

## ANALYSIS OF THE STATE FINANCIAL LOSSES TO SUBSIDIARIES OF STATE-OWNED ENTERPRISES IN TERMS OF BUSINESS JUDGMENT RULES

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### ABSTRACT

*The recovery of financial losses suffered by subsidiaries should prioritize recovery efforts that have a non-punitive nature or without punishing a certain person who is considered responsible for the management of BUMN subsidiaries unless there is intentional unlawful conduct and there are elements of criminal acts in it. In accordance with the principle of business judgment rule, the directors can be exempted, because the directors are considered to have made business decisions in accordance with good faith. In this research, the author uses a descriptive analytical research method, because the author will describe or provide an overview of the object under study through the data collected. The form of research used in this writing is normative legal research, because this research uses legislation and court decisions and also legal norms that exist in society. Researchers also collect data in the form of decisions from the corruption court on corruption cases that harm state finances. Losses arising in subsidiaries of SOEs whose capital is not sourced from the state budget or is not equity participation of SOEs and does not receive or use state facilities, are not included in the State's losses. the role of the business judgment rule if the person commits acts of criminal acts of corruption not due to encouragement or coercion and/or business decisions that are not based on prudence from the directors, the directors will be free from legal liability.*

**KEYWORDS** State Financial Losses, SOE Subsidiaries, Business Judgment Rules



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### INTRODUCTION

In the development of the business world, companies have an important role in advancing the country's economy. One of the companies that can help the country's economy is state-owned companies and subsidiaries of state-owned companies themselves. The existence of state companies or SOEs as one of the pillars of the Indonesian State economy is based on Article 33 paragraph (2) of the

**How to cite:** Fajar Reyhan Apriansyah. (2024). Analysis Of The State Financial Losses To Subsidiaries Of State-Owned Enterprises In Terms Of Business Judgment Rules. *Journal Eduvest*. 4 (8): 7369-7378  
**E-ISSN:** 2775-3727  
**Published by:** <https://greenpublisher.id/>

1945 Constitution of the Republic of Indonesia (UD NRI 1945) which states that "Branches of production that are important for the state and control the lives of many people are controlled by the State" (1945, n.d.).BUMN is a public company with a legal entity so that its form is a limited liability company as stipulated in Law Number 40 of 2007 concerning Limited Liability Companies (PT, 2007).

The basic regulation is used as a foothold by SOEs in establishing and managing a company (Raharja, 2022). To be able to optimize performance and be able to maintain its existence in an increasingly competitive and open economic development, BUMN as one of the economic pillars in carrying out its activities can actually form a subsidiary or also known as "*Subsidiary*". In Article 1 point 2 of the Regulation of the Minister of SOEs Number 3 of 2012 concerning Guidelines for the Appointment of Members of the Board of Directors and Members of the Board of Commissioners of SOE Subsidiaries, it is emphasized that what is meant by a subsidiary of SOEs is a limited liability company whose shares are mostly owned by SOEs or a limited liability company controlled by SOEs (BUMN, n.d.).

A further definition of a subsidiary is a company that is more than half owned by another company or wholly owned by another company. The other company is called the parent company or holding company. SOEs are business entities in which all or most of the capital is owned by the state through direct participation from separated state assets (Arifin P. Soeria Atmadja, 2017). Meanwhile, if a subsidiary of BUMN is formed and there is capital participation from BUMN as a holding company, it means that the capital is in the form of a Limited Liability Company (PT) as a legal entity that has separate assets from shareholders. BUMN is a business entity whose formation is subject to laws and regulations. The wealth of BUMN is separate from the wealth of the State because the State's wealth in BUMN is only limited to shares, so that if at some point the BUMN experiences a loss, it is not a loss to the State (Natun, 2019).

In Persero SOEs, the state's position is as a shareholder, the state here acts as an ordinary civil legal entity, both in SOEs whose shares are wholly owned by the state and in SOEs whose shares are partly owned by the state. The purpose of the state's position as a civil legal entity here is that the state has the same rights and obligations as other shareholders if in a public company BUMN. The state as a civil legal entity must use the civil standards and mechanisms regulated by a persero, namely through the General Meeting of Shareholders (GMS) (Simatupang, 2011).

The explanation above is in line with the case study researched by the author. The author examines the authority and responsibility of BUMN subsidiaries if there is a *criminal crime*. The subsidiary studied is PT Borneo Alumina Indonesia (BAI). PT Borneo Alumina Indonesia is a subsidiary of INALUM and ANTAM which is projected to develop, build, own, operate and manage a Smelter Grade Alumina Refinery (SGAR Project) with a capacity of 1 Million Alumina products per year in Menpawah Regency, West Kalimantan Province, Indonesia, with the aim of increasing national added value by refining bauxite ore into alumina products. Based on the 2020 annual report, PT INALUM (BUMN) is 100% owned by the government or state, then provides capital in the form of shares in PT Borneo Alumina Indonesia by 60% and PT ANTAM (BUMN) by 40%, finally PT ANTAM

provides a share composition of 65% owned by PT INALUM and 35% public shares that already exist in the stock exchange (INALUM, 2020).

In 2022, there was a case between PT Borneo Alumina Indonesia as a subsidiary of PT ANTAM and INALUM and the community regarding land acquisition. The thing that made this case a criminal offense was because the panel of judges argued that PT Borneo Alumina Indonesia's finances included state finances. Because indeed the source of capital for PT Borneo Alumina Indonesia is from two large state companies (BUMN). Based on Decision Number 41/Pid.Sus-TPK/2022/PN Ptk, the position of the case involving PT Borneo Alumina Indonesia has been described. In terms of land acquisition, PT Borneo Alumina Indonesia authorized its employees to go to the field to take care of land acquisition. The verdict stated that the employee who misused the authority was Ridwan Setiawan, S.H., Bin Zarkasih.

From the explanation above, financial losses suffered by SOE subsidiaries should be considered as losses in business which are business risks that are inherently always attached to every business activity carried out by a business entity. Thus, the recovery of financial losses suffered by subsidiaries should prioritize recovery efforts that have a *non-punitive* nature or without punishing a certain person who is considered responsible for managing BUMN subsidiaries, unless there is intentional unlawful action and there are elements of criminal acts in it. With the existence of financial recovery through a *non-punitive* approach, it is hoped that the directors or management of BUMN subsidiaries who have good faith can be protected from criminalization of decisions or policies and business steps taken with the aim of running and developing the BUMN subsidiaries they manage (Suryanto, 2020).

In developing legal practice, this is not the case, with the variety of legal concepts, understanding and scope of state finances causing difficulties in providing a clear definition and limitations on state finances in the scope of BUMN subsidiaries. Even at the level of BUMN as the parent company of BUMN subsidiaries, there are still differences in views regarding the legal concepts, understanding and scope of state finances. The existence of dissimilarities also affects law enforcement efforts that must be applied in an effort to recover losses from state finances suffered by BUMN subsidiaries. Several approaches that can be taken in an effort to recover financial losses of BUMN subsidiaries are through administrative law enforcement, civil law enforcement and criminal law enforcement as an *ultimum remedium*.

If no solution is found, then each case will proceed with criminal law enforcement. In this case there has been an act that is considered detrimental to state finances. In accordance with the principle of *business judgment rule*, the board of directors can be acquitted, because the board of directors is considered to have made business decisions in accordance with good faith. Moreover, the board of directors delegates to members or employees in carrying out a task, then what has been delegated is the personal responsibility of the member or employee, and if there is negligence or carelessness then it is outside the responsibility of the board of directors.

Because the author wants to make sure the indicators can be said that the state has suffered losses and how the responsibility of BUMN subsidiaries, the author wishes on this occasion to discuss this problem with the title "Status of BUMN Subsidiaries in Corruption Cases and an Analysis of State Financial Losses Against BUMN Subsidiaries".

Previous research discussed various aspects related to state financial losses in corruption cases involving SOE subsidiaries, the legal status of SOE subsidiaries, and the application of the business judgment rule principle. Ahmad Fahd Budi Suryanto focuses on law enforcement procedures and the financial impact of corruption on SOE subsidiaries, with a different case study from the current research which focuses on PT Borneo Alumina Indonesia. Ilham Rahmadi Wicaksono focuses on the legal status of SOE subsidiaries from the perspective of public finance law, while this research examines legal status in the context of corruption. Mohamad Alvin Alvano discusses the application of the business judgment rule in preventing criminalization of directors, with different objects but still related to the principle.

## **RESEARCH METHOD**

This research uses doctrinal legal methods with a juridical normative approach, which emphasizes the importance of choosing the right research method to support the smooth running of scientific research. This research is descriptive analysis, which aims to describe and analyze legal issues, as well as provide legal arguments related to the events studied (Sugiyono, 2016). The methods used include case and statutory approaches, focusing on the case of PT Borneo Alumina Indonesia involving state financial losses due to corruption.

This research utilizes secondary data derived from library materials, such as laws and regulations, court decisions, and other legal literature. The legal sources used can be divided into three types: primary, secondary and tertiary legal materials. Primary legal materials include various laws and regulations relevant to the issue under study, while secondary and tertiary legal materials provide additional support and explanation to the primary legal materials (Soekanto, 2015). Data collection tools included court decisions and expert opinions that were analyzed in accordance with existing legal theories.

The research approach used includes statutory, conceptual, and analytical approaches, which are relevant to the research objectives. The results of the research are expected to provide an overview of the law enforcement process in corruption cases, as well as explore the status and liability of SOEs if their subsidiaries are involved in corruption that harms state finances.

## **RESULT AND DISCUSSION**

### **State Financial Losses Against Bumn Subsidiaries in Corruption Crime**

The position and status of a SOE subsidiary is explained as an entity formed from the intervention of the SOE's parent company, with a position subject to civil law or public law depending on the type of ownership. SOEs in the form of PT (Persero) have a minimum capital of 51% owned by the state and operate for profit.

Nonetheless, SOEs are often not given complete freedom in running their businesses due to the legal risks associated with financial losses.

SOEs and their subsidiaries, which are also in the form of PTs, are independent legal entities that are subject to applicable legal regulations. The relationship between a SOE's parent and subsidiaries follows the principle of "separate legal entity," which means that each has separate legal responsibilities. However, there are challenges in applying this principle, particularly in relation to shareholders' liability, which is limited to their paid-up capital.

When the state invests capital in an SOE, that capital becomes SOE assets and is no longer considered state assets. However, there is a disharmony of views between government agencies on the status of this segregated wealth, which often affects the operations of SOEs and their subsidiaries.

SOE subsidiaries are formed to support SOE performance and increase profits. Despite their legal autonomy, the relationship between parent and subsidiary is often complex, with the risk of "piercing the corporate veil" if the parent is directly involved in the subsidiary's activities, which can result in the loss of limited liability for shareholders.

State financial losses to subsidiaries cannot be determined directly, but there must be a careful calculation of this so that there are no mistakes that lead to a criminal act. Because state financial losses are very sensitive and can lead to criminal acts of corruption. One of the elements that is always considered and emphasized is that there must be harm to state finances or the state economy in accordance with Article 12 paragraph (1) and Article 3 of Law Number 31 of 1999 as amended to Law Number 20 of 2001 concerning Eradication of Corruption. Related to state losses, as discussed above, it must meet the real and certain elements as stated by Expert Dian Puji Nugraha Simatupang.

In relation to state financial losses to SOE subsidiaries, this refers to the capital provided by the parent company to the SOE subsidiary. BUMN subsidiaries, the majority of which come from the participation of BUMN capital to subsidiaries, also need to remember that based on the consideration of the Panel of Judges of the Constitutional Court in Constitutional Court Decision No. 62 / PUU-XI / 2013 that separated assets in BUMN are state assets so that BUMN capital participation in subsidiaries is also part of state assets.

Due to the consideration in the Constitutional Court's decision, the authority of the Supreme Audit Agency (BPK) is getting stronger where it was previously mentioned in Article 6 paragraph (1) of Law Number 15/2006 concerning the Supreme Audit Agency which states that "BPK is tasked with examining the management and responsibility of state finances carried out by the central government, local governments, other state institutions, Bank Indonesia, state-owned enterprises, public service agencies, regionally-owned enterprises, and other institutions or agencies that manage state finances.

The status of state losses can only be proven through an examination or financial audit conducted by the Supreme Audit Agency (BPK), which if the results of the examination indicate a loss to state finances in a subsidiary of BUMN Persero, then an assessment of the alleged state loss is carried out by the BPK as stated in Article 10 Paragraph (1) of the BPK Law as follows:

"BPK assesses and/or determines the amount of state losses caused by unlawful acts either intentionally or negligently committed by treasurers, managers of BUMN/BUMD, and other institutions or bodies that organize state financial management".

As the organizer of state financial management, in this case, separated state assets, if the BUMN or BUMN subsidiary suffers losses. However, as the classification of state losses requires the existence of unlawful acts in the form of intent or negligence of the state financial manager, then the losses of BUMN and the losses of BUMN subsidiaries can only be considered as state losses.

The cause of state losses to subsidiaries is the result of intentional or negligent unlawful acts that have a causal relationship with these losses committed by organs in BUMN subsidiaries, both GMS, directors, and commissioners, as organizers of state financial management based on good and healthy corporate principles.

### **Application of Business Judgment Rules in Corruption Cases Committed by Subsidiaries of Bumn Companies**

The Business Judgment Rule is a doctrine in corporate law that protects directors from personal liability for business decisions, provided that such decisions meet certain criteria such as good faith, prudence and alignment with the interests of the company. In the Indonesian context, this doctrine is adopted in Law Number 40 of 2007 on Limited Liability Companies, although it is not explicitly mentioned. This doctrine provides protection for directors who have acted professionally and in accordance with the principle of fiduciary duty in carrying out their duties.

In SOEs, despite using state capital, directors are also protected by this doctrine. However, their responsibilities are more onerous as they involve the management of state finances. The Business Judgment Rule applies as long as the business decisions taken fulfill elements such as good intentions, prudence, and right purpose. If a loss occurs, directors are not necessarily considered guilty if they have carried out their duties according to this doctrine.

Directors' misconduct that is not protected by this doctrine includes actions contrary to fiduciary duty, lack of information, and decision-making without rational consideration. If directors violate these principles, they can be held personally liable. The Business Judgment Rule serves as a guarantee for directors to innovate and drive corporate development without fear of personal liability as long as they act in accordance with applicable legal principles.

#### ***Business Judgment Rules in Corruption Cases***

The application of the Business Judgment Rule in corruption cases is related to state losses, which are the main indicator to determine the existence of corruption crimes. The definition of state losses is regulated in various laws, such as the Law on State Finance, State Treasury, and the Supreme Audit Agency. State losses include elements of lack of money, goods, securities, the amount of loss is real and certain, as well as the existence of intentional or negligent unlawful acts, with a clear causal relationship. The Business Judgment Rule plays an important role in situations where the actions of directors are not based on coercion or carelessness in making business decisions, so directors can be free from legal bondage if

corruption occurs not because of these factors. Corruption itself is seen as an evil and destructive act, reflecting the perversion of morals and power in government.

### ***State Financial Losses in Corruption Crimes***

State losses are defined in several laws, including Article 1 point 22 of Law No. 1 Year 2004 on State Treasury. Such losses can come from state or local finances. Dian Puji Nugraha Simatupang from the University of Indonesia emphasized that SOE finances are not included in state finances because they are legally separate. State finances in SOEs are recognized in the form of shares, and SOE losses are related to the state's status as a shareholder, not a holder of power.

Corruption is defined as an act of self-enrichment that harms the state. Law No. 31 of 1999, which was later amended to Law No. 20 of 2001, emphasizes that even if the proceeds of corruption have been returned, the perpetrator is still punished. The elements of corruption include unlawful acts that enrich oneself or others, and harm state finances or the state economy.

Corruption is triggered by internal and external factors, including weak religious teachings, educational influences, poverty, weak legal sanctions, and ineffective government structures. Perpetrators of corruption can be individuals or corporations, who are responsible for their actions in accordance with the Criminal Code. Criminal acts can be committed directly, through intermediaries, or with the assistance of other parties.

## **Analysis of Corruption Case of Pt Borneo Alumina Indonesia Case Number 41/Pid.Sus-Tpk/2022/Pn Ptk in Pontianak Corruption Court Based on State Financial Losses and Application of Business Judgment Rule**

### ***Position of Corruption Case of PT Borneo Alumina Indonesia Case Number 41/Pid.Sus-TPK/2022/Pn Ptk in Pontianak Corruption Court***

The corruption case involving PT Borneo Alumina Indonesia focused on land acquisition involving several parties, including the convict Ridwan Setiawan, S.H, an employee of PT Borneo Alumina Indonesia. This case has reached an inkraacht decision at the Pontianak District Court with Case Number 41/Pid.Sus-TPK/2022/PN.Ptk, where Ridwan Setiawan was found guilty of abuse of authority in land acquisition.

This case involved two charges, a primary charge that was not proven, and a subsidiary charge that was proven. Ridwan Setiawan was found guilty of not re-verifying the land documents used in the transaction, as well as conducting land acquisition without following proper procedures. These actions resulted in losses to the state, with Ridwan Setiawan using SPTs and SKTs that already had certificates of ownership (SHM) in other people's names.

In the land acquisition process, Ridwan Setiawan worked with Bahrin, who acted as an intermediary between the landowner and PT Borneo Alumina Indonesia. Bahrin also manipulated prices and documents to benefit himself and Ridwan Setiawan, and to the detriment of the state. Ridwan Setiawan's main mistakes included setting land prices that were not in accordance with applicable regulations and not re-measuring the land.

Ridwan Setiawan, S.H. was finally convicted on a subsidiary charge involving abuse of authority to the detriment of the state. He was charged under Article 3 jo. Article 18 of Law Number 31 of 1999 as amended by Law Number 20 of 2001 on the Eradication of Corruption. In this case, various criminal elements, including personal gain, abuse of authority, and state loss, were fulfilled in the actions taken by Ridwan Setiawan.

### ***Corporate Responsibility in Corruption Crime***

Corporate crime, which often involves collusion, corruption and nepotism, has become a serious problem in many countries. Collusion is often seen in the form of political lobbying, financial mark-ups, and bribery, resulting in economic and non-economic losses, including decreased public trust in government and business. Cases such as the mark-up of funds by PT Borneo Alumina Indonesia show that corruption can occur within corporations, especially if the corporation is a subsidiary of a state-owned enterprise.

Corporate criminal liability is often debated, because criminal law initially only views humans as perpetrators of criminal acts. However, with the view of White Collar Crime, now corporations can also be considered as criminal subjects. Some experts, such as Suprpto, argue that corporations can have collective guilt, especially if the criminal act is committed by the management or employees on behalf of the corporation. The responsibility of the corporation in criminal cases includes the recovery of losses and legal liability of the perpetrator.

There are various systems of corporate criminal liability. Mardjono Reksodiputro identifies three main forms:

1. The management of the corporation as the perpetrator of the criminal offense.
2. The corporation is the perpetrator of the crime, but the management is responsible.
3. The corporation and its management are the perpetrators of criminal acts that must be held responsible.

Sutan Remy Sjahdeini added a fourth form, namely joint liability between the management and the corporation. This addition aims to overcome injustice if only one party is held accountable. This principle avoids administrators who take refuge behind the corporation and ensures fair responsibility for all parties concerned.

### ***Corporate Liability Under the Corruption Law***

Law Number 31 Year 1999, as amended by Law Number 20 Year 2001, regulates corporate criminal liability in corruption offenses. Corporations can be criminally charged if they are involved in bribery, either as givers or receivers. Article 20 of this Law stipulates that:

1. Corporations and their officers may be subject to criminal charges.
2. Criminal acts of corruption are committed by persons in corporations, either individually or jointly.
3. The management may be required to appear in court to represent the corporation.



In practice, corruption offenses in corporations often involve several individuals and are committed collectively. Article 103 of the Criminal Code on participation and Article 55 of the Criminal Code describe various forms of participation in criminal acts, with *medeplegen* being a frequent form. *Medeplegen* involves conscious cooperation between perpetrators to commit criminal acts together.

## CONCLUSION

In the context of corruption involving SOE subsidiaries, like the case of PT Borneo Alumina Indonesia, state financial losses are a critical element that must be evaluated carefully. SOEs and their subsidiaries, although legally separate, may still have overlapping responsibilities. The Business Judgment Rule protects directors from liability if they act in good faith. However, corporate and individual accountability still exists when there is evidence of intentional wrongdoing or negligence leading to state losses. The challenge lies in balancing corporate autonomy with legal accountability for managing state finances.

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