

# THE LEGAL POLICY OF REGULATING THE CONCEPT OF FUTURE VALUE AMID THE DISCOURSE ON STATE FINANCES IN STATE-OWNED ENTERPRISES

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## Abstract

The legal position of state finances also determines any state finance loss which occur as a result of a business decision made by SOE. Business decision made by the BOD of a company has significant impacts on the performance of an LLC such as revenue and increased value of the company. In order to generate profit, the BOD must be able to take appropriate corporate action. BOD of LLC often takes future value action by performing risky action which may damage the company in expectation of highest possible profit for the company in the future. In the context of SOE management is often viewed as detrimental to state finances because it's considered a corporate crime that ends with corruption. Problems occur when performing assessments of state loss as SOE and Law Enforcers have different perspectives. Law Enforcers often can't see the future value of a corporate action taken by SOE Persero. The problem in this paper is what is the Legal Policy of Regulating the Concept of Future Value in Determining State Financial Loss? Research method was judicial normative, which is a study that emphasizes the usage of written legal norms are related to the source's perception and view. Research result showed that if loss happened from the policy performed by the BOD of SOE (LLC) in corporate action for future interest of company shouldn't be automatically consider as criminal action as state financial loss because it must be investigated first and if the loss is smaller than profit generated by SOE also doesn't affect state assets which is deposited to SOE be viewed as an action by them to realize the vision and mission of SOE.

**Keywords:** *Future Value, SOE, Business Transaction, Legal Policy, State Finance*

## 1. INTRODUCTION

Indonesia must increase national economic growth evenly. Economic growth also must be encouraged by improving the welfare of the people of Indonesia in real terms<sup>1</sup>. One of agencies which have an important role in realizing this, is State-Owned Enterprise (SOE), which is a business unit that produces goods and/or services required for the benefit of the people. By establishing SOE, State plays its role as economic actor for public benefit by providing goods, services, and looking for profit for state revenue<sup>2</sup>.

Politically and economically, there are three reasons for SOE establishment in Indonesia. First, being a vessel for state business through nationalization of foreign assets, e.g., in the 1950s, the Government nationalized Dutch companies in Indonesia. Second, building industries required by the society which the society (or private party) can't enter due to large investment or very high business risk. The government has done this in various ways, e.g., building urea fertilizer factories in several regions in Indonesia in the 1960s. Third, build very strategic industry related to state security and stability, e.g., PT Pindad (building industries of weaponry), and Perum Bulog (food stock management)<sup>3</sup>.

<sup>1</sup> RM. A B. Kusuma, *Lahirnya UUD 1945* (Jakarta: Yayasan Paneur Siwah, 2009), 474.

<sup>2</sup> Safri Nugraha, *Pengkajian Hukum Tentang Privatisasi Perusahaan Milik Negara Ditinjau Dari Undang-Undang Dasar 1945* (Jakarta: Badan Pembinaan Hukum Nasional, 2011), 41.

<sup>3</sup> Riant Nugroho and Randy R. Wrihatomolo, *Manajemen Privatisasi BUMN* (Jakarta: Gramedia, 2008), 15.

SOEs in Indonesia are found as the implementation of politics and economy mandated by Indonesia Constitution Article 33 (2), (3) and (4)<sup>4</sup>. The mandates also stated in Article 2 verse (1) of Law Number 19 of 2003 on State- Owned Enterprise (SOE Law), which states that the objectives of SOE are:

- a. “Make contributions to national economic development in general and state revenues;
- b. Make a profit;
- c. Establish public benefit through the supply of high quality and affordable goods and/or services for the life of many people;
- d. Become the pioneer of business activities that cannot be performed by the private sector and cooperatives;
- e. Actively provide guidance and assistance to business people from the economically weak group, cooperatives, and society.”

SOE Law defines SOE as an entity, the capital of which is in part or in whole owned by the State through direct participation that is derived from the State’s separated assets. The definition of “Separated” in the Elucidation of Article 2 of SOE Law is separation of state assets that are derived from the State Budget to be used as the State’s capital participation in SOE for henceforth the development and management are no longer based on the system of the State Budget, but development and management based on the principles of a sound company.

SOE Law is the basis for SOEs to be one of the economic actors in the national economic system besides the private sector and cooperate to support economic democracy. Moreover, SOEs expected to optimize their role and be able to maintain their presence in the world’s economic development which becomes more open and competitive through the development of cooperative culture and professionalism, such as improvement and monitoring through the principles of GCG.

In practice, direct capital participation by the Government to SOEs through separated state assets often brings forth a dilemma for the (BOD), especially related to decision making for the interests of the Company management, particularly in making transaction and investment which contain business risk or legal risk. There is a difference in the understanding of state agencies, especially Law Enforcers which encourage and make great contributions to the situation. Moreover, differences in the principles of norms regulated by legislations also contribute to the difference in understanding.

The definition of state finances in Law Number 17 of 2003 on State Finances (State Finances Law) creates a dilemma when facing the definition of the word “separated” SOE capital. On one hand, SOE Law states that direction and management of state capital are separate to be the capital of SOE. Therefore, the management is no longer based on the APBN system, but based on the principles of company management and sound business mechanism. On the other hand, based on the State Finances Law, state rights and obligations still exist when state capital which has been separated become the capital of SOE, so there is confusion on the role of the State only as a shareholder in SOE or involved as a public entity in SOE.

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<sup>4</sup> M. Iqbal Asnawi, “Implikasi Pengelolaan BUMN Persero Dalam Kerangka Welfare State Berdasarkan Mekanisme Perseroan Terbatas,” *Jurnal Hukum Samudra Keadilan* II, no. 1 (2016): 127, <https://ejournalunsam.id/index.php/jhsk/article/view/32>.

Unclear content of Legislation is also found in the definition of state finances in the Corruption Law. According to the Corruption Law, state finances refer to the entire state assets in any form, whether separated or not separated, including within it all parts of state assets and all rights and obligations arising due to: being under the control, management and responsibility of SOE/ROE. The differences bring forth a consequence for BOD of SOE which puts them in a difficult position when making the decision, especially decision which has a risk of loss. Any loss incurred may cause them to be accused of incurring loss to the State<sup>5</sup>.

There is controversy on SOEs' source of assets which is separated state assets, especially in terms of how SOEs' assets are treated as a part of state finances. Although SOE Law mandates the management of SOE Persero based on LLC Law, if state loss happens in SOE Persero, the Law Enforcers will use Article 2 letter g of the State Finances Law which states that separated assets are state assets the same as the Law Number 31 of 1999 as amended by Law Number 20 of 2001 on Eradication of Corruption (Corruption Law)<sup>6</sup>.

Besides various legislations, BOD must perform business analysis on action which will be done, considering SOE also has the objective of making profit. In taking corporate action, BOD must consider various aspects and/or revenue they may gain as reward of the corporate action. Corporate action doesn't always look 'good' at the start of the implementation. BOD often must take extreme steps that are unusual for most people to save the Company and/or make maximum profit by utilizing some facilities and policies which have been released before which no longer produce maximum revenue.

There are at least two opinions on state assets in capital participation in SOE. First opinion still considers separated state assets as state finances, meaning state's participation from the State Budget is still considered a state asset<sup>7</sup>. The view is adopted by the Law Enforcers, Corruption Eradication Commission (KPK) and Audit Board of the Republic of Indonesia (BPK) as well as the Central Audit Board of the Republic of Indonesia. Second opinion considers separated state assets to no longer be a part of state finances because the status has turned into the finance of another legal entity, in this case SOE, and the responsibility is similar to the management and capital participation in private companies. The view is adopted by Arifin P. Soeria Atmadja and Erman Radjaguguk<sup>8</sup>.

Since the position of the government is as a Shareholder in a Limited Liability Company (LLC) or performing capital participation, their position isn't as a public legal entity, because the duty of the government is to be a public legal entity, which Lemaire refers to as *Bestuurzorg*, to organize public welfare, in which the head of state administration is given freedom to act quickly and appropriately (*doeltreffen*) to address interests for public welfare<sup>9</sup>.

Basically, in conducting its business activities, SOE conducts business like other enterprises, i.e., to make a profit. However, in reality, not all SOEs can make profit. Therefore, it's possible that BOD makes business decision which doesn't match the agreed business strategy.

Although GMS has made decision on the performance assessment of the BOD, including Board of Commissioners by giving *acquit et discharge*, financial still may happen to

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<sup>5</sup> Prasetyo, *Dilema BUMN: Benturan Kepentingan Business Judgment Rule BJR Dalam Keputusan Bisnis Direksi BUMN* (Jakarta: Rayyana Komunikasindo, 2014), 107.

<sup>6</sup> *Ibid.*

<sup>7</sup> Alfin Sulaiman, *Kuangan Negara Pada Badan Usaha Milik Negara Dalam Perspektif Ilmu Hukum* (Bandung: P.T. Alumni, 2011), 15.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

Persero which will be an object of investigation of the Law Enforcers even the court<sup>10</sup>. Actually, the authority of BOD to take legal action isn't limited to the actions mentioned in the purpose and objectives, but also include other actions, i.e. actions which according to custom, fairness and propriety may be concluded from the purpose of intention of the Company<sup>11</sup>.

Basically, the business decision made by BOD, in this case, SOE, has significant effect on company performance. Good company performance can generate benefits in terms of income and value of the company. A company that has good performance can increase its value in the present and future value. The future value of a company can be seen from the growth of the company's stock value in the future<sup>12</sup>. High future value gives profit to company shareholders, the government.

Problems often occur when making an assessment of whether any state loss happens, leading to different perspectives between SOE and the Law Enforcers. Law Enforcers often can't see future value of the action of an SOE Persero, which is a business action. The principle of taking a little loss to gain future profit in the perspective of policymakers in SOE is unacceptable for Law Enforcers and other state agencies, such as BPK and BPKP, which consider the state loss to not only be real but also potential, such as state revenue which will be received.

Therefore, the formulation of the problem in the present study was What is the Legal Policy of Regulating the Concept of Future Value in Determining State Financial Loss?

## 2. RESEARCH METHOD

The research method used in this study was judicial normative through statute, case, historical, comparative, and conceptual approach<sup>13</sup> and descriptive to gain a comprehensive, complete, and systematic picture of the research problem. The data comes from secondary data that uses primary legal material in the form of relevant legislations, secondary legal materials, and tertiary legal materials. The data collection techniques in the study were literature study and interviews. The data processing method went through editing process and the data analysis was performed qualitatively.

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<sup>10</sup> Prasetio, *Dilema BUMN: Benturan Kepentingan Business Judgment Rule BJR Dalam Keputusan Bisnis Direksi BUMN*, 107.

<sup>11</sup> Hasbullah F. Sjawie, *Direksi Perseroan Terbatas Serta Pertanggungjawaban Pidana Korporasi* (Bandung: P.T. Citra Aditya Bakti, 2013), 111.

<sup>12</sup> John J. Ballow, Roland Burgman, and Michael J. Molnar, "Managing for Shareholder Value: Intangibles, Future Value and Investment Decisions," *Journal of Business Strategy* 25, no. 3 (June 2004): 26, <https://www.emerald.com/insight/content/doi/10.1108/02756660410536973/full/html>.

<sup>13</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, Revisi. (Jakarta: Kencana, 2010), 93.

### 3. ANALYSIS AND DISCUSSION

#### 3.1 The discourse of State Finances in SOE

The definition of state finances is written in the State Finances Law and Corruption Law which state that:

- 1) Article 1 number 1 State Finances Law defines state finances as all rights and obligations of the State that can be valued in money, in the form of cash or goods that can be owned by the state in connection with the implementation of the rights and obligations. This is further explained in Article 2 letter g, covers state assets/regional assets managed on its own or by other parties in the form of cash, securities, receivables, goods and other rights that can be valued in money, including assets separated on state enterprise/local company.
- 2) The general elucidation of PTPK Law explains that state finances are the entire state assets, whether separated or not separated, including inside it all parts of state finances and all rights and obligations arising due to:
  - a. being under the control, management and responsibility of the office of state agency, whether at the central or regional level;
  - b. being under the control, management, and responsibility of SOE/Regional-Owned Enterprise (ROE), foundation, legal entity, and the company which includes state capital, or company which includes third party capital based on agreement with the State

Although those Laws have firmly place separated assets in SOE as a part of state finances, the stipulations often oppose the views of the principle of autonomy of private legal entity and theory of state finances transformation. According to these views, by changing the legal form of a SOE into Persero, the status of state finances which come from the separation of state finances in SOE (which in the SOE Law are said to no longer be subjected to the principles of State Budget Management) are no longer within the reach of the supervisory system of BPK on the usage of cash from the State Budget. This view puts aside the interests of the State to secure state money which enters the cash of SOE through subsidy mechanism, an appointment for public service, and capital participation.

Furthermore, the thought above isn't without legal basis. In general, those who have this view base it on Article 1 clause (1) of SOE Law. The Article is understood as when state assets have been separated, the assets are in the realm of private law. Article 11 of the SOE Law states the management of SOE Persero is performed based on Law Number 1 of 1995 on LLC and implementation (the LLC Law currently has been amended by Law Number 40 of 2007). It means that the LLC Law is consistent with the *lex specialis derogat lex generalis* which applies for SOE Persero. Therefore, if an SOE Persero experiences a loss, the loss isn't a state financial loss but a company loss, or often referred to as business risk as a private legal entity.

Differing views on the scope of state finances as described above continue until the issue is submitted for Material Test in Constitutional Court. Constitutional Court decisions Number 48/PUU-XI/2013 is related to the request to examine Article 2 letter g and letter i of the State Finances Law, and Verdict Number 62/PUU- XI/2013 is related to the request to examine Article 6 clause (1), Article 9 clause (1) letter b, Article 10 clause (1) and clause (3) letter b, and Article 11 letter a of the Law Number 15 of 2006 on the BPK. Both requests for examination essentially contain the same intention, questioning the definition of state assets in the context of separated state assets in SOE/ROE and challenge the authority of BPK to

examine state finances management and responsibility in terms of separated state assets in the SOE/ROE.

The Verdicts above, confirmed that the status of state assets that come from state finances and separated from State Budget to be included as capital participation in SOE is still considered as state financial regime. The release of the Verdict ends the debate on the phrase "**assets separated on state enterprise/local company**" in Article 2 Letter g of the State Finances Law which is one of the elements of state finances.

LLC are generally profit-oriented to maintain the continuity and development of the companies. Therefore, BOD must be granted an authority to perform organizational management to reach optimal result. Through the granted authority BOD also must be given responsibility to manage the Company.

Consequence of capital participation of the Government on LLC is the Government must bear the risk and be responsible for the loss of the business they funded<sup>14</sup>. Therefore, the position of the Government isn't as a public legal entity. If the Government as a public legal entity must also bear the loss, it's feared that the public function won't be optimal<sup>15</sup>. The removal of Persero from state control means consequences and debts arising from the activity of the Persero as a legal subject must be borne alone by the Persero. Bill for Persero can't be demanded from the personal properties of the managers and Shareholders<sup>16</sup>. The rationale above makes the Government as the Shareholder in SOE as a private legal entity.

State loss according to Bohari as quoted by Djafar Saidi isn't a loss in the definition in the world, because it's a company, but a loss which happens due to violation of law. In this regard, other factors causing state financial loss are inappropriate implementation of policy, enriching oneself, others, or corporation<sup>17</sup>. The definition of state financial loss also can be found in several legislations such as:

Article 1 Number 15 of Law Number 15 of 2006 on BPK states that:

"state/Regional loss referred to here is a real shortage of money, securities, and goods, of which amount is caused by unlawful actions, either intentionally or negligently."

The elucidation of Article 32 verse (1) of Law Number 31 of 1999 Jo. Law Number 20 in 2001 on Eradication of Corruption states that:

"state financial loss is a loss of which the amount has already been able to be calculated based on the finding of the authorized agency or appointed public accountant."

Separation of state assets performed by the state as a public legal entity is a state administrative legal action with the objective that the legal status of the separated assets is no longer subject to the State Budget mechanism. It means that separated state assets are subject to the legal mechanism in effect in the legal entity which receives the separated state assets.

According to the Elucidation of Article 4 of SOE Law on State- Owned Enterprise, separated means separation of the state assets from the State Budget to be used for state's

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<sup>14</sup> Arifin P. Soeria Atmadja, *Keuangan Publik Dalam Perspektif HukumL Teori, Kritik Dan Praktik* (Jakarta: Rajawali Press, 2009), 115.

<sup>15</sup> *Ibid.*

<sup>16</sup> Rudhy Prasetya, *Kedudukan Mandiri Perseroan Terbatas Disertai Dengan Ulasan Menurut Undang-Undang Nomor 1 Tahun 1995* (Bandung: P.T. Citra Aditya Bakti, 1995), 50–51.

<sup>17</sup> Muhammad Djafar Saidi, *Hukum Keuangan Negara* (Jakarta: Rajagrafindo Persada, 2013), 11.

capital participation in an SOE, and further, the direction and management thereof are no longer based on the State Budget system, but on the principles of sound corporate governance.

Separation of state assets according to Appendix X of the Regulation of Minister of Finance Number 96/PMK.06/2007 concerning Procedures for Implementation of the Use, Utilization, Removal, and Transfer of State Assets is a transfer of ownership of state assets which are initially state assets that aren't separated into separated state assets to be calculated as capital of a legal entity. It means there is transfer of ownership.

The calculation of the value of state financial loss in corruption in the agency is performed through two mechanisms:

- a. Investigative examination on the initiative of the agency on the return of regular examination results or due to complaint and request of legislative institution related to suspicion of unlawful management and responsibilities of state finances which result in state financial loss.
- b. Investigative examination of calculation of state financial loss on the request of the Law Enforcers in stages of investigation.

According to the legal theory of state budget and public finances, separation of state assets is a legal action of the State as a public legal entity to another legal entity so that all of their rights and obligations are transferred from state rights and obligations to the rights and obligations of the legal entity. Therefore, the State as a public legal entity and State Budget as state finances don't get any obligation on the separated assets, including obligation to pay bills or any risk arising from the separated assets.

This is clearly regulated in Article 1 Number 1 of Law Number 1 of 2004 on State Treasury (State Treasury Law). The state treasury is "the management and accountability of state finances, including separated investment and wealth set out in the State Budget and Regional Budget." The stipulation uses the phrase "separated investment and wealth set out in the State Budget and Regional Budget," meaning as long as the wealth is still set in State Budget/ Regional Budget, legal action of separation of wealth using government regulation hasn't been performed, it's still included in state treasury. However, after the state assets are separated using government regulation and become the assets of legal entity which receives them because all of the rights and obligations are no longer the rights and obligations of the State. Concrete legal evidence that separated state assets are no longer state assets are<sup>18</sup>:

- a. The money is no longer stores in the state cash as the state money storage which is determined by the minister of finance as the state general treasurer;
- b. The rights and obligations arising over the separated state assets no longer uses the State Budget Law as the basis of income and expense;
- c. The minister of finance as the state general treasurer doesn't have authority over separated finances unless in their position as the representative of the State as a Shareholder whose legal position is equal to other Shareholders in accordance with LLC Law;
- d. Invoice and/or risk arising over the separated state assets aren't the burden of the State Budget and don't appear in the budget implementation list (DIPA).

The massive scope of state finances in Article 2 of the State Finances Law and Elucidation of Article 1 of Corruption Law leads to expanding scope of state loss, whether the

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<sup>18</sup> Amrizal Syahrin, Dian Puji N. Simatupang, and Taufik Basari, *Laporan Bedah Kasus Tindak Pidana Korupsi Pengadaan Pesawat Terbang PT. Merpati Nusantara Airline Nomor Register Perkara 36/Pid.B/TPK/2012/PN.Jkt.Pst. Atas Nama Terdakwa Hotasi D. P. Nababan* (Jakarta, 2015), 32.

loss of the State as a public legal entity or the State as a private legal entity. In this case, state loss is formulated as shortage of money, securities, and goods, regardless of the cause of the state loss. State loss must be viewed in three related legal systems, i.e. civil, state administrative, and criminal law. Therefore, the trend of state loss isn't always directed to the criminal law system by ignoring state administrative law and civil law. Today's ignorance of the two legal systems is caused by poor understanding of the state administrative law theory, that neglected.

Regarding the state financial loss, now there's a single understanding that the status of separated state finances in SOE is a part of state financial regime. However, it doesn't mean that all stipulations of legislations for State Organizing Organs in *mutatis mutandis* applies on SOE, because the direction and management of separated state assets aren't performed based on the State Budget system but based on the principles of GCG.

Constitutional Court in one of their considerations also states that the governance in the arrangement of SOE and its assets should use corporate mechanism to be able to follow the world's development and competition and performs capital accumulation, which requires immediate decision making. Therefore, it's clear that the paradigm of the function of SOE is as an extension of the company which is run based on business judgment rules, which is different from government administration which is performed based on government judgment rules.

In the Articles in the State Finances Law, Corruption Law, and Constitutional Court view in the judicial review of the Corruption Law, there are definitions of state finances. The definition of state finances in the State Finances Law and the Corruption Law, all rights and obligations of the State that can be valued in money, as well as everything in cash or in the form of goods that can be owned by the state in connection with the implementation of the rights and obligations, including **separated assets in state enterprise/local company or under the control, management and responsibility of SOE/ROE**.

The Constitutional Court through the Verdict No. 62/PUU-XI/2013 states:

“..... SOE which is truthfully performing management on **state financial management** is also subject to constitutional supervision .....”

Therefore, it's concluded that BOD in SOE Persero which managed enterprise of which the shares, partially or entirely, is owned by the State must consider 2 (two) legislations at the same time, i.e. regulation of Company management according to LLC Law and SOE Law, and legislations relate to state finances to avoid various risk which may cause loss, whether loss which is purely business loss, or loss which happens due to negligence which results in in-state loss.

From the perspective of corruption, although the Corruption Law doesn't provide any clear definition of state loss, according to the Constitutional Court in Verdict No. 25/PUU-XIV/2016:

“... state loss due to administrative error isn't an element of corruption. State loss becomes an element of corruption if there are elements of a **violation of the law and abuse of authority**.”

Further, the Constitutional Court states that:

“...state loss is an implication of 1) unlawful action which benefits oneself or another person or a corporation as referred to in Article 2 verse (1) of the Corruption Law; 2) abuse of authority with the

objective of benefiting oneself or another person or a corporation as referred to in Article 3 of the Corruption Law.... The elements of state financial loss are no longer understood as estimation (potential loss) but must be understood as having happened or real (actual loss) to be able to be applied in corruption.”

Article 1365 of the Civil Code establishes that every unlawful action which causes a loss on another person requires the person who performs the action to compensate for the loss<sup>19</sup>. Related to the content of Article 1365 of the Civil Code, M.A. Moegni Djojodirdjo as quoted by Sedyo Prayogo states that<sup>20</sup>:

“Article 1365 of the Civil Code doesn’t provide formulation but only regulates that if one experiences a loss due to unlawful action performed by another person on them, they will be able to file a claim to District Court successfully”.

Unlawful action in Article 1365 of the Civil Code initially contained a narrow definition that unlawful action is an action that violates legal rights and obligations according to the law, or in other words unlawful action (*onrechtmatigedaad*). The definition is significantly affected by the view of Hoge Raad in the famous case of *Lindenbaum vs. Cohen* so, today the definition of unlawful is expanded to every action which violates propriety, caution, and decency in the relation among members of the society and with other people’s property<sup>21</sup>. Hoffman explains that an unlawful action must have four elements, i.e.<sup>22</sup>:

- a. Someone must perform the action;
- b. Action must be against the law;
- c. Action must incur damage on someone else);
- d. Action is due to mistake which can be blamed on them).

Regarding the corporate action which has been performed by the BOD and BOC of SOE, if the corporate action doesn’t generate revenue as expected or even incurs loss, in the view of Law Enforcers, the element of unlawful action and abuse of power can be references whether the loss due to corporate action is purely corporate action or action which harms state finances. Based on the elements of state loss adopted by the Law Enforcers, not all losses on state finances (whether state finances which aren’t separated or separated state finances in SOE/ROE) are categorized as state loss, unless the loss is caused by unlawful action, either intentionally or negligently.

In the view of the Ministry of SOE and SOE managers, the loss happening in SOE doesn’t automatically cause state loss, as long as the loss doesn’t reduce the equities of the company or make the equities smaller than the capital transferred by the government. Because the separated assets are capital, as long as the capital invested by the State in the SOE doesn’t diminish, then it doesn’t cause state loss, because the state financial record is also not diminished. State loss only happens if the loss in SOE causes the equity value of the capital transferred by the Government in the form of shares is reduced.

From a business perspective, company loss can’t be assessed per transaction and be declared as fraud. The assessment of whether the SOE experiences a loss or not can only be

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<sup>19</sup> R. Soebekti and R. Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata* (Jakarta: Pradnya Paramita, 2004), 346.

<sup>20</sup> M. A. Moegni Djojodirdjo, *Perbuatan Melawan Hukum* (Jakarta: Pradnya Paramita, 2009), 17.

<sup>21</sup> Rosa Agustina, *Perbuatan Melawan Hukum* (Jakarta: Fakultas Hukum Universitas Indonesia, 2008), 281.

<sup>22</sup> Komariah Emong Sapardjaja, *Ajaran Sifat Melawan Hukum Material Dalam Hukum Pidana Indonesia* (Bandung: P.T. Alumni, 2012), 284.

done at the end of fiscal year. In other words, a loss in a business transaction is a company loss that can't be called state loss yet. However, after the losses are accumulated at the end of the fiscal and are found to cause the equities of the company to be under the transferred capital, the company loss can be referred to as state loss. Then, the state loss can be investigated to see whether it's caused by unlawful action or purely business risk.

### **3.2 Legal Policy in Regulating the Concept of Future Value in Determining State Financial Loss**

Future Value is the value in the future of an amount of money in the present or a series of payments which is evaluated using a certain interest rate. Money value in the future (Future Value) is determined by certain interest rate in effect in financial market. The higher the interest rate, the higher the money value in the future. Therefore, investors' mindset and behaviors rely on interest rates. If the interest rate is high, they will lend money or deposit money, and if the interest rate is low, they will borrow money for business activities.

However, just as a decision making doesn't always yield maximum result, corporate action also has business risks in the forms of loss and/or not achieving returns as initially calculated. As a decision, corporate action is often 'bloody' to start to produce future value or value added in the future.

According to Lawrence J. Gitman as quoted by Moh. Benny Alexandri in *Manajemen Keuangan Bisnis*, time value of money is defined as

"Money that the firm has in its possession today is more valuable than money in the future because the money it now has can be invested and earn positive return".

The money we currently have will be more valuable because the current money already can be used, thus able to generate positive benefits<sup>23</sup>.

According to Sutrisno, there are two configurations of the concept of the value of money (Time Value of Money), so the concept of time value of money can be separated into<sup>24</sup>:

- a) Future value
- b) Present value

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<sup>23</sup> Moh. Benny Alexandri, *Manajemen Keuangan Bisnis Teori Dan Soal* (Bandung: Alfabeta, 2008), 53.

<sup>24</sup> Sutrisno, *Manajemen Keuangan: Teori, Konsep Dan Aplikasi* (Yogyakarta: Penerbit Ekonisia, 2000), 111–114.

The concept of Future Value is closely related to policy in investment. The investment policy is related to the future, but the assessment of the benefit is performed in the present. Therefore, in particular net income of investment which will be received in the future must be valued now, whether it's received once or gradually, by using the calculations above.

Revenue in the future is essentially net cash flow from investment which will consist of project cost/initial investment (initial outlays). The cost covers costs to get investment and investment costs, as well as working capital to finance the initial operation of the investment project.

- a) Cash flow and cash outflow during the investment project.
- b) The residual value of the investment project.
- c) Other cash inflow and cash outflow outside of the implementation of the investment project.

In general, the future value can be defined as value of money which will be received in the future from an amount of capital invested by someone with certain interest rate, or can also be defined as a business plan performed in the present with the prediction that it will bring profit in the future.

As an organization which accommodates economic activities, Company Organs, especially BOD, must be able to make breakthroughs, updates, and effort to seize opportunities calculatedly in facing business risks, because a business in certain condition can generate profit and can also suffer a loss. The paradigm of the function of SOE as an extension of the State which is performed based on the business judgment rules, is an adequate foundation to participate in every business opportunity, including performing business activities (which contain Future Value aspect) which could benefit the Company.

To faces the business world which becomes more open and competitive, corporate action which contains the Future Value aspect must be able to be formulated in a planned and measured way, as well as performed professionally. The principles of GCG can't be put aside. The process and mechanism of the implementation should meet the stipulations of the legislations and business ethics which reflect transparency, accountability, responsibility, independence, and fairness. Therefore, Future Value can be applied in the business activities of SOE as long as it's entirely aimed for the interests of the Company consistent with the purposes and objectives of the Company, as well as consistent with policies which are considered appropriate within the limits set by Legislations in effect and articles of association. Some of the reasons for the importance of regulatory arrangement in Indonesia are<sup>25</sup>: 1) Hyper-regulation; 2) Conflicting; 3) Overlapping; 4) Multi interpretation; 5) Inconsistency; Ineffective; 7) Creating unnecessary burden; 8) Creating high-cost economy.

In order to solve today's problems, President Jokowi in the Closed Meeting in the Presidential Office in 7 January 2017 confirms and instructs legal reform to not only touch the downstream sectors related with public services, but also the upstream sectors related with regulatory reform, procedure, and regulatory arrangement which must be the priorities of legal reform today<sup>26</sup>.

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<sup>25</sup> Arfan Faiz Muhlizi, "Penataan Regulasi Dalam Mendukung Pembangunan Ekonomi Nasional," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 6, no. 3 (December 18, 2017): 355, <https://rechtsvinding.bphn.go.id/ejournal/index.php/jrv/article/view/191>.

<sup>26</sup> *Ibid.*

Formation of law is a part of activities in regulating a society which consists of associations of individual humans with all their dimensions<sup>27</sup> so that designing and forming law which is acceptable for the general public is a difficult task. The difficulty comes from the reality that forming law is a form of communication between the stipulating institution, i.e. legislative power holders, and the society in a country<sup>28</sup>.

Difficulties in forming law are now more significant in Indonesia which facing various social problems based on multidimensional structural and cultural issues. In reality, law formation today and in the future will keep increasing as a response to the demands of the society as the development and condition of the society become increasingly complex<sup>29</sup>.

Law formation will follow the social-political structure of each country. In countries that follow the authoritarian political configuration, the legal establishment will show authoritarian characteristics as well. Meanwhile, when the process of legal establishment takes place in the context of social-political structure of a democratic country, there will be compromises in conflicts of different values and interests in the society<sup>30</sup>.

For better regulation of future value transaction policy and to meet legal certainty aspect, stakeholders and shareholders must have the same understanding at the level of the legislators and the level of the executors of regulation, so all parties, understand the rules in managing SOE as a state business entity.

SOE Persero is essentially an LLC, so all stipulations and principles apply to an LLC SOE Persero. Vision and mission of SOE are inseparable from vision and mission of the State as the forming body. Similarly, the corporate action it performs can't purely be business action. The business performed by SOE also contains "Government request". For example, the construction of telecommunication facilities by PT Telkom Indonesia (Persero), Tbk in remote areas contains the vision and mission of the Government which are delegated to them to perform.

In this case, SOE can perform corporate actions that can be categorized into two categories. First, corporate action which is performed purely as a business activity and second, corporate action which is performed to implement the vision and mission of the Government which must be achieved. Corporate action by Company may not be performed thoughtlessly by BOD. Every action must refer to provisions of legislation and Company regulations in the Articles of Association of the Company. This is attempted to be implemented by the principle of GCG which is currently required by Government to be implemented in private and SOE Companies.

Basically, business decision made by BOD, in this case SOE, has significant impacts on company performance. Good company performance can't generate profit in terms of revenue and value of the company. A company with good performance can improve its value in the present and future, or also referred to as future value. Future value of a company can be

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<sup>27</sup> Satjipto Rahardjo, "Penyusunan Undang-Undang Yang Demokratis.," in *Seminar "Mencari Model Ideal Penyusunan Undang-Undang Yang Demokratis Dan Kongres Asosiasi Sosiologi Hukum Indonesia" 15-16 April 1998* (Semarang: Fakultas Hukum Universitas Diponegoro, 1998), 3-5.

<sup>28</sup> Pierre Andre Cotte, *The Interpretation of Legislation in Canada*, 2nd ed. (Quebec: Les Editions Yvon Balais Inc., 1991), 4.

<sup>29</sup> Roman Tomasic, *Legislation and Society in Australia* (New South Wales: The Law Foundation of New South Wales, 1979), 9.

<sup>30</sup> Anis Ibrahim, *Legislasi Dan Demokrasi: Interaksi Dan Konfigurasi Politik Hukum Dalam Pembentukan Hukum Di Daerah* (Malang: In-TRANS Publishing, 2008), 104.

seen from the growth of share value of the company in the future<sup>31</sup>. High future value benefits company Shareholders. In this case, the major Shareholders of SOE is the Government of the Republic of Indonesia.

According to a source in the Ministry of SOE, Future value isn't a mistake or truth because, future value is a business planned implemented in the present to generate profit in the future. In calculating business prediction and future value of a corporate action, decision making should be considered and performed well, meaning it shouldn't violate the legislations and Articles of Association of the Company. BOD must show that what they do isn't a moral hazard and there is prudence factor as regulation by the LLC Law. As more detailed technical rule, a Company can make a SOP to be the basis of every activity and/or decision making. Corporate action taken by the BOD must not contain bad intention and perform with caution. For example, before taking an action, the BOD can appoint an independent consultant, e.g., technical, business, legal, and other professionals, to perform a study and provide opinion related to the corporate action. Directions from independent consultants can be inserted in SOP. The appointment of independent consultant also must be inserted in the Company's SOP as an implementation of the prudential principle. If after all prudential steps are taken, Company still suffers a loss, it's called business loss.

SOP could be one of the keys to the implementation of the prudential principles of the BOD and the Board of Commissioners. Besides making SOP which contains the direction of an independent consultant, all actions to be taken should get legal opinions from the State Attorney or Civil Deputy Attorney General and State Administration to see whether the corporate action is relatively safe to take.

To support this, a conception must be adopted by all parties as a part of the policy of forming better legislation in state assets management, especially in managing state business in the form of SOE, so that in the future in the management of SOE business transaction which expect the greatest profit (future value) and to secure the BOD in case of loss due to lawful actions consistent with the doctrine of business judgment rules which is explicitly regulation in the LLC Law. The Author suggests a concept as the final conclusion of the research discussion that in the future, in the context of future value transaction performed by the BOD of SOE (LLC) incorporate action performed for the interests of the company, an action of the BOD which in representing SOE can't be considered state financial loss if the value of the business loss is smaller than the profit generated by the SOE and doesn't affect state capital transferred to the SOE.

Therefore, an action by the BOD in representing SOE can't be considered state financial loss if the value of the business loss is smaller than the profit generated by the SOE and doesn't affect state capital transferred to the SOE. Using the policy formulation, all parties, including the Law Enforcers, Practitioners and Academicians have the same understanding about when SOE loss can be viewed as a state financial loss or business loss.

For example, PT A (SOE) receives state capital participation in the amount of 100 billion rupiah, so that the State becomes the largest shareholder of SOE, having more than 51% of shares. In case some business transactions and corporate actions performed by the SOE manage to generate a profit of 150 billion, while in a business transaction as a part of corporate action, the SOE suffers a loss of 130 billion, the author believes that the transaction can't be

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<sup>31</sup> Ballow, Burgman, and Molnar, "Managing for Shareholder Value: Intangibles, Future Value and Investment Decisions," 26–34.

considered a state financial loss because principally the state assets which is invested in the SOE don't diminish. Moreover, the transactions performed by SOE still generate profit, so that principally the SOE still gets a profit of 20 billion despite suffering a business transaction loss.

This concept will bring great benefit for the State and BOD of SOE because:

1. BOD can move freely in generating profit for SOE and performing business transaction to achieve SOE objectives without worrying about unclear state finances.
2. State can see whether there is any state financial loss from the amount of decrease in the state capital from the total capital previously transferred by the State to the SOE.

#### 4. CONCLUSION

The policy of formation of legislations on regulating the concept of future value should be made so in the future, the context of future value transaction performed by the BOD of SOE (LLC) incorporate action performed for the interests of the company can't be considered as a state financial loss if the value of the business loss is smaller than the profit generated by the SOE and doesn't affect state capital (state assets) transferred to SOE. Also, if any loss happens because of the actions of BOD, it must be investigated first to see whether the loss is caused by violation of the law, like enriching oneself, others, or a corporation, or purely business risk taken by BOD using Good Corporate Governance. Through the formulation of the policy, all parties can have the same view whether SOE loss is state financial loss or business loss.

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