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Analysis of Indonesian Court Decisions on Director's Duty in State-Owned Enterprises: An Agency Problem Perspective

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Abstract

This paper discusses the Indonesian court decisions on four cases that involve state-owned enterprises and its subsidiary's director: PT Merpati Nusantara Indonesia, PT Pertamina (Persero), PT Pelabuhan Indonesia II (Persero) and PT ASDP Indonesia Ferry (Persero). The director in these companies was charged with corruption following business decision that they made. This paper proposes to re-analyze these cases from agency problem perspective which suggests that in an entity where ownership and management are separated, conflict of interest is common and that owner shall spend some costs to align his and his manager's interest. Using juridical normative method, this paper discusses the similarities and inconsistencies of these cases and finally analyze them from agency problem perspective. From the perspective of agency problem, there were different interests shown by the government as shareholder and the director – the government focused on avoiding state loss while the director pursued the company's best interest at the time. Despite already prescribing incentives and monitoring mechanisms under the law, policy-maker and law enforcement shall acknowledge these conflict of interests as input to better the corporate governance procedure and enforcement of director's duty.

Keywords: *state-owned enterprise, director's duty, agency problem*

I. Introduction

The reputation of Indonesian state-owned companies' directors is not picture-perfect. Over the years, public has been presented with scandals involving directors of state-owned companies, with the latest involving three directors of PT ASDP Indonesia Ferry. A lot of cases involving director, especially director of state-owned enterprises in Indonesia, are tried in a corruption proceeding. However, analyzing these cases from the lens of company law, one may find conclusions which do not lead to corruption.

Under Indonesian Law No. 40 of 2007 on Limited Liability Company (**Company Law**), directors have the duty to manage the company for the interest of the company. As any businesses, some management decisions may result in profits or losses. Directors will not be held liable if they can prove that their action has fulfilled the conditions of Article 97(5) of the Company Law, which are usually referred to as Indonesian business judgment rule[1]. This rule

[1] Chandra Noviardy Irawan Pujiyono and Irma Cahyaningtyas, "Implementation of Business Judgement Rules in Indonesia: Theories, Practices, and Contemporary Cases," *Indonesian Journal of Advocacy and Legal Services* 4, no. 1 (2022).

applies to any type of limited liability company, including Indonesian state-owned enterprises (**SOE**).

Based on Article 10 of Law Number 19 of 2003 on State-Owned Enterprises as amended by Law Number 16 of 2025 (**SOE Law**), a SOE which capital is divided by shares or a Persero is subject to the Company Law unless regulated otherwise. In line with the provision of the Company Law, Article 9F of the Law 19/2003 also stipulates that director will not be liable for the loss of the SOE as long as they can prove that (i) the loss is not due to his/her mistake or negligence; (ii) he/she has manage the SOE in good faith and care for the interest and objective of the SOE; (iii) there is no conflict of interest; and (iv) he/she has taken actions to prevent the loss for continuing.

Notwithstanding this, past court decisions show inconsistencies in the rules. At least four cases involving directors of the following companies which worth discussing: PT Merpati Nusantara Indonesia (**Merpati**), PT Pertamina (Persero) (**Pertamina**), PT Pelabuhan Indonesia II (Persero) (**Pelindo II**) and PT ASDP Indonesia Ferry (Persero) (**ASDP**). Each director in the said companies is tried in a corruption proceeding due to business decisions that they made.

This paper intends to re-analyze the respective cases from the perspective of the corporate law theories. Instead of focusing on the corruption element of each case, this paper will take the perspective of agency problem. Agency problem is a problem arisen in an entity that separates ownership and management due to from different interest between owner (shareholder) and agent (principal). Since Indonesian SOE is a limited liability company, the "owner" or shareholder does not manage the company themselves; instead the management is handed over to board of directors. This paper proposes the idea that, in the cases mentioned, the issue was not necessarily corruption to start with, but rather agency problem or different interest being pursued by shareholder (in this case the government) and the director.

Therefore, **(i) how are the four cases involving SOE directors being decided by Indonesian court?** and **(ii) to what extent would the analysis different if the four cases are seen through the perspective of agency problem?** To such end, the first part of this paper will discuss the four cases mentioned and comparing them to find if any similar patterns e.g. corruption allegation, malfunction of board of commissioners as supervisor of director's duties, and blurred interpretation on what constitutes Indonesian law's director's duties. Second part of the paper will address the agency problem and how different the analysis would be if the four cases discussed are assessed from such perspective.

II. Legal Materials and Research Method

This research uses juridical normative method. To respond the research question, this research uses primary and secondary source of law. The primary source of law analyzed for this research includes Law No. 19 of 2003 on State-owned Enterprise as amended lastly by Law No. 16 of 2025 and Law No. 40 of 2007 on Limited Liability Company as amended lastly by Law No. 6 of 2023 as well as court decisions. In addition, this paper uses secondary source of law uses to analyze the research question such as books, and journals.

III. Results and Discussion

a. Indonesian Court Decisions on Breach of Director's Duty: A Pattern of Inconsistencies

Based on the year of the decisions, the following summarizes the case of (i) Hotasi Nababan, president director of PT Merpati Nusantara Airlines (**Merpati**); (ii) Karen Agustiawan, president director of PT Pertamina (Persero) (**Pertamina**); (iii) Richard Joost Lino, president director of PT Pelabuhan Indonesia II (Persero) (**Pelindo**); and (iv) Ira Puspadewi, president director of PT ASDP Indonesia Ferry (Persero) (**ASDP**). Merpati is included in the analysis in this paper because, even though the government is not a direct shareholder of Merpati, Merpati's shares was owned almost wholly by PT Garuda Indonesia (Persero), an SOE, and at the time the loss suffered by Merpati was regarded by Indonesian court as state loss.

i. Aircraft Lease to Survive Financial Crisis – Merpati[2]

Merpati is an Indonesian airline company whose shares are owned by PT Garuda Indonesia (Persero), an SOE which also operates airlines business. On December 2006, it entered into an aircraft lease agreement with lessor Thirdstone Aircraft Leasing Group (TALG), whereby TALG will purchase two aircraft from the aircraft seller if Merpati agrees to lease such aircraft from TALG at USD150,000 each. The aircrafts that Merpati would lease (i.e., Boeing 737-400 and 737-500) were different than the aircraft specified under the Company Work Plan and Budget (*Rencana Kerja dan Anggaran Perusahaan* or RKAP) that was approved by the general meeting of shareholders. However, the president director proceeds with the lease transaction without trying to amend the RKAP beforehand and signed the aircraft lease agreement (Lease Agreement). In January 2007, the aircraft were never delivered by TALG as promised. TALG also refused to return the security deposit to Merpati. Merpati then filed a breach of contract claim against TALG to the US court and won.

The case was brought by the Commission for Corruption Eradication (*Komisi Pemberantasan Korupsi* or **KPK**) to the Corruption Court at Central Jakarta District Court. The Central Jakarta District Court by majority decided that Hotasi was not guilty of corruption by reasons that the decision was for the company's best interest that was in financial difficulty at the time. However, in cassation stage, the Indonesia Supreme Court reversed the decisions. By reasons that the director's incompliance with good corporate governance as claimed by the prosecutor, the court declared that the director were guilty of corruption.

ii. Participation in a bid for employees' professional development – Pertamina[3]

Pertamina is an Indonesian SOE that carries out an oil and gas business. Its shares are wholly owned by the Government of Indonesia. In 2009, Pertamina decided to participate in a bidding process to acquire 10% participating interest in an oil block in Australia through its subsidiary, PT Pertamina Hulu Energi (PHE). Pertamina's president director supervised the bidding process. Interestingly, the president director expressed to her team that Pertamina or PHE did not intend to win the bid; Pertamina's and PHE's participation was to expose and familiarize

[2] The facts of the case are compiled from Central Jakarta District Court Decision No. 36/Pid.B/TPK/2012/PN.JKT.PST and Supreme Court Decision No. 417 K/Pid.Sus/2014

[3] The facts of the case are compiled from Jakarta High Court Decision No. 34/Pid.Sus-TPK/2019/PT.DKI and Supreme Court Decision No. 121 K/Pid.Sus/2020

their employees in a bidding process for their own professional development. Pertamina's board of commissioners knew this intention and had no problem approving the investment proposal for the said purpose. Hence, regardless of the red flags provided by the third party legal and financial advisors, PHE continued its participation in the bidding process. Despite being reluctant to support the director's decision to sign the share purchase agreement, the board of commissioner eventually agreed for PHE to continue performing their obligation under such agreement. A year later, the production in the oil block was stopped due to technical issues and up until then, PHE did not receive any profits. In 2013, PHE withdrew its investment, and it suffered a loss of over IDR500 billion (or approximately USD33 million).

The Corruption Court of Central Jakarta and Jakarta High Court decided that Karen's decision in making PHE participate in such bidding was corruption. The Supreme Court, on the other hand, overturned such decision. The Indonesia Supreme Court acknowledged Karen's action as "wanting to develop Pertamina's business by adding more oil and gas reserve" despite the fact delivered in the court that PHE never intended to win the bid.

iii. Direct Procurement After Unsuccessful Tender Process – Pelindo II[4]

The case involves a procurement of a certain type of crane by Pelindo, a SOE that operates port in Indonesia. The procurement of such crane initially was done through an auction but after several times, there are no candidates that could procure the specific crane that Pelindo II wants. They then conducted direct appointment of PT Barata Indonesia. While the negotiation with PT Barata Indonesia is still ongoing, the president director of Pelindo II instructed his employee to take a Chinese crane manufacturing company, Wuxi Hua Dong Heavy Machinery Science and Technology Group Co. Ltd. (HDHM), on survey. The negotiation with PT Barata Indonesia failed and the president director instructed to directly invite HDHM and two other foreign companies to participate in the auction. In the process, because Pelindo II had an internal regulation which requires that procurement process prioritizes domestic producers, the president director also instructed to change such procedure so that Pelindo II can appoint foreign producers. Later on, one of the companies eventually withdrew from the process and the president director decided to go with HDHM due to price consideration even though the crane specification was different than what Pelindo II initially wanted. Due to this different specification and lack of due diligence on the product, the procurement and maintenance of the cranes procured from HDHM resulted in state loss and the president director is charged with corruption.

The case was appealed and brought to cassation. Each appeal and cassation confirmed the findings and decision of the district court.

iv. Cooperation Agreement and Shares Acquisition for Business Expansion – ASDP[5]

Ira Puspadewi, the president director of ASDP, was in corruption trial together with ASDP's other two directors. ASDP is a SOE providing ferry services, and integrated port and waterfront

[4] The facts of the case are compiled from Jakarta High Court Decision No. 6/Pid.Sus-TPK/2022/PT.DKI and Supreme Court Decision No. 5124 K/Pid.Sus/2022

[5] The facts of the case are compiled from Central Jakarta District Court Decision 68/Pid.sus-TPK/2025/PN Jkt Pst

tourism destinations services. The business decision in question is regarding ASDP's decision in entering into a business cooperation agreement with PT Jembatan Nusantara, a private ferry services company, which was later followed by shares acquisition of the same company. Although PT Jembatan Nasional was a company that suffered losses, ASDP kept the plan with for the purpose of obtaining 53 more ferry operational licenses because, due to moratorium from the government, it was unclear whether ASDP could obtain a new license in the future. The Minister of SOE as ASDP's shareholder knew and agreed that the cooperation agreement is the first step before shares acquisition. The board of commissioner initially was against the plan to acquire shares in PT Jembatan Nasional and only approved the cooperation agreement. That said, allegedly because of the replacement of the president commissioner, board of commissioner eventually agreed with the shares acquisition plan. In order to ease ASDP to enter into cooperation agreement with PT Jembatan Nusantara, a board of directors' decree regarding ASDP's cooperation procedure removing the requirement for the cooperation partner to submit a proposal, completion of feasibility study, financial soundness of the partner and board of commissioner's approval in choosing partners. In the end, the business decision resulted in state loss of over IDR1 trillion.

The president director and the other two directors were charged with corruption by the Central Jakarta District Court No. 68/Pid.Sus-TPK/2025/ PN Jkt Pst on 20 November 2025. Different with the previous cases, President of Indonesia decided to use his prerogative rights under Article 14 of the 1945 Constitution and issued a Presidential Decree on 25 November 2025 to rehabilitate the three directors of ASDP[6]. Under Indonesia Criminal Procedural Code, rehabilitation means restoring the defendant's dignity following an unreasonable arrest, detain, prosecution and trial[7]. As a result, under Article 95 of the Indonesia Criminal Code, the defendant may claim for compensation.

v. Similar Pattern in Director's Business Decision

Some similarities can be drawn from the cases summarized above. First similarity is that, despite taking business decision which result in state loss, *none* of the director in the said cases was proven to have enriched themselves[8]. Indeed, their decisions resulted in the enrichment of other people[9], and all directors were, at some point during the court proceedings, charged with corruption. Notwithstanding this, one shall note the very basic principle of criminal law which is that none shall be criminally liable without *mens rea* or an intention to conduct criminal action. In those cases, there are facts showing that the directors might not intentionally enrich other people or corporation either. In Merpati, the enrichment of other party was due to that party's breach of contract and event such breach of contract was confirmed by a court decision in the United States. In Pertamina and Pelindo II, the other party received profits because the

[6] The copy of the presidential decree is not yet available in public domain. The official press release can be accessed here: https://setkab.go.id/prabowo-rehabilitasi-pejabat-asdp-penjelasan/

[7] Article 1 point 23 Indonesia Criminal Code

[8] See: (i) for Merpati, was not explicitly mentioned but the Supreme Court decision in cassation level only confirmed that the director enriched the counter-party corporation; (ii) for Pertamina, also was not explicitly mentioned, but the District Court only decided that the director enrich the counter-party corporation; (iii) for Pelindo II, page 260 of Supreme Court Decision No. 5124 K/Pid.Sus/2022; and (iv) for ASDP, page 1051 of Central Jakarta District Court No. 68/Pid.Sus-TPK/2025/ PN Jkt Pst

[9] At the time of the case was decided, the applicable law was Article 2 of Law No. 31 of 1999 on Corruption. The said provision now has been revoked by Law No. 1 of 2023 on Criminal Code (as amended by Law No. 1 2026). But the act of enriching oneself, other people or Corporation that result in loss of state's finance or state's economics is punishable under corruption act provisions.

directors overlooked the red flags in the projects they were doing, not because they intentionally wanted to enrich them. Lastly, in ASDP, the court found no conflict of interest between the directors and the shareholder of PT Jembatan Nasional so that there is no possibility that the director would enrich him through the acquisition of shares in such company.

Secondly, notwithstanding the decisions were taken without the intention to conduct corruption, the directors did not indeed fully comply with the procedures applicable to the SOE. In Merpati case, the president director entered into lease agreement for aircraft that has different specification from the RKAP which breach Minister of SOE Decree No. Kep-101/MBU/2002 on Drafting of RKAP in SOE[10]. President Directors of Pelindo II and ASDP, on the other hand, each enacted an internal procedure which, according to the prosecutor, was intended to pave the way for their "corrupt" plan to proceed. As a result, director of Pelindo II violated Minister of SOE Regulation No. PER-05/MBU/2008 on Guidance of Goods and Services Procurement for SOE, while the director of ASDP breached her duty as director under Minister of SOE Regulation No. PER-01/MBU/2011 on Implementation of Good Corporate Governance of SOE. Meanwhile, Pertamina's director did not necessarily breach a specific procedure, but her action was considered violating the good corporate governance under the Minister of SOE Regulation No. PER-01/MBU/2011 on Implementation of Good Corporate Governance of SOE too during the first instance and the appeal.

Third, in some of the cases, board of commissioners showed an inconsistent position and was not able to prevent the director from taking the business decisions in question. In Pertamina and ASDP, the board of commissioners changed their position about the business plan the director will take. On the other hand, in Merpati, although the decision to lease an aircraft did not need approval from the board of commissioner, the board of commissioners were informed of the director's plan. As the company organ that has the duty to advise and supervise the director's activity, the role of board of commissioners should have been vital in making the director avoid mistakes such as the case mentioned. Nonetheless, the role of board of commissioners of SOE could lead to further research.

As comparison, the said cases may be summarized into Table 1 below.

Table 1. Comparison of Facts of the Cases

Cases	Business decision	Violation on SOE Regulations	Role of the Board of Commissioners
Merpati (2013-2014)	Entering into aircraft lease agreement to save the company from financial difficulty	Minister of SOE Decree No. Kep-101/MBU/2002 on Drafting of RKAP in SOE	The decision did not require BOC approval since it was within the BOD authority, but BOC was updated on the progress of the transaction

[10] This regulation now has been revoked by Minister of SOE Regulation No. Per-2/MBU/03/2023 on Guidance on Governance and Significant Corporate Action of SOE

Cases	Business decision	Violation on SOE Regulations	Role of the Board of Commissioners
Pertamina (2019)	Acquisition of an oil block for employee professional development	Minister of SOE Regulation No. PER-01/MBU/2011 on Implementation of Good Corporate Governance of SOE	Hesitant at first but supported the decision for the bidding process. The board of commissioner later withdrew such support when Pertamina won the bid
Pelindo II (2021)	Direct procurement from foreign company after several failed tender from domestic companies	Minister of SOE Regulation No. PER-05/MBU/2008 on Guidance of Goods and Services Procurement for SOE	Not specifically mentioned
ASDP (2025)	Entering into cooperation agreement and shares acquisition in another company for business expansion and more profits	Minister of SOE Regulation No. PER-01/MBU/2011 on Implementation of Good Corporate Governance of SOE	Initially rejecting the idea then approving it (arguably) after the president commissioner was replaced with different person

Source: Author

vi. Inconsistent Decisions by Indonesian Court

While the facts of the four cases were similar, the decisions by Indonesian courts were not. Over the years, same Indonesian courts interpret the business decision differently. For example, only in Merpati case did the District Court acknowledged the commercial nature of director's decision and that the director is not liable because of it, although one judge issued dissenting opinion against the director. However, in all the district court decisions following Merpati, i.e. Pertamina, Pelindo II and ASDP, the decisions were the other way around. In the case following Merpati, district court always found that the directors conducted corruption but, interestingly, in each of the case there is always one judge who issued dissenting opinion in favor of the director.

The Supreme Court's position, on the other hand, is more unpredictable. In Pertamina, the Supreme Court acknowledge the commercial nature of director's decision and that it is common for a company to suffer losses because businesses have risks. The Supreme Court also acknowledged that there was no fraud, conflict of interest, and intentional unlawful act in Pertamina so that business judgment rule applied to the director. Following Pertamina, we can conclude two findings from Pelindo II and ASDP. In Pelindo II, the Supreme Court did not take

into account the commercial consideration of the director's decision i.e. that the company needed to procure cranes for their business and that several auction processes had been done without success. Furthermore, this paper also finds that the Supreme Court's decision in Pertamina was not followed by the district court in a similar situation as reflected in ASDP. In ASDP, the district court eventually decided against business judgment rule even though, similar with Pertamina, there was no conflict of interest in the director's decision. The dissenting judge in ASDP even took the chance to remind the readers regarding the Supreme Court's position on business judgment rule that Supreme Court applied in Pertamina and that, compared to Pertamina, ASDP's director was more careful in making their decisions.

Table 2. Comparison of Indonesian Court Decisions

Cases	**Corruption Verdict**	**Dissenting Opinion**
Merpati (2013-2014)	**District Court:** No	**District Court**: Yes, against the director
	High Court: -	**High Court**: -
	Supreme Court: Yes	**Supreme Court**: None
Pertamina (2019)	**District Court:** Yes	**District Court**: Yes, in favor of the director
	High Court: Yes	**High Court**: No
	Supreme Court: No	**Supreme Court**: None
Pelindo II (2021)	**District Court**: Yes	**District Court**: Yes, in favor of the director
	High Court: Yes	**High Court**: No
	Supreme Court: Yes	**Supreme Court**: None
ASDP (2025)	**District Court**: Yes	**District Court**: Yes, in favor of the director
	High Court: -	**High Court**: -

Cases	Corruption Verdict	Dissenting Opinion
	Supreme Court: -	**Supreme Court**: -

Source: Author

b. Analysis through agency problem perspective: would the result and enforcement be different?

This section offers to re-analyze the cases of Merpati, Pertamina, Pelindo II and ASDP from the perspective of agency problem. To such end, this section will first normatively introduce agency problem. From the literatures on agency problem, this section will then explain that agency problem happens in Indonesian SOE especially in the four cases discussed in the previous section.

i. Agency Problem

Agency problem is a common issue in an entity that separates ownership and management. It was first discussed in 1932 when Berle and Means wrote that in "modern corporation", ownership and management are separated[11]. When owners do not manage its own corporation, the consequence is that owners' and managers' interests are bound to be different. When shareholders may have the interest to maximize the value of the company so that they can pay the debts and receive dividends, the agents (directors) may not have the same intention because they do not receive all profits or bear all costs of the business[12]. The issue is that the agent, because they have access to company's information, they may act opportunistically even acting in contrary from what they have promised the owner[13].

To ensure that managers act in line with owner's interest, owners shall spend some costs. These costs are referred to as agency costs. Jensen and Meckling in 1976[14] explains that agency costs may take three forms: (i) monitoring cost, or the cost needed to limit the agent's self-interest behavior; (ii) bonding cost, or the cost to guarantee that the agent will not take an action that would harm the principal's interest and (iii) residual cost, or the cost of welfare reduced because owner spends in the monitoring and bonding costs.

The study on agency problem has been developed and one of the highly discussed topics is the agency problem in a concentrated ownership especially where the controlling shareholder is the government. Puchniak[15] discussed that the agency problem described by Berle and Means may

[11] Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (1932; The Macmillan Company, 1933).
[12] Sofie Cools, "The Dividing Line Between Shareholder Democracy and Board Autonomy: Inherent Conflicts of Interest as Normative Criterion," *European Company and Financial Law Review* 11, no. 2 (2014), https://doi.org/10.1515/ecfr-2014-0258.
[13] John Armour et al., "Agency Problems, Legal Strategies and Enforcement," *ECGI Working Paper Series in Law*, no. 135/2009 (November 2009).
[14] C. Jensen and H. Meckling, "THEORY OF THE FIRM: MANAGERIAL BEHAVIOR, AGENCY COSTS AND OWNERSHIP STRUCTURE," *Journal of Financial Economics* 3, no. 4 (1976): 305–60.
[15] Dan W. Puchniak, "Multiple Faces of Shareholder Power in Asia: Complexity Revealed," in *Research Handbook on Shareholder Power* (Edward Elgar Publishing Ltd., 2015), https://doi.org/10.4337/9781782546856.00041.

not be applicable in Asian countries where companies have one majority shareholder, usually family or government. This results in different type of agency problem which may be unique to each jurisdiction[16]. While in dispersed ownership described by Berle and Means directors may use the company for their own self-interest, in an empirical research, Lin[17] theorizes that in a concentrated ownership, controlling shareholder can influence the director's independence in making decisions. Despite having influence on the directors, if the controlling shareholder is a government, such as the case of SOE, Lim[18] identifies the risk of poor management. This is because the government has financial as well as social objective and the latter has an unclear criterion. Consequently, it is unclear how to spend on agency cost; if they use bonding cost, the criterion for reward is unclear, while monitoring also difficult due to various department involved in the SOE[19].

ii. Agency Problem Exists in Indonesian SOE

If we look at the four cases discussed in the previous section from the perspective of agency problem, we should first identify in the regulations regarding Indonesian SOE (1) the separation of owner and manager; (2) the interest of owner and manager; and (3) the type of agency cost spent to minimize the conflict of interest.

1. Separation of owner and manager in Indonesian SOE

Firstly, the SOE Law stipulates that a Persero is a limited liability company which is also subject to the Company Law[20]. Under the Company Law, two of the organs of a limited liability company are the general meeting of shareholder and board of directors[21]. While board of directors are tasked to manage and represent the company, shareholders do not have a certain duty but are ones who put capital into the company and hold authorities not given to the board of directors. Under the SOE Law, the President of Indonesia holds the ultimate power to manage the state finance, including owning state assets that are separated in SOE[22]. This power is authorized to the SOE Regulatory Body (*Badan Pengaturan BUMN* or **BP BUMN**) and Investment Management Body Daya Anagata Nusantara (**Danantara**) as shareholders in the SOE[23]. It is clear from the reading of the SOE Law that neither BP BUMN nor Danantara as shareholders have the day-to-day responsibility to manage the SOE, board of directors does. Therefore, from the company structure of a Persero, it is the "modern corporation" that potentially have agency problem due to owners' or shareholders' assets being managed by manager, in this case, the directors.

[16] Puchniak, "Multiple Faces of Shareholder Power in Asia: Complexity Revealed."
[17] Da Lin, "Beyond Beholden," *Law Faculty Publications* 44 J. Corp. L. 515 (February 2019), https://ssrn.com/abstract=3335195.
[18] Ernest W. K. Lim, "Concentrated Ownership, State-Owned Enterprises and Corporate Governance," *Oxford Journal of Legal Studies* 41, no. 3 (2021): 663–91, https://doi.org/10.1093/ojls/gqaa050.
[19] Lim, "Concentrated Ownership, State-Owned Enterprises and Corporate Governance."
[20] Article 10 of the SOE Law
[21] Article 1 point 2 of the Company Law
[22] Article 3 paragraph (1) and paragraph (2) of the SOE Law
[23] Article 3 paragraph (5) of the SOE Law

2. Interests of the owner and manager of SOE

The different interest of the state as shareholder and the director can also be compared from the SOE Law. Ultimately, the owner of an SOE is the Government of Indonesia. Meanwhile, structurally, the direct shareholders of Indonesian SOE are BP BUMN and Danantara which, on behalf of the President of Indonesia, invest in the SOE the separated state assets. Therefore, this paper will assess each of these owners' interest.

From the government's point of view, their participation in an SOE is to increase state revenue. The SOE Law provides president's ownership in SOE constitutes separated state asset (*kekayaan negara yang dipisahkan*). Under Minister of Finance Regulation No. 246/PMK.06/2016 on Administration of Separated State Assets, separated state asset (is state asset from State Budget (*Anggaran Pendapatan dan Belanja Negara* or APBN) or other sources used especially for long-term and sustainable investment, including investment in SOEs. The government expects these investments to return to them in the form of dividends which will be categorized as Non-tax State Revenue (*Penerimaan Negara Bukan Pajak* or PNBP). The government will then use the PNBP to pay for state expenses. In summary, as discussed in previous section, the state has profit-oriented interest (e.g. increasing state revenue) which ultimately be used for paying for public expenses. BP BUMN and Danantara, with their own functions, shall then make sure the said interests are achieved.

Board of directors, on the other hand, shall have the best interest of the SOE in mind in performing their duty. In the case of SOE, the interest of the company may be understood from Article 2 of the SOE Law which stipulates that the purpose of SOE establishment is to gain profits and contribute to the national economy and increase state revenue. In addition to that, SOEs also have social purposes to guarantee the procurement of good quality goods and/or services that can compete in the market, initiating business activity that private sectors and cooperatives are unable to do, supporting the micro, small, medium enterprises, cooperatives and the people, building strategic industry based on research, innovation and technology. So far, the interest of the SOE is in line with the interest of the government as the owner.

That said, the law rewards director based on financial gain, not the achievement of other objectives, e.g. the objective of supporting small enterprises. According to Minister of SOE Regulation No. PER-3/MBU/03/2023 on Organs and Human Resources of SOE (**MSOE Regulation 3/2023**), there are some types of remuneration provided for directors who achieve certain performance milestones:

- Bonus (*tantiem*) is provided for directors whose company gains profits and does not record any accumulated loss;
- Performance incentive (*insentif kinerja*) is provided for directors whose performance improves although may record certain accumulated loss;
- Special incentive (*insentif khusus*) is provided for directors who carries out certain duty from the government or for his effort during national/local force majeur;
- Long term incentive (*insentif jangka panjang*) is provided for directors whose performance and governance reach international-level best practices.

From MSOE Regulation 3/2023, only the special incentive that is not tied with director's achievement in generating financial benefits for the company. Bonus and performance incentives, on the other hand, are tied to the company's recorded profits. Meanwhile, long-term incentive, even though it is tied with non-financial measurement (e.g. motivation to improve the director's performance) it also acts as a reward for the director in maintaining long-term shares value even during unfortunate situation for the company. The standard for rewarding directors for achieving non-financial interest of the company, however, is unclear.

Noting the above, from the four cases discussed in this paper, the government as shareholder can be seen as having the interest of not losing the state assets that they invested in the SOE. Despite the purpose of the government in using separated state assets is to do investment which may or may not generate profits, the government certainly does not intend to suffer losses from such investment. Given this, certain director's actions were decided without the necessary context that it deserves e.g. Merpati's director defied RKAP by buying different type of aircraft to rescue the company from financial difficulty; ASDP's director decided to cooperate and acquired shares to be able to acquire the ferry operational license amid moratorium from the government; and the Pelindo II's director decided to purchase different type of crane due to multiple failure auction.

In the four cases assessed in this paper, all but one director made business decision to pursue financial gain. Merpati, ASDP and Pelindo II, although pursuing the interest of the company at the time, ultimately has financial interest. The exception though was Pertamina's director who admitted that the business decision she made to participate in a bid was not because Pertamina wants to win but rather they want to train their employees in an international bidding process. Nevertheless, financially motivated or not, all directors in those cases were found to have breached corporate governance.

3. Agency Cost Spent in Indonesian SOE

Referring to Jensen & Meckling's types of agency cost discussed in earlier section, this paper argues that Indonesian SOE spends agency cost in both bonding and monitoring costs. Bonding costs or remuneration for a job well done is clearly one of the agency cost that shareholder government spent, as discussed in the previous subsection.

In addition to bonding costs, monitoring costs are also spent as evidenced in several articles in the SOE Law. Firstly, in Article 15C of the SOE Law where, prior to the director being appointed, the director shall sign management contract or statement of corporate intent containing promises and statement that the relevant director will fulfill all the target agreed with the shareholders and board of commissioners. Secondly, in managing the business of an SOE, directors must follow the long-term working plan and annual working plan that have been approved by the general meeting of shareholders (i.e. BP BUMN and Danantara). Thirdly, internally Indonesian SOE shall also be monitored by several committees such as audit committee which assist board of commissioners in supervising the director's duty[24]. Despite having bonding and monitoring, however, government as shareholders of Indonesian SOE does not seem to have been able to align its interest with the directors.

[24] Article 70 of the SOE Law

IV. Conclusion and Recommendations

In conclusion, the four cases taken as example in this paper does not necessarily bear the issue of corruption. Despite having similarities in the context of the decision-making process, Indonesian courts were inconsistent in analyzing the facts and deciding those cases. Furthermore, from corporate law point of view, these are the issue of agency problem whereby government as shareholder wants to avoid state losses, but the directors kept the interest of the company in mind at the time of making the business decisions.

As a recommendation, there needs to be better corporate governance mechanism to ensure that both interests are aligned. In other words, the government shareholder might want to reconsider spending agency costs in other means beside bonding and monitoring. Lastly, enforcement by the law enforcement and the court should not immediately criminalizing the directors but shall rather be analyzed from company law point of view.

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