulfil their commissioner roles in SOEs.

In terms of public servant commissioners, the vice-chairman of the corruption eradication commission, Dr Haryono Umar, stated that an SOE commissioner should focus on their job; hence a department’s high-ranking official should not concurrently serve as a commissioner in an SOE. The placement of government officials as SOE commissioners has been debated in Indonesia. The General Secretary for the Minister for SOEs, Said Didu, once declared that the government, as an SOE shareholder, was

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125 Interview with Dr Ikhsanuddin Noorsy (Jakarta, 19 March 2009)  
126 Interview with Dr Haryono Umar, the Vice-Chairman of the Corruption Eradication Commission, (Jakarta, 26 February 2009)
entitled to place a representative as an SOE commissioner.\textsuperscript{127} This has been argued against by the Vice-Chairman of the Corruption Eradication Commission who stated that the government had the right to place representatives on SOEs as commissioners, but these representatives need not be government officials. Rather, the government should appoint professional people as commissioners on behalf of the government, so that he or she can focus on SOEs when carrying out their duties.\textsuperscript{128}

Therefore, public servants should not hold commissioner positions because it is very difficult for a government official to work well when they have more important or demanding jobs in a government agency. Businessmen or skilled workers, however, may be considered for the role of an SOE commissioner as long as they give up their previous positions, while academics likewise could be considered if they were to give up their position at their university. Big fish can also be commissioners so long as they have the relevant ability in the field of an SOE’s business area. Retired persons on the other hand should not be given the role because their ability to work is questioned in regards to their age and physical condition.

Laws and practices regarding the holding of commissioners’ meetings in the researched companies can also are seen as evidence that a board of commissioners is not considered as an important company body. This study found that the law only requires an SOE’s board of commissioners to hold a meeting once a month, while some self-regulation within researched companies required board meetings to be held twice a month. This indicates that a role on a board of commissioners is only a part

\textsuperscript{128} Umar, above n 126
time position. Yet, according to M.1, if an SOE is running poorly, the board would be required to attend daily in order to monitor the running of the company. This would suggest that having a full time board of commissioners would ensure that Indonesian SOEs are managed more efficiently and effectively.

Furthermore, as has been examined in this paper, a board of commissioners’ appointment process is not undertaken as seriously as the appointment of a board of directors. The law does not require the appointment of commissioners through a fit-and-proper test. This has seen the appointment of commissioners solely through a political process, in which the TPA is chaired by a President determining who will be a commissioner in an SOE.

By comparison, unlike the existing appointment procedure of SOEs’ commissioners, the Indonesian banking sector through Bank Indonesia (the Central Bank of Republic of Indonesia) regulates in detail about the mandatory fit-and-proper test process in appointing members of boards (commissioners and directors boards). This is explicitly stated in the Bank Indonesia Regulation No. 5/25/PBI/2003 concerning Fit-and-proper Test, as presented in Figure 5.

129 Interview with M.1 (Jakarta, 4 March 2009)
According to the Bank Indonesia Regulation No. 5/25/PBI/2003, a bank nominates candidates for being both board of commissioners and board of directors to the Bank Indonesia. No more than two candidates for each vacant position can be nominated. In the case of the concerned bank is in a recovery program by a particular government agency, the nomination has to be undertaken by such government agency.

**Figure 5: Mandatory fit-and-proper test in the banking sector**

Accordingly, the Bank Indonesia Regulation No. 5/25/PBI/2003 tells us that a bank’s commissioner holds a significant position; therefore every candidate who is nominated by either bank or government shall pass a fit-and-proper test to make sure that the nominated candidate is a person with sound integrity, competence and financial reputation.

5.8 CONCLUSION

This paper has discussed the functioning of the board of commissioners in Indonesia by using six pure SOEs as examples, which represent a variety of business segments of Indonesian SOEs: mining, energy, airport, insurance, trading and plantation. Also, in terms of number of capital, the six researched companies –big companies with capital over 100 trillion rupiah, medium-sized companies with capital of 1 to 100 trillion rupiah and small companies with capital of less than 1 trillion rupiah, can be considered as representative of Indonesian SOEs.
It has found that public servants, businessmen or skilled workers, pensioners, academics and big fish commissioners make up the five types of commissioners in existence in Indonesian pure SOEs. These types of commissioners are busy people where they have main jobs in addition to SOEs’ commissioners.

The legal position of a board of commissioners indicates that the government, as the sole acting pure SOEs’ shareholder, has full power over the central control bodies of a company, the boards of commissioners and directors.

Seen from the perspective of agency theory, the appointment and dismissal of boards of commissioners and directors by the government as shareholder effectively ensures that the two boards are agents to government. This study has also discovered that under the existing laws there is no fit-and-proper test for electing Indonesian SOE commissioners. Rather, the election of a board of commissioners’ members is achieved through a political process in which the President of the Republic of Indonesia is a chair of the TPA. These laws legitimise political intervention in Indonesian SOEs and should be reviewed.

Further research on the face of the Indonesian SOEs’ board of commissioners and their determining factors should be directed to find out the relationship between the members of boards of commissioners and the political party or the government in power. A study of who is party to proposing the commissioners could be the first step in order to uncover the political relations of the members of boards of commissioners. This is needed to distance the SOEs from political interference, which in turn creates
SOEs that are owned by society with the government as a shareholder acting to support healthy companies.