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THE APPOINTMENT OF SOE'S IN THE CONSTRUCTION SECTOR BY FAST-TRACKING DEVELOPMENT OF TOLL ROADS REGULATION

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ABSTRACT

In the year 2020 many obstacles and disadvantages to toll road infrastructure development has resurfaced. From this phenomenon here and there in 2020, PT. Waskita Karya (Persero) Tbk written down poor achievement which was marked by a net loss of IDR 7.38 trillion. The intention of this research is to study privatization of State-Owned Enterprises (SOEs) under "Persero" model. The objective of this study is to seek what factors cause obstacles and losses to such SOEs. The research method is normative juridical. The findings show that there are two types of SOE, one of which is privatized. The legal problem is there are private companies as a shareholder of the SOEs whilst the government responsible for the potential loss of the project. The government has had plans to build toll roads outside of Java, which include speeding up the construction of toll roads in Sumatra. In 2014 the President has given an assignment to such SOEs then creates various obstacles and losses for the Government. The conclusion of this research is how to reconstruct understanding upon SOEs, Public Private Partnership concept, as well as interpretation upon exclusion regarding SOEs under Monopoly and Unfair Competition Law.

A. INTRODUCTION

For the time being inward Indonesia, Public Private Partnership concept (PPP) taking part in infrastructure development, was initially selected as an option by the government because infrastructure development stagnated during the monetary crisis. The unstable domestic monetary conditions at that time resulted in the flight of capital abroad. In the meanwhile when the condition of Indonesia was getting worse as a result of the crisis, President Soeharto published a Decree of President so that private sector could take part in the construction of toll roads.[1] However, these attempts had initially

[1] Decree of President Number 7 of 1998 concerning the Cooperation between the Government and Private Business Corporation taking part in Infrastructure Development and/or Management. Such Presidential Decree has been revised several times, first by Regulation of

failed.[2] Funding for infrastructure projects was under the responsibility of the government. Attempts were made to allocate funds to balance the fulfillment of the need for infrastructure facilities with the rate of population growth. However, because the government was unable to meet all the funding needs due to limited government budgets in the government revenue as well as expenses budget (*Anggaran Pendapatan dan Belanja Negara/*APBN), participation from private sector was expected.[3]

Taking part in 2014, the Government published law and regulations featuring in the framework of fast-tracking the development of toll roads in Sumatera.[4] In this case the Government appointed PT. Hutama Karya (*Perusahaan Perseroan*/Persero) (PT. HK) carry out the toll road concessions upon 24 toll road sections in Sumatera of which economically feasible however generaly are not feasible financially to be funded.[5] For the assignment of toll road concessions in Sumatera, PT. HK was given a concession period of 40 years. The realization of the business plan depends on the realization of vehicle traffic and the realization of toll road tariffs stipulated by Ministry Office of Public Works and Public Housing.

The obstacles and disadvantages to toll road infrastructure development has occurred since 2020. The Corruption Eradication Commission (*Komisi Pengawasan Korupsi/*KPK) found that the potential loss to the state from the construction of the toll road. In terms of governance, the KPK has found corruption-prone points, such as weak accountability for toll road concession auctions, conflicts of interest, and Toll Road Company (*Badan Usaha Jalan Tol*/BUJT) that do not carry out their obligations. Another problem is toll road governance and the regulatory planning process for toll road

President Number 67 of 2005 as to Cooperation between Government and Business Entities in Provision of Infrastructure, and finally by Regulation of President Number 13 of 2010 as to Amendments to Regulation of President Number 67 of 2005 as to Cooperation between Government and Private Business Corporation in Provision of Infrastructure and finally regulated in Regulation of President Number 38 of 2015 as to Cooperation between Government and Private Business Entities in Provision of Infrastructure.

2 Dissertation of Iwan Erar Joesoef, *Public Private Partnership Model: Study of the Application of Build Operate Transfer Contracts in Toll Road Concession Agreements in Indonesia, Doctoral Program in Law, Faculty of Law, University of Indonesia, 2011.*

3 Don. Wallace, "Private Participation in Infrastructure and the Provision of Public Services-Inevitable and Difficult," *Transnat'l Law.* 18 (2004): 117. See too, Intan Zania, Fokky Fuad, Yusup Hidayat, and Aris Machmud, "Penugasan Pembangunan Jalan Tol Trans Sumatera Pada BUMN," *Binamulia Hukum* 12, no. 2 (2023): 444.

4 Presidential Regulation Number 100 of 2014 has been amended by Presidential Regulation Number 117 of 2015 concerning Amendments to Presidential Regulation Number 100 of 2015 concerning the Acceleration of Toll Road Development in Sumatra.

5 Agus Riyanto, "Penugasan Badan Usaha Milik Negara Dalam Pengusahaan Jalan Tol (Studi: Penugasan PT Hutama Karya (Persero) Dalam Pengusahaan Jalan Tol Di Sumatera)," (PhD diss., Universitas Pembangunan Nasional Veteran Jakarta, 2021), 23. See too, Bima Gavian Cahyo, Fokky Fuad, and Suartini Suartini, "Perlindungan Hukum Bagi Pengguna Jalan Tol Oleh PT. Hutama Karya (Persero)," *Binamulia Hukum* 13, no. 1 (2024): 112.

management, the tender documents do not contain sufficient information on the technical conditions, potential conflicts of interest where construction investors are dominated by state-owned contractor, so, there was a conflict of interest in the process of procuring construction services.[6] In 2014, the Government in order to the development of Regions in Sumatra established regulations in the context of accelerating the construction of toll roads in Sumatra.[7] In this case the Government gave the assignment to PT. HK to carry out toll road concessions on 24 toll road sections in Sumatra that are economically feasible but generally are not financially feasible.[8]

In the operation towards toll roads, traffic risk becomes the risk of the business entities that develop them. Realization of return on investment plus reasonable profits is highly dependent on traffic realization, and in practice, fulfillment of minimum toll road service standards by BUJT is also highly dependent on traffic realization. On February 2020, Indonesian Government issued the regulation regarding infrastructure financing through limited management rights. As such, in carrying out the government assignment to PT. HK, the government needs to consider providing traffic realization guarantees in the business plan, to ensure that PT. HK as BUJT on 24 toll roads taking part in Sumatera can provide reliable toll road services to the public in accordance with the provisions of the Minimum Toll Road Service Standards. If traffic realization exceeds traffic calculations in the business plan, PT. HK is required to deposit excess revenue realization to the state treasury.[9]

Since 2020, toll road infrastructure development has faced governance and financial challenges. The KPK identified state losses of IDR 4.5 trillion and corruption-prone areas, including weak accountability in concession auctions, conflicts of interest, inadequate tender documents, and failure of BUJT to fulfill obligations. By 2016, toll roads reached 2,923 km with investment of IDR 593.2 trillion.[10] The toll road development scheme lacked consideration of

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[6] Achmad Dwi Afriyadi, "KPK Finds Potential State Losses of IDR 4.5 T from Toll Roads" in full," *Detikfinance*, April 21, 2023 https://finance.detik.com/infrastruktur/d-6605614/kpk-temukan-potential-kerugian-negara-rp-45- t-from-wake-toll. Accessed on July 20, 2026.

[7] Presidential Regulation Number 100 of 2014 has been amended by Presidential Regulation Number 117 of 2015 concerning Amendments to Presidential Regulation Number 100 of 2015 concerning the Acceleration of Toll Road Development in Sumatra.

[8] Agus Riyanto, "Penugasan Badan Usaha Milik Negara Dalam Pengusahaan Jalan Tol (Studi: Penugasan PT Hutama Karya (Persero) Dalam Pengusahaan Jalan Tol Di Sumatera)," (PhD diss., Universitas Pembangunan Nasional Veteran Jakarta, 2021), 25.

[9] Intan Zania, Fokky Fuad, Yusup Hidayat, and Aris Machmud, "Penugasan Pembangunan Jalan Tol Trans Sumatera Pada BUMN," *Binamulia Hukum* 12, no. 2 (2023): 445. See too, Hamzah, and Liber Sonata Depri, "tinjauan yuridis perjanjian konstruksi pembangunan jalan tol antara Pt. Hutama Karya (Persero) dan Pt. Waskita Karya (Persero) Tbk," *Pactum Law Journal* 1, no. 03 (2018): 219.

[10] Achmad Dwi Afriyadi, "KPK Finds Potential State Losses of IDR 4.5 T from Toll Roads" in full," *Detikfinance*, April 21, 2023 https://finance.detik.com/infrastruktur/d-6605614/kpk-temukan-potential-kerugian-negara-rp-45- t-from-wake-toll. Accessed on July 20, 2026.

technical feasibility and land acquisition cost-sharing. Tender documents contained insufficient technical information, while 61.9% of construction investors were SOEs, creating potential conflicts of interest in construction procurement. These problems were accompanied by financial difficulties at PT Waskita Karya (PT Wika), which recorded a loss of IDR 7.38 trillion in 2020 due to delays in divesting five toll road sections.[11] Its assets carried credit burdens of IDR 50–54 trillion, while debt reached IDR 90 trillion in 2019.[12]

Appearing in 2005, the Government set out to seriously carry out the Public PPP concept. It began by means of bearing of *the Indonesia Infrastructure Summit I* in the middle of January 2005 (IIS I, 2005). In those circumstances, the Government proposed 91 PPP assignments to investors.[13] Nevertheless, the carrying out of the PPP concept encountered many difficulties, one of which is land acquirement.

To oversee these projects so that they are worthy of cooperation requires very hard work from the Government. To further facilitate private participation in infrastructure in accordance with the Instruction of President Number 5 of 2008 as to the Focus of the Economic Program (2008-2009), National Development Planning Bureau (*Badan Perencanaan dan Pembangunan Nasional*/Bappenas) announced a list of projects to be developed under the PPP scheme. This effort is part of the Government's commitment to transparency and active participation of stakeholders in the context of implementing development plans.[14]

From the times past of the toll road infrastructure development appearing in Indonesia, it can be observed that there have been many regulatory changes. In such circumstances, there were the legal problem such as toll road organization and the regulatory planning process for toll road management. In fact that KPK has found corruption-prone points. The government's decision to accelerate construction of the Trans Sumatra toll road based on the results of Koica study contained in the Koica report, Final Report: The Establishment of A Master Plan For The Arterial Road Network in

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[11] Suhaiela Bahfein, and Hilda B Alexander, "Waskita Karya sells all toll roads until 2025, this is the reason," *Tempo.Co*, April 21, 2023. https://swa.co.id/swa/trends/waskita-karya-jual-all-jalan-tol-Jadi-2025-ini alasannya#:~:text=PT%20Waskita%20Karya%20(Persero)%20Tbk,IDR%2050%20 to%2054%20trillion. Accessed on July 20, 2026.

[12] Suhaiela Bahfein, and Hilda B Alexander, "Waskita Karya sells all toll roads until 2025, this is the reason," *Tempo.Co*, April 21, 2023. https://swa.co.id/swa/trends/waskita-karya-jual-all-jalan-tol-Jadi-2025-ini alasannya#:~:text=PT%20Waskita%20Karya%20(Persero)%20Tbk,IDR%2050%20 to%2054%20trillion. Accessed on July 20, 2026.

[13] Iwan E. Joesoef, *Perjanjian Pengusahaan Jalan Tol (PPJT) Sebagai Kontrak Berdimensi Publik antara Pemerintah dan Swasta (Investor) dalam Proyek Infrastruktur*, (Jakarta: BP-FHUI, 2006), 84.

[14] State Ministry of National Development Planning/National Development Planning Bureau - Bappenas (2009). *PPP Book: Public – Private Partnerships, Infrastructure Projects in Indonesia, Republic of Indonesia*. Jakarta: Bappenas.

Sumatra, Public Works Ministry (*Kementerian Pekerjaan Umum dan Perumahan Rakyat*/PUPR), July 2010.[15] The results of economic analysis according to Koica for the Trans Sumatra toll road in general economic feasibility is still low so Koica in his report did not do financial analysis. This means that the government failed to carry out the Legal Transplant process for a concept originating from another country. Reflecting on the past of toll road infrastructure progress taking part in Indonesia carried out by the government using the PPP model, the question that must be answered is what factors cause the obstacles to the expansion of toll road infrastructure with the PPP model. For this reason, this study examines the legal issues and reconstructs understanding concept of PPP.

Although Indonesia has established a comprehensive regulatory framework for Public Private Partnership (PPP), including regulations governing infrastructure provision and toll road development, the existing framework does not fully address the challenges arising from the adoption of a concept originally developed in different legal and institutional contexts. The gap is particularly evident in the implementation of toll road PPP projects, where regulatory requirements have not always been effectively aligned with Indonesia's socio-economic, political, and institutional conditions. This indicates the need to examine whether the existing regulatory framework is sufficiently adapted to the Indonesian context.

Previous studies have examined PPP in Indonesia mainly from the perspectives of infrastructure financing, toll road development, government assignments, and project implementation. However, limited attention has been given to the legal transplant process underlying the adoption of the PPP model and to whether the transplanted concept is compatible with Indonesia's legal, socio-political, cultural, and economic conditions. Therefore, there remains a research gap concerning how the PPP concept should be adapted and reconstructed to address the specific challenges of toll road infrastructure development in Indonesia. This study offers a novel perspective by examining the PPP model through the concept of legal transplant and proposing its adaptation to Indonesia's specific legal and socio-economic context. Rather than merely evaluating the implementation of PPP, this study focuses on how a foreign-derived PPP concept can be reconstructed to achieve greater compatibility with Indonesia's regulatory framework and conditions of toll road infrastructure development.

Accordingly, this study aims to examine the legal transplant of the PPP concept in Indonesia, identify the factors that hinder its implementation in toll road infrastructure development, and formulate an appropriate approach for

[15] Koika, *Final Report: The Establishment of A Master Plan For The Arterial Road Network In Sumatra Island* , Ministry PUPR, July 2010.

adapting and reconstructing the PPP model to Indonesia's legal, socio-political, cultural, and economic conditions.

This PPP model regarding construction and development toward toll road infrastructure taking part in Indonesia must be made to order to the socio-political, cultural and economic conditions in the Legal Transplant process. This research objective is to understand how government transplanted the concept from foreign country. In this circumstance, how government adopt the concept of PPP from foreign country? and how should government to adopt the PPP concept promptly?

B. RESEARCH METHODS

This research employs a normative juridical approach to examine the legal issues surrounding the implementation of Public Private Partnership (PPP) in toll road infrastructure development in Indonesia. The research uses a statute approach and a case approach. The statute approach is used to examine the consistency and adequacy of the regulations governing PPP, toll road concessions, infrastructure development, and the appointment of State-Owned Enterprises (SOEs). Meanwhile, the case approach is used to analyze the obstacles and losses arising from the implementation of the PPP model, particularly the problems associated with the assignment of SOEs as Toll Road Business Entities (BUJT), including the case of PT Waskita Karya. This approach is consistent with the normative legal research framework employed in the study, which draws conclusions deductively from applicable legal norms and relevant cases.

The data collection method is conducted through documentary and library research by collecting and examining legal regulations, academic literature, government documents, institutional reports, and relevant case-related information. The research primarily relies on statutory materials governing toll roads, PPP, infrastructure financing, SOEs, and business competition. The study also considers government and institutional documents concerning toll road development, including reports relating to the development of toll roads in Indonesia and the implementation of the Trans-Sumatra toll road project. The case of PT Waskita Karya and the problems identified in toll road development are examined as empirical phenomena supporting the normative analysis.

The legal materials consist of primary, secondary, and tertiary legal materials. Primary legal materials include the 1945 Constitution of the Republic of Indonesia, Law Number 38 of 2004 concerning Toll Roads, Law Number 19 of 2003 concerning State-Owned Enterprises, Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, Government Regulation Number 15 of 2005 concerning Toll Roads, and Presidential Regulation Number 38 of 2015 concerning

Government and Business Entity Cooperation in Infrastructure Provision. The regulatory framework has developed through several instruments, including Presidential Regulation Number 100 of 2014 and Presidential Regulation Number 117 of 2015 concerning the acceleration of toll road development in Sumatra. Secondary legal materials comprise books, scholarly articles, dissertations, government reports, and other academic writings concerning PPP, legal transplant, toll road concessions, and SOE governance. Tertiary materials include legal dictionaries, legal encyclopedias, and supporting reference materials.

The collected materials are analyzed qualitatively and deductively by identifying, interpreting, and comparing relevant legal norms with the circumstances revealed through the cases and supporting documents. The analysis focuses on whether the existing PPP regulatory framework is compatible with Indonesia's legal, socio-political, cultural, and economic conditions. Particular attention is given to the concept of legal transplant, considering that the PPP model originated from different legal and institutional contexts and therefore requires adaptation to the receiving legal system. The analysis ultimately seeks to identify the factors causing obstacles and losses in toll road PPP implementation and to formulate an appropriate reconstruction of the PPP model for Indonesia.

C. DISCUSSION

1. Government Adoption and Adaptation of Foreign PPP Concepts in Indonesia

PT. HK is a SOEs which was established based on the Government Regulation Number 61 of 1961 (March 29, 1961) under the name PN. Hutama Karya. The company status modified to a Limited Liability Company refer to Regulation of Government Number 14 of 1971 related to Limited Liability Company Deed Number 74 (15 March 1973), in conjunction with Deed of Amendment Number 48 (8 August 1973), in conjunction with Deed of Amendment Number 85 dated 29 April 2013, with 100% share ownership by Government of the Republic of Indonesia as well as Ministry of State-Owned Enterprises as Proxy of Shareholders. However, not all SOEs are 100% owned by the Government; some SOEs are controlled by private investors. The list of construction SOEs in Indonesia that are also assigned to toll road concessions (BUJT) and the composition of shareholders, can be seen below, among others:[16]

[16] Hamzah, and Liber Sonata Depri, "tinjauan yuridis perjanjian konstruksi pembangunan jalan tol antara Pt. Hutama Karya (Persero) dan Pt. Waskita Karya (Persero) Tbk," *Pactum Law Journal* 1, no. 03 (2018): 221.

Table 1. Share Ownership of SOE Contractors (Government)

No	Company name	Shareholders
1	PT. Amarta Karya (Persero).	100.00% Indonesian Government.
2	PT. Brantas Abipraya (Persero).	100.00% Indonesian Government.
3	PT. Hutama Karya (Persero).	100.00% Indonesian Government.
4	PT. Istaka Karya (Persero).	7.66% Indonesian Government, Creditors 92.34%.
5	PT. Nindya Karya (Persero).	1.00% Indonesian Government, PT. Company Asset Manager (Persero) 99.00%.
6	Housing Development Housing National.	100.00% Indonesian Government
7	PT. Adhi Karya (Persero) Tbk.	51.00% Indonesian Government, 49.00% Public.
8	PT. Housing Development (Persero) Tbk.	51.00% Indonesian Government, 49.00% Public.
9	PT. Waskita Karya (Persero) Tbk.	66.04% Indonesian Government, 33.94% Public.
10	PT. Wijaya Karya (Persero) Tbk.	65.05% Indonesian Government, 34.95% Public.

Refer to the table 1, apart from PT. HK, there are four other SOEs whose shares are entirely owned by the state that allowed them to be assigned the progress of 24 toll roads in Sumatera by Government. Government task to PT. HK of development of 24 toll roads taking part in Sumatera was officiated through Decree of Presidential No 100 of 2014 as to the Acceleration of Constructing and Building Toll Roads in Sumatera, last modified with Decree of President Number 117 of 2015. Based on Regulation of Government Number 43 of 2013 concerning Second Amendment Regulation of Government Number 15 of 2005 concerning Toll Roads and Regulation of Government Number 49 of 2011 concerning Amendments to Regulation of Government Number 1 of 2008 concerning Investment Government. The assignment includes funding, technical planning, implementation construction, operation. and maintenance.[17]

The government's decision to accelerate construction and development of Trans Sumatera toll road refer to results upon Koica study, Final Report: The Establishment of a Master Plan for the Arterial Road Network in Sumatera, Public Works Ministry Office (*Kementerian Pekerjaan Umum dan Perumahan*

[17] Agus Riyanto, "Penugasan Badan Usaha Milik Negara Dalam Pengusahaan Jalan Tol (Studi: Penugasan PT Hutama Karya (Persero) Dalam Pengusahaan Jalan Tol Di Sumatera)," (PhD diss., Universitas Pembangunan Nasional Veteran Jakarta, 2021), 26.

Rakyat,/PUPR), July 2010.[18] Refer to results of economic analysis according to Koica for the Trans Sumatera toll road in general economic feasibility is still low, so that the Koica report did not include a financial analysis. According to the Regulations of Minister of Public Works Number 6/PRT/M/2010 article 8 paragraph 2, the project is declared feasible if the value of the financial feasibility of the project was at least 4% (four percent) above the average interest rate on government bank loans. Based on this consideration, the government was still implementing its construction of toll roads with assignment schemes to SOE even though the level of eligibility the economy was still not optimal. This was done in order to accelerate the economic growth in Sumatra as stated in the list of considerations of the issuance Regulation of President Number 100 of 2014 concerning Acceleration of Toll Road Construction and Development taking part in Sumatera.[19]

Concession of toll roads can be carried out in the model of build, operate, and transfer (BOT), operation and maintenance contracts (O&M), or other forms as approved by the Minister.[20] The intended form of BOT is a business entity that is required to build toll roads and/or facilities, including financing, which is sustained with operation and maintenance within a definite stage of time and has right to collect service usage fees from users to return investment capital, operating and maintenance costs and profits reasonable manner,[21] and afterward the expiry of the concession agreement must be surrendered to the Government without reimbursement of any costs. An O&M contract is a joint venture company obligated to make available operation and maintenance services within a definite period of time to operate or support the operation of a toll road section.[22]

The government divides toll road concession contracts into two categories based on investment feasibility. For toll roads that are economically viable but not yet financially profitable, the Government undertakes concession activities covering funding, technical planning, and toll road construction, while

[18] Koika, *Final Report: The Establishment of A Master Plan For The Arterial Road Network In Sumatera Island* , Ministry PUPR, July 2010.

[19] Agus Riyanto, "Penugasan Badan Usaha Milik Negara Dalam Pengusahaan Jalan Tol (Studi: Penugasan PT Hutama Karya (Persero) Dalam Pengusahaan Jalan Tol Di Sumatera)," (PhD diss., Universitas Pembangunan Nasional Veteran Jakarta, 2021), 28.

[20] Witon Adha Gantara, and Anas Lutfi, "Kajian Yuridis Asset Recycling BUMN (Studi Kasus Asset Recycling PT Hutama Karya (Persero)," *Unes Journal of Swara Justisia* 8, no. 2 (2024): 361. See too, Ikka Puspitasari, and Budi Santoso, "Perjanjian Kerjasama Pemerintah Dan Swasta Dengan Pola (Bot) Build Operate Transfer Dalam Pembangunan Jalan Tol (Studi Pembangunan Jalan Tol Semarang-Solo)," *Law Reform* 14, no. 1 (2018): 59.

[21] Yescombe, ER, *Public Private Partnerships: Principles of Policy and Finance,* 1 st Edition (Oxford: Elsevier Ltd., 2007), 99. See too, Lorenzo Marco, and Gunawan Djajaputra, "Pembatalan Perjanjian Bangun Guna Serah (Build Operate Transfer/BOT) Antara Pemerintah Daerah Kota Bogor Dengan Pihak Swasta (PT Pancakarya Grahatama Indonesia) Ditinjau Dari Sudut Kitab Undang-Undang Hukum Perdata," *Jurnal Hukum Adigama* 1, no. 1 (2018): 1639.

[22] Vinter, Graham D., *Project Finance – a Legal Guide* (London: Sweet & Maxwell, 1995), 37.

the private sector (toll road business entity) is responsible for operation and maintenance. For toll roads that are both economically viable and financially profitable, the private sector (toll road business entity) undertakes all concession activities, including funding, technical planning, construction, operation, and maintenance.[23]

The Toll Road Regulatory Agency (Badan Pengatur Jalan Tol, BPJT) data divides toll road concession contracts into three types of schemes based on investment feasibility, with reference to paragraph (2) of Article 43 of Law Number 38 of 2004 and Articles 19–23 of Government Regulation Number 15 of 2005. The first is the Build-Operate-Transfer (BOT) concession contract financing scheme, applied to toll road investment projects with a positive Financial Internal Rate of Return (FIRR). An example is the private-sector concession of the "Depok–Antasari" toll road section by PT Citra Waspphutowa.[24]

The second is the Design-Build-Operate (DBO) concession contract financing scheme, applied to toll road investment projects with a negative FIRR, such as the "Tanjung Priok Access" toll road section. The third is a concession contract with a co-financing scheme, in which financing is partially provided by the Government and partially by private investors for toll road projects with a marginal FIRR. An example of this scheme is the "Solo–Kertosono" toll road plan.[25]

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23 Hilman Muchsin, *Investasi jalan Tol-Memahami Pelaksanaan Structure, Feasibility, Business Competition and Investment Credit*, (Jakarta: BP-FHUI, 2007), 45. See too, Ikka Puspitasari, and Budi Santoso, "Perjanjian Kerjasama Pemerintah Dan Swasta Dengan Pola (Bot) Build Operate Transfer Dalam Pembangunan Jalan Tol (Studi Pembangunan Jalan Tol Semarang-Solo)," *Law Reform* 14, no. 1 (2018): 61.

24 Didik Mulyanto, Diaz Adiazma, Fitriani Nurza, Hilda Alatas, Nitta Ratnasari, Mochamad Agung Sasongko, and Juliawan Superani, "Laporan Kajian Tata Kelola BPJT dalam Penyelenggaraan Jalan Tol," *Kajian Tata Kelola Komisi Pemberantasan Korupsi (KPK)* (2022): 343. See too, Rina Rusfiantini, Yusup Hidayat, Suparji Suparji, and Aris Machmud, "Freies Ermessen BPJT Pada JTTS Dalam Perspektif Hukum Administrasi Negara: Studi Kasus PT. Hutama Karya (Persero)," *Binamulia Hukum* 13, no. 1 (2024): 151.

25 Nurdin Manurung, Head of the Toll Road Regulatory Agency, Regulation/Management of Toll Road Programs in Indonesia,_presented at the IAMPI Learning & Sharing Session XXVIII, Jakarta, July 23, 2009.

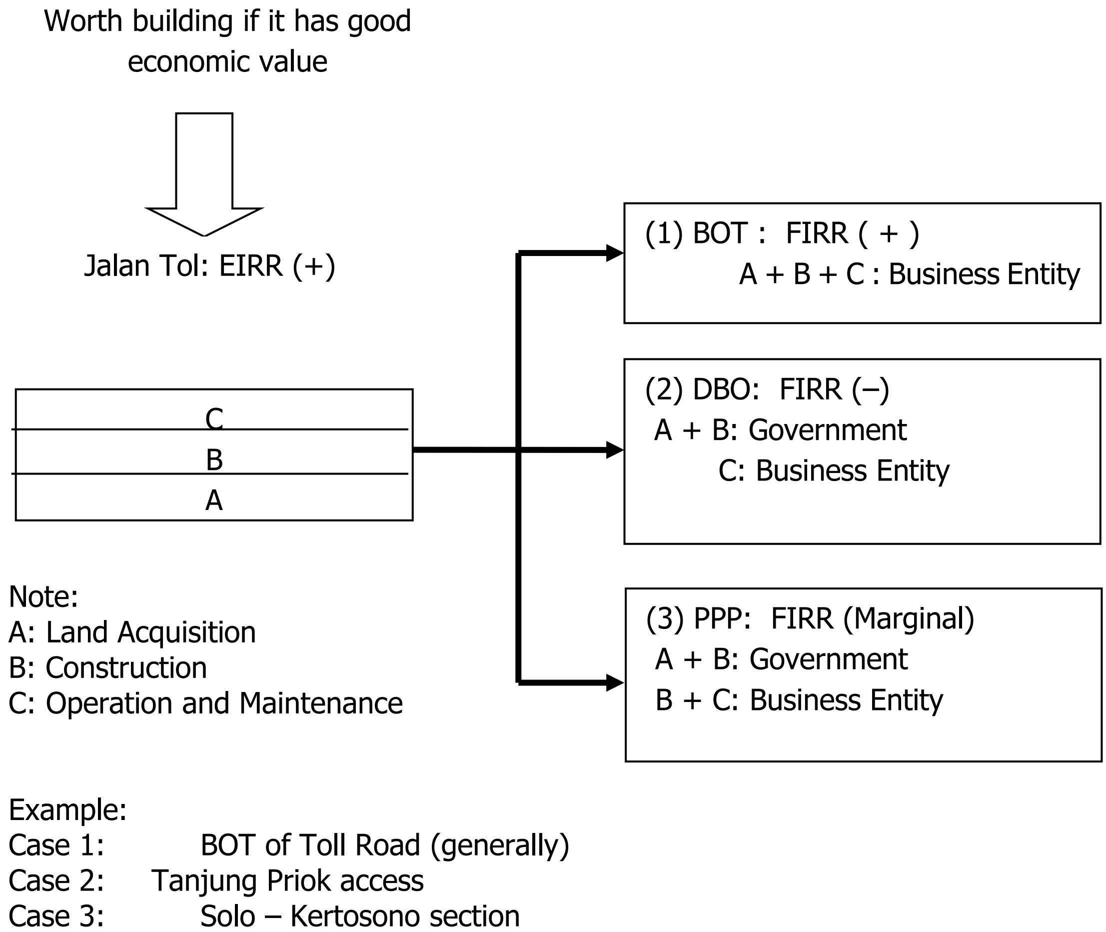

Figure 1. Toll Road Concession Scheme[26]

The figure 1 illustrates three toll road concession schemes based on the project's Financial Internal Rate of Return (FIRR). Projects with a positive FIRR are implemented through the Build-Operate-Transfer (BOT) scheme, in which the business entity handles land acquisition, construction, operation, and maintenance. Projects with a negative FIRR use the Design-Build-Operate (DBO) scheme, where the government is responsible for land acquisition and construction, while the business entity manages operations and maintenance. Meanwhile, projects with a marginal FIRR apply the Public-Private Partnership (PPP) scheme, involving shared responsibilities between the government and private sector. The figure also presents examples of each scheme, including general toll road BOT projects, Tanjung Priok Access, and the Solo–Kertosono section.

[26] Nurdin Manurung, Head of the Toll Road Regulatory Agency, Regulation/Management of Toll Road Programs in Indonesia,_presented at the IAMPI Learning & Sharing Session XXVIII, Jakarta, July 23, 2009.

Notes:
EIRR: *Economic Internal Rate of Return*
FIRR: *Financial Internal Rate of Return*

Case 3: Mention of the PPP scheme for Solo section Kertosono does not have a schematic name yet because of some of the segments Were built by the government (59.95 Km), while others by the private sector (119.05 Km).

With the issuance of Law Number 38 of 2004, opportunities are open for all private investors to participate taking part in construction and development toward toll roads in Indonesia with PPP concept.[27] After IIS I 2005, especially for toll road infrastructure, according to data from BPJT, private investors who won the toll road infrastructure investment procurement held by the Government and signed the PPJT recorded that there were 22 toll road sections to be built by private investors with the BOT pattern,while the other 4 toll roads will be built by the Government with the Design - Build - Operate (DBO) pattern.

The government itself has issued policies to support the risks that arise in building toll road infrastructure (government support). As a long term contract agreement*,* in legal and economic method, it is stated that the risks that arise are referred to as unforeseen contingencies*,* which Richard A. Posner calls mutual mistakes*,* while Robert Cooter and Thomas Ulen call them mutual mistakes about facts.[28]

A government is very much unlike a private company. The government holds a permanent interest in the transfer of assets or goods and services.[29] They are ultimately responsible for setting goals, seeing results delivered according to standards, and securing the public interest. As a consequence, when implementing service delivery to private sector, the executor of public sector investment procurement can still be held liable for many standpoints. Within conceptual framework, the hypothesis carried out by Mary M. Shirley and Lixin Colin Xu on how good contracts can improve the economic

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[27] Aris Machmud, "Penugasan Pembangunan Jalan Tol Trans Sumatera Pada BUMN," *Binamulia Hukum* (2024): 23.

[28] Richard A. Posner, *Economic Analysis of Law,* 5th edition (New York: Aspen Law & Business A Division of Aspen Publishers, Inc, 1998), 114. See too, Robert Cooter and Thomas Ulen, *Law and Economics,* 3rd edition (New York: Addison-Wesley Longman, Inc., 2000), 270.

[29] Diane. Howard, "Achieving a level playing field in space-related public-private partnerships: Can sovereign immunity upset the balance," *J. Air L. & Com.* 73 (2008): 723. See too, Lorenzo Marco, and Gunawan Djajaputra, "Pembatalan Perjanjian Bangun Guna Serah (Build Operate Transfer/BOT) Antara Pemerintah Daerah Kota Bogor Dengan Pihak Swasta (PT Pancakarya Grahatama Indonesia) Ditinjau Dari Sudut Kitab Undang-Undang Hukum Perdata," *Jurnal Hukum Adigama* 1, no. 1 (2018): 1641.

performance of government-owned enterprises is related to three problems, namely: information asymmetry, incentives, and commitment.[30]

In the Government's policy to support these risks, the Government divides them into three risk categories. The first is political risk*,* namely the risk posed by unilateral policies/actions/decisions from the Government which directly and significantly impact corporate financial losses. business, which includes risk of confiscation of interest in assets, changing of risk in laws and legal regulations, and restrictions of risk, currency conversions as well as prohibitions on return of funds. Secondis project performance risk*,* namely risks related to project implementation, which include location risk and operational risk. Third, demand of risk*,* is the risk that arising from lower demand for goods and services produced by cooperation project assignment compared to what was agreed upon.[31]

The risks that arise unexpectedly in the Ministerial Regulation (or unforeseen contingencies), as argued by Klaus Berger quoted in John Y. Gotanda, can be a solution or a further study in resolving disputes over responsibility for risk management that are not clearly regulated in the agreement, namely the need for an arbitration and renegotiation institution which must be included in the agreement clause.[32] For the implementation of this policy, the Government previously also formed a Risk Management Committee for Infrastructure Provision.

The Government's support is based on Government policy, namely through a Committee for Policy of Acceleration toward Infrastructure Development (*Komite Kebijakan Percepatan Pembangunan Infrastruktur,*/KKPPI) formed by the Government with a Regulation of President of Indonesian Republic. In this circumstance, it is explained how the legal regulations for the realization of the accelerated infrastructure development policy by the Government itself in supporting the application of the PPP concept, especially for toll road concessions by business entities. BPJT itself has tried to recognize the problems in the toll road industry. The BPJT Report "Toll Roads Development in Indonesia*"* identifies several problems in

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30 Mary M. Shirley, and Lixin Colin Xu, "Information, incentives, and commitment: an empirical analysis of contracts between government and state enterprises," *The Journal of Law, Economics, and Organization* 14, no. 2 (1998): 359.

31 Bima Gavian Cahyo, Fokky Fuad, and Suartini Suartini, "Perlindungan Hukum Bagi Pengguna Jalan Tol Oleh PT. Hutama Karya (Persero)," *Binamulia Hukum* 13, no. 1 (2024): 112. See too, Muhammad Insa Ansari, "Penugasan Pemerintah pada Badan Usaha Milik Negara Sektor Ketenagalistrikan Dalam Perspektif Hukum Korporasi," *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 4, no. 3 (2017): 6.

32 John Y. Gotanda, "Renegotiation and adaptation clauses in investment contract, revisited," *Vand. J. Transnat'l L.* 36 (2003): 1461.

the toll road industry.[33] First, land acquisition costs are borne by investors, while the timing and costs of land acquisition remain uncertain. Second, the lengthy land acquisition process reduces the concession period and consequently affects the level of financial feasibility. Third, land acquisition is affected by various factors, including the P2T (land acquisition team), land disputes, ambiguously interpreted regulations, and Law Number 5 of 1960 concerning Basic Agrarian Regulations (*Undang-Undang Pokok Agraria*/UUPA), which provides the basis for land acquisition through deliberation. Finally, another major issue concerns the ability of toll road business entities to provide the required capital (equity).[34]

PPP in the transport sector, in terms of road operations, entitles private companies to recover construction costs, and provide repayment to investors by taking toll collection income from service users or payment from Government. Government Bureau render supervision of the private company's accomplishment and regulates other standpoints of contract, as well as maintenance, setting of toll rates, and approving technical designs.[35]

A wide variety of PPPs rely on Government Bureau or kind of project. Appearing in several PPP set up, large company pay a public entity "upfront fee" inward to contract. In another instances, Government as well as private sector pattern a kind of joint venture to share toll risk as well as income. Contracts are regularly for fixed terms*,* and at running out*,* government can take renegotiation of contracts with toll road operators, or private parties can transfer facilities to government free of charge. In case set up decently, PPP will be as a proficient way to furnish fundamental networks among communities, whilst also reducing taxpayer costs as well as shift risks of Government to private investors. For implementing PPP in its form, the Government must perform a new laws and regulatory structures that will build the trust of investors.[36]

2. Adopting the Public-Private Partnership Concept by Legal Transplant

The adoption of the Public-Private Partnership (PPP) concept in Indonesia represents an important development in infrastructure governance, particularly in addressing limitations in public financing and improving the

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[33] Didik Mulyanto, Diaz Adiazma, Fitriani Nurza, Hilda Alatas, Nitta Ratnasari, Mochamad Agung Sasongko, and Juliawan Superani, "Laporan Kajian Tata Kelola BPJT dalam Penyelenggaraan Jalan Tol," *Kajian Tata Kelola Komisi Pemberantasan Korupsi (KPK)* (2022): 346.

[34] Ministry of Public Works, Toll Road Regulatory Agency (22 February 2010). "Development of Toll Roads in Indonesia", 15 (unpublished report).

[35] Peter Lacina, "Public-Private Road Building in Latin-America: Legal Advances and Challenges," *Law & Bus. Rev. Am.* 15 (2009): 661. See too, Bima Gavian Cahyo, Fokky Fuad, and Suartini Suartini, "Perlindungan Hukum Bagi Pengguna Jalan Tol Oleh PT. Hutama Karya (Persero)," *Binamulia Hukum* 13, no. 1 (2024): 112.

[36] Peter Lacina, "Public-Private Road Building in Latin-America: Legal Advances and Challenges," *Law & Bus. Rev. Am.* 15 (2009): 664.

efficiency of infrastructure provision. However, the adoption of PPP cannot be understood merely as the transfer of a foreign policy model, but also as a process of legal adaptation to the Indonesian regulatory and institutional context. Therefore, understanding the fundamental concept of PPP is necessary before examining how the Indonesian government adopts and adapts this concept through its legal framework.

An understanding of Public PPP by quoting opinion of William J. Parente from USAID *Environmental Services Program*, who defines PPP as:[37]

"An agreement between a public entity and a private party, under which: (a) the private party undertakes government functions for a specified period of time, (b) the private party receives compensation for performing the function, directly or indirectly, (c) the private party is liable for the risks arising from performing the function and, (d) the public facilities, land or other resources may be transferred or made available to the private party".

PPP contract models are classified into two groups, namely, as follows:[38] (a). Classification of PPP contracts based on usage (*usage-based*), (b). Classification of PPP contracts based on availability (*availability-based*). The PPP contract models can be classified into three contract model categories, namely:[39] (a). Concession contract model, (b). Energy sales contract (*Power Purchase Agreement, PPA*) model, (c). Private financing initiative (*PFI*) contract model, (d). Alternatives to other PPP contract models[40].

In the Legal Transplant *process* regarding the use of other countries' concepts to be applied in Indonesia, Alan Watson said:[41]

"Law shows us many paradoxes. Then he said that perhaps the strangest of all is that, on the one hand, a people's law can be regarded as being special to it, indeed a sign of that people's identity, and it is in fact remarkable how different in important detail even two closely related systems might be; on the other hand, legal transplants-the moving of a rule or a system of law from country to another, or from one person to another-have been common since the earliest recorded history".

[37] Yescombe, ER, *Public Private Partnerships: Principles of Policy and Finance,* 1 st Edition (Oxford: Elsevier Ltd., 2007), 101.

[38] Rian Hari Anggoro, Yusuf Hidayat, and Sadino Sadino, "Tinjauan Hukum Kerugian Badan Usaha Milik Negara Akibat Penugasan Pengusahaan Jalan Tol Dari Pemerintah," *Spektrum Hukum* 20, no. 2 (2023): 87.

[39] Witon Adha Gantara, and Anas Lutfi, "Kajian Yuridis Asset Recycling BUMN (Studi Kasus Asset Recycling PT Hutama Karya (Persero)," *Unes Journal of Swara Justisia* 8, no. 2 (2024): 343.

[40] Yescombe, ER, *Public Private Partnerships: Principles of Policy and Finance,* 1 st Edition (Oxford: Elsevier Ltd., 2007), 97.

[41] Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd Edition, Athens, (Georgia: University of Georgia Press, 1993), 9.

Kahn-Freund proposed a two-step process for determining the viability of a proposed legal transplant.[1] The first stage is to ascertain the relationship between the legal rule to be transplanted and the socio-political structure of the donor country. The second stage involves comparing the socio-political environments of the donor country and the receiving country.[42]

Featuring in view of this Kahn-Freund transplant theory, Loukas A. Mistelis argues that the study of legal transplants has reappeared since the fall of totalitarian rule. However, in this circumstance, the concept of PPP has been adopted from foreign countries during President Soeharto' regime that was different in concept and law. No domestic system is perfect or entirely transferable. Harmonization becomes more effective, and legal transplantation are useful if they are harmonious with existing legal entities at the receiving country and that is not a question of *compatibility* with local communities. The intentional incorporation and thought of foreign ideas and legal concepts, and the careful selection of legal transplant can ensure a commercialized legal framework that helps the development of economy. Nonetheless, in the discourse of international business deal, this tendency has been taken notes and must be recognized.[43]

In this circumstances what factors cause obstacles and losses to such SOEs as BUJT and how should the SOEs appointed to perform the Toll Road Infrastructure rather than PT. Jasa Marga (Persero) Tbk., as be appointed by law. Refer to the before mentioned, based on the legal normative research ofwhich refer to statute approach and case approach this research concluded deductively. As the related regulations as the norms and the cases as the phenomenon throughout 2020 were collected from mainstream of several online-media, concleded there were any legal problem due to the problem of legal transplant of the concept PPP especially the concept of Toll Roads Development. In this situation we can take the lessons from the case of PT. Wika.

This research focus on the concession contract model. In this model, The initial development of the concession contract model was begun featuring in France. Even though the term PPP is contemporary, such concept by using private funds in order to make available public facilities has a long history. Taking part in 18th and early 19th centuries, the British Business Groups

[42] Loukas A. Mistelis, "Regulatory aspects: Globalization, harmonization, legal transplants, and law reform—Some fundamental observations," *The International Lawyer* (2000): 1055.

[43] Rina Rusfiantini, Yusup Hidayat, Suparji Suparji, and Aris Machmud, "Freies Ermessen BPJT Pada JTTS Dalam Perspektif Hukum Administrasi Negara: Studi Kasus PT. Hutama Karya (Persero)," *Binamulia Hukum* 13, no. 1 (2024): 153.

developed "turnpike trusts",[44] which lend money from private investors to fix roads, and these loans were repaid by tolls. Featuring in France, canal construction by private sector funding began in 17th century. This PPP contract model is recognized as concession contract model ("concession"): namely the "user pays" model ofwhich the private sector party receiving concession rights ("concessionaire") is permitted to take fees for public services for the use of facilities, as for instance, the payment of a toll for the use of a bridge, tunnel or road. The toll is used to give back private sector for construction and operation toward facility, of which is customarily rendered to public sector at completion of concession period.

The PPP contract agreement above affords the basic architecture of the preparation, while the contract itself is "*incomplete*" and it does not and cannot define all components and allow for all results,[45] so that it needs to be adjustments and reviews in its implementation. The execution of PPP in construction and development toward toll roads in Indonesia which concerns a variety of social, economic and natural environmental conditions. This contract law has been modified from the 19th century to adapt to the modern life, changing from the spirit of understanding contracts as being sacred towards understanding a new contract that is fair. In the old understanding of the contract, it is referred to as "pacta sunt servanda ex fide bona" to which applies the sanctity of the individual autonomy in contracts: "as a moral force behind contract as promised is autonomy: all parties are bound to their contract because they have chosen to be".[46]

In building infrastructure, appointment of SOEs has been excluded by the Anti- Monopoly and Unfair Business Competition laws and regulations. Article 51 of the law is interpreted by many parties as a form of exception for SOEs in business monopoly. However, according to M. Iqbal, Chairman of the Supervisory Commission Business Competition (*Komisi Pengawasan Persaingan Usaha, KPPU*) June 2001 – June 2002, the exception is not absolute. Monopoly and Prohibition Act on Unfair Business Competition grant exceptions to SOEs that engage in unfair business competition. State-owned enterprises (SOEs) may carry out monopolistic activities subject to certain requirements. First, the activities must concern sectors that dominate the livelihood needs of the people. Second, such activities must be regulated by

[44] Darrin Grimsey and Mervyn K. Lewis, *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance,* Cheltenham, UK – Northampton, MA, (USA: Edward Elgar Publishing Limited, 2007), 43.

[45] David. Campbell, "The incompleteness of our understanding of the law and economics of relational contract," *Wis. L. Rev.* (2004): 645. See too, Rian Hari Anggoro, Yusuf Hidayat, and Sadino Sadino, "Tinjauan Hukum Kerugian Badan Usaha Milik Negara Akibat Penugasan Pengusahaan Jalan Tol Dari Pemerintah," *Spektrum Hukum* 20, no. 2 (2023): 98.

[46] K. M. Sharma, "From sanctity to fairness: an uneasy transition in the law of contracts," *NYL Sch. J. Int'l & comp. l.* 18 (1998): 95.

statute. Third, the SOE must be specifically appointed by the government to undertake the relevant activities.

However, it must be remembered that the exception is the structure that SOEs can monopolize but the conduct or the behavior remains included. In other words, if SOEs with such exception did unfair business competition, for example preventing other business actors from entering a related line of business, then the SOEs must still comply with the regulations in the Law on Monopoly Prohibition and Unfair Business Competition.[47]

This opinion needs to be reconstructed, because currently SOEs have been privatized in the form of holding companies. Article 33 of the 1945 Constitution does not recognize the term Persero in SOEs. In accordance with Article 9 of the Law on SOEs, SOEs comprise two types of companies, namely Persero and Perum. A Limited Liability Corporation (Persero) is an SOE in which all or at least 51% of its shares are owned by the Republic of Indonesia. Meanwhile, a Public Corporation (Perum) is an SOE whose capital is wholly owned by the government and is not divided into shares. Its primary purpose is to serve the public interest by providing high-quality goods and/or services while simultaneously generating profits based on sound corporate management principles.

Some of the legal issues that have arisen from SOEs (Persero) are the emergence of cases of losses suffered by SOEs since 2020. First, the lawsuit of PT. Asuransi Jiwasraya (Persero), that taking part in 2018 and 2019 announced defaults on its customers This occurred due to an error in managing customer finances, starting from collecting funds for 'JS Insurance' Products, "Saving Plan", and the occurrence of irregularities in the process of investing in assets that are suspected of being unlawful.[48] Second, cases of abuse of the dominant position held by SOEs as state companies that are given the right to monopolize various economic sectors for the benefit of the people are not always carried out in accordance with the limits allowed by legislation. There is a tendency to concentrate the market structure in the air transport industry on domestic flights by several airlines, moreover the market concentration increases when the Garuda Group carries out a Joint Operation (KSO) and/or Management Cooperation with the Sriwijaya Group in the November 2018 period which in turn also triggers violations against

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[47] Legalonline, "Not All State-Owned Enterprises Are Exempted from the Anti-Monopoly Law," *Legalonline*, August 10, 2021. https://www. Hukumonline.com/berita/read/hol5241/Not-all-State Owned Enterprises-exempt-from-undang-undang-anti-monopoli. Accessed on July 20, 2026.

[48] Redhina Elfahra, and Iwan Erar Joesoef, "Tanggung Jawab Negara (Pemerintah) Atas Gagal Bayar PT. Asuransi Jiwasraya (Persero): Studi Perlindungan Nasabah," *Jurnal Justitia: Jurnal Ilmu Hukum dan Humaniora* 8, no. 2 (2021): 309.

competition.[49] Third, cases of price fixing agreements are prohibited by Article 5 of the Law concerning to Anti-Monopoly and Unfair Business Competition. due to the potential to reduce competition in terms of products price being merchandised resulting in shortfalls for consumers of which there is price fixing agreement among Excelcomindo, Indosat, Telekomunikasi Indonesia, and Bakrie Telecom.[50]

Thus, government retained construction companies in Persero model such as PT. HK, PT. Wika are not exempt due to privatization of SOEs. Based on this condition the toll road concession scheme is not BOT but DBO, where FIRR (*Financial Internal Rate of Return)* is negative.[51] In this scheme, Land Procurement and Construction are carried out by the Government, while Operations and Maintenance activities are accomplished by SOEs in the form of Public Corporations whose capital is 100% owned by the Government. Thus for the effective delivery of a concession project, and for the long term sustainability of a PPP, it is necessary to work hard in terms of elucidating and implementing regulations, i.e. careful preparation of project planning and negotiation of concession agreements.[52]

Because the project has a negative FIRR (*Financial Internal Rate of Return),* it will definitely incur losses in its operational implementation. This loss arises from the obligation of SOEs to fulfill the Public Service Obligation (PSO), under which their operations in the market must ensure services that meet high-quality standards. In fulfilling this obligation, SOEs must act in good faith toward customers and clearly inform users of the terms and conditions of the services provided. Service providers must also ensure that services are not postponed without prior notification. In cases of payment default, service postponement may only occur after the user has been notified in writing at least 8 (eight) days before the postponement. Furthermore, service providers may not impose expenditure requirements or minimum costs.[53]

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49 Faisal Fachri, and Iwan Erar Joesoef, "Analisis Pertimbangan KPPU Terhadap Pelanggaran Persaingan Usaha Tidak Sehat Dilakukan Oleh Perusahaan Penerbangan BUMN (Studi Kasus Putusan No. 15/KPPU-I/2019)," *Jurnal Cahaya Keadilan* 9, no. 1 (2021): 59.

50 Army Setyo Wibowo, and Iwan Erar Joesoef, "Perjanjian Kerja sama Interkoneksi Short Message Service pada Industri Telekomunikasi dalam Persaingan Usaha Tidak Sehat; Studi Putusan Kasasi Nomor 9k/Pdt. Sus-Kppu/2016," *SALAM: Jurnal Sosial dan Budaya Syar-i* 8, no. 4 (2021): 1148.

51 Nurdin Manurung, Head of the Toll Road Regulatory Agency, Regulation/Management of Toll Road Programs in Indonesia,_presented at the IAMPI Learning & Sharing Session XXVIII, Jakarta, July 23, 2009. See too, Ikka Puspitasari, and Budi Santoso, "Perjanjian Kerjasama Pemerintah Dan Swasta Dengan Pola (Bot) Build Operate Transfer Dalam Pembangunan Jalan Tol (Studi Pembangunan Jalan Tol Semarang-Solo)," *Law Reform* 14, no. 1 (2018): 63.

52 C. Fuguo, "The Emerging Legal Framework for Private Finance in Infrastructure in China: a Preliminary Review of the Beijing Concession Regulation," *Public Procurement Law Review* 2 (2006): 62.

53 Teresa Morais Leitao, and Eduardo Maia Cadete, "Public service obligations in the electricity and gas sectors: Portugal," *International Energy Law and Taxation Review* (2004): 29.

The existence of PSO is in the framework of ensuring that the activities toward supplying to public goods and services, especially terms and conditions of transportation services, are obtainable in adequate quantities despite the fact that they do not provide sufficient revenue for service providers to continue to carry out their activities. The PSO-offered routes that are not financially profitable must still be provided, because it is hoped that this will provide an economic multiplier effect for the people in the areas traversed by the route.[54]

Regarding the Government's assignment to SOEs to organize PSO, a number of funds in the expenditure items in the APBN must be provided. The budgeted funds are included in the subsidy expenditure item,[55] for support to SOEs in the context of proceeding the PSO, excluding the types of subsidies afforded by Government in model of such as electricity subsidies, fuel subsidies, fertilizer subsidies, postal subsidies as well as other subsidies. Definition of subsidies, stated by Mike Crosetti (1999), as quoted by Kadoatje (2002), is as follows:[56]

" *All measurement that keep prices for consumers below the market level, it keeps prices for producers above the market level, reduce costs for consumers or producers by giving direct or indirect financial support."* These subsidies can be in kind of money (cash transfers) and subsidies in kind.

The provision of subsidies is actually included in the concept of PPP although it creates a predicament for Government, of which, on the one hand the provision of subsidies and PSO is a consequence as well as duty and responsibility of the Government, but on the other hand, this is restricted by limited obtainable financial plan.[57]

D. Conclusion

The appointment of SOEs in the construction sector as Toll Road Business Entities by Government taking part in the framework of fast-tracking

54 Iwan Erar Joesoef, and Yuliana Yuli Wahyuningsih, "Legal Transplant of Modern Banking Concepts in the Culture of Mutual Cooperation Communities in Micro, Small and Medium Enterprises: The Idea of Partnership of Cooperative and Bank/Non-bank Financial Institutions as Micro Finance Institutions," In *International Conference on Law Studies (INCOLS 2022)*, Atlantis Press, 2022, 70.

55 Intan Zania, Fokky Fuad, Yusup Hidayat, and Aris Machmud, "Penugasan Pembangunan Jalan Tol Trans Sumatera Pada BUMN," *Binamulia Hukum* 12, no. 2 (2023): 449.

56 Diki Okta Dwi Putra, "Upaya Hukum Pembebasan Tanah Pusaka Tinggi Untuk Pengadaan Jalan Tol Di Sumatera Barat," *Jurnal Hukum Ius Publicum* 5, no. 2 (2024): 209. See too, Diyan Isnaeni, "Konsep Hukum Pengadaan Tanah Untuk Pembangunan Jalan Tol Dalam Perspektif Hak Menguasai Negara," *Yurispruden: Jurnal Fakultas Hukum Universitas Islam Malang* 3, no. 1 (2020): 99.

57 Rinitami Njatrijani Suradi, and Feisya Amalia Ghaisani, "Tanggung Jawab Badan Usaha Jalan Tol Atas Kerugian Pengguna Jalan Tol Akibat Kesalahan Dalam Pengoperasian Ruas Jalan Tol Di PT. Jasa Marga (Persero) TBK Cabang Jakarta-Tangerang," *Diponegoro Law Review* 5, no. 2 (2016): 12.

development of provinces in Sumatera by establishing regulations in the context of accelerating toll road construction in Sumatra has caused losses for these SOEs. The factors causing these losses are the Government's incorrect application of the PPP concept implemented by SOEs. The application of the PPP concept which originates from foreign concepts does not refer to the legal transplant theory, causing problems of obstacles and losses in its implementation. The first factor, the government does not distinguish between the privatization of SOEs (Persero) and SOEs (Perum) whose capital is 100% government-owned. In the concept of PPP, the Government has divided the model scheme based on FIRR (*Financial Internal Rate of Return).* If the FIRR is positive, then the obligation for land acquisition, construction and operation and maintenance activities is carried out by the BUJT with the BOT (Build, Operate, Transfer) contract model.

Construction is carried out by the government while operation and maintenance activities are carried out by BUJT. Whereas if FIRR is marginal then the contract model is PPP where the obligations for land procurement and construction are carried out by the government while construction activities and operation and maintenance activities are carried out by BUJT. The second factor is that the government does not provide an interpretation of the exceptions to SOEs in Article 51 of the Law on Anti-Monopoly and Unfair Business Competition, whether the exemption is *Perum* SOEs whose capital is 100% owned by the government or also Persero SOEs which comprise SOEs which has been privatized. From these causal factors the government should review the kind of SOEs of which SOEs (Persero) and SOEs (Perum) in order to interpret the exception to SOEs in Article 51 of the Law on Anti-Monopoly and Unfair Business Competition.

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