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LEGAL PROTECTION FOR CREDITORS TO ENSURE THE FULFILLMENT OF STATE-OWNED ENTERPRISES (PERSERO)'S LIABILITIES IN THE INDONESIAN LEGAL SYSTEM

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Abstract

The professional management of State-Owned Enterprise Ltd. (Persero) will increase profits from business operations, which will in-turn increase state income. On the other hand, the less professional management of State-Owned Enterprises will lead to a negative impact due to economic losses. To prevent disputes between debtors and creditors when the Limited Liability State-Owned Enterprises (Persero) 1 suffers losses, the state has regulated a resolution through a bankruptcy mechanism to protect the rights of creditors. However, as a matter of fact, there are numerous inconsistent judicial interpretations regarding state capital participation in the State-Owned Enterprise Persero. In addition, disharmony of legal regulations has resulted in different views and understanding of judges regarding the legal position of State-Owned Enterprises in the implementation of bankruptcy and state finances. Based on these inconsistencies and disharmony, this study addresses three essential research questions: first, why is it necessary to apply legal protection to ensure that State-Owned Enterprises (Persero) fulfil its liabilities? Second, what will be the future legal protection for creditors to ensure that State-Owned Enterprises as debtors fulfil their liabilities? This normative legal research used statutory, conceptual, and case study approaches. This research concludes that legal certainty is needed to ensure creditor protection in the bankruptcy mechanism for State-Owned Enterprises. This legal certainty will only be achieved by changing the existing regulations through confirming the legal norm that the capital invested in the State-Owned Enterprise is the financial right of the State-Owned Enterprise Persero and is no longer included in state finances managed under the State Budget. This legal norm is necessary to avoid legal disharmony and inconsistency due to the diverse definitions of capital participation in State-Owned Enterprises (Persero) in bankruptcy decisions. This research initiates reformulation and clarity regarding the meaning of State capital participation in State-Owned Enterprises Persero.

Keywords: *Bankruptcy, Creditors, State-Owned Enterprises*

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A. Introduction

The establishment of State-Owned Enterprises in the form of Limited Liability Companies (*Persero*) conflicts with Law Number 40 of 2007 concerning Limited Liability Company Law. The establishment of a State-Owned Enterprises (*Persero*) has led to juridical consequences. As a legal subject, the State-Owned Enterprise (*Persero*) has rights and obligations,[2] and thus, in its development, it risks losses and potential bankruptcy without professional management that does not comply with the sound principles of corporate governance.[3] Under bankruptcy regulations for State-Owned Enterprises in Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, the government is well aware of the financial ups and downs that State-Owned Enterprises may experience.

B. Methodology

This study addresses the following two research questions. First, why is legal protection for satisfying the obligations of State-Owned Enterprises (*Persero*) necessary? Second, what will be the future legal protection for creditors to ensure that State-Owned Enterprise (*Persero*) as debtors fulfil its liabilities?

This research is classified as normative legal research using statutory, conceptual, and case approaches. The research object of this study is related to the legal protection for creditors to ensure that State-Owned Enterprises (*Persero*) fulfil its liabilities in the Indonesian legal system. The qualitative data were obtained from literature and documentary studies to produce descriptive-analytical knowledge.

[2] Ridwan Khairandy, *Pokok-Pokok Hukum Dagang Indonesia* (1st edn, FH UII Press 2013) 159; Aminuddin Ilmar, *Hak Menguasai Negara Dalam Privatisasi BUMN* (1st edn, Kencana 2012) 18; Muhammad Teguh Pangestu, *Badan Usaha Milik Negara dan Status Hukum Kekayaan Negara: Berdasarkan UU BUMN* (CV Social Politic Genius (SIGn)); Gunawan Nachrawi, 'Implementation of Management of State-Owned Enterprises for People's Welfare' (2022) 4 International Journal of Science and Society 522 <https://ijsoc.goacademica.com/index.php/ijsoc/article/view/600>; Kornelius Benuf and Muhamad Azhar, 'Metodologi Penelitian Hukum sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer' (2020) 7 Gema Keadilan 20 <https://ejournal2.undip.ac.id/index.php/gk/article/view/7504>.

[3] Andriani Nurdin, *Kepailitan BUMN persero berdasarkan asas kepastian hukum* (ALUMNI 2012); Rudhi Prasetya, *Perseroan Terbatas: Teori Dan Praktik* (Cet 1, Sinar Grafika 2016); Curtis J Milhaupt and Mariana Pargendler, 'Governance Challenges of Listed State-Owned Enterprises Around the World: National Experiences and a Framework for Reform' (2017) 50 Cornell International Law Journal 474 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1907&context=cilj>; Hidayatulloh and Éva Erdős, 'Legal Risk of State-Owned Enterprises' Debt' (2024) 3 European Journal of Law and Political Science 10 <https://ej-politics.org/index.php/politics/article/view/120>.

C. Discussion and Results

1. Legal Protection to Ensure that State-Owned Enterprises (*Persero*) Fulfil its Liabilities

Bankruptcy, which facilitates the distribution of the debtors' assets to creditors, is a definite and fair solution for the process of distributing the assets of insolvent entities. Bankruptcy is used as an exit from financial distress, a way out of complicated financial problems. In terms of legal protection for creditors to ensure the fulfilment of the liabilities of State-Owned Enterprises, Article 55 paragraph (1) of the Bankruptcy Law regulates that creditors can execute or sell their collateral as if the bankruptcy had not occurred. In this article, the state of bankruptcy does not disturb the interests of creditors who have the right to priority treatment. The procedure for fulfilling debtors' liabilities is based on the following principles:

1. General legal principles. These principles state that in the case of insolvency, for debtors with many creditors and insufficient assets to pay off their entire debt, the creditors generally will compete to collect their debt. However, often, the last creditors to collect their debts will run out of debtor's assets and get nothing, which is unfair because it harms other creditors. Thus, the bankruptcy institution must regulate fair procedures for the satisfaction of creditors' claims.
2. The principle of equality of creditors (*creditorium parity*). This principle stipulates that creditors have the same rights to all of the debtor's assets, provided that if the debtor is unable to pay off its debts, the debtor's assets will be seized.[4] All of the debtor's assets, in the form of movable and immovable assets as well as assets currently owned and existing in the future, will be marshaled by the debtor. This is based on Article 1311 of the Civil Code, which mandates that every action a person takes regarding assets will always have an impact on his assets, either increasing (credit) or reducing the amount of assets (debit).[5]

[4] Kartini Muljadi, *Kepailitan Dan Penyelesaian Utang Piutang* (Alumni 2001) 168; Fuady Munir, *Hukum Pailit Dalam Teori Dan Praktek* (5th edn, PT Citra Aditya Bakti 2014); Putu Edgar Tanaya and Kadek Agus Sudiarawan, 'Akibat Hukum Kepailitan Badan Usaha Milik Negara Pasca Berlakunya Undang-Undang Nomor 17 Tahun 2003 Tentang Keuangan Negara' (2017) 3 Jurnal Komunikasi Hukum (JKH) 117 <https://ejournal.undiksha.ac.id/index.php/jkh/article/view/9247>.

[5] Kartini Mulyadi, "Kreditor Preferens dan Kreditor Separatis dalam Kepailitan" in Emmy Yuhassarie (ed), *Undang-Undang Kepailitan dan Perkembangannya* (Pengkajian Hukum 2005) 164; Andika Wijaya, *Penanganan Perkara Kepailitan Dan Perkara Penundaan Pembayaran Secara Praxis* (1st edn, PT Citra Aditya Bakti 2017); Muhammad Akram, Sabir Alwy and Andi Tenri Famauri, 'Pertimbangan Hakim Terhadap Pernyataan Kepailitan Badan Usaha Milik Negara (BUMN)' (2022) 6.

3. The principle of *pari passu prorata parte*. This principle is an embodiment of the Civil Law Article 1132 which is used as a way to mediate disputes between debtors and creditors. Apart from that, this principle is also coupled with the principle of equality to resolve debt payment problems in the sense of the principle used by judges to divide the debtor's assets among creditors.
4. Principles of Structured Claims. This principle refers to the classification and grouping of various types of debtors according to their respective classes. Under General Civil Law, creditors are only differentiated into preferred creditors and general creditors. Preferred creditors in general civil law can include creditors who have material security rights and creditors according to law must have priority claims. However, in bankruptcy, preferred creditors only refer to creditors whose receivables according to law must take priority, such as privileged rights holders, retention rights holders, and so on, while creditors who have material collateral in bankruptcy law are classified as separatist creditors.
5. Debt principles. This principle stipulates that the debt used for a bankruptcy petition originates from performance debt, be it arising as a result of forbearance agreements or arising as a result of a statutory order, as well as a limitation on the minimum amount of debt that can be used as a basis for filing a bankruptcy petition.
6. Principles of Debt Collection. This principle refers to retaliation from creditors against bankrupt debtors. The principle of debt collection describes bankruptcy as a collective proceeding (joint action) to carry out the liquidation of bankruptcy assets, which are then distributed to creditors because, without bankruptcy law, each creditor competes individually to claim the debtor's assets for their own interests. The principle of debt collection in bankruptcy is manifested to carry out asset settlement through efficient and certain liquidation, the principle of simple proof to immediately implement bankruptcy decisions (*uitvoerbaar bij voorrad*), as well as the provision of waiting period for material secured claim holders, and the curator as the executor of management and settlement.
7. Debt pooling principle. In its development, this principle is not just about distributing bankruptcy assets to creditors based on a *pari passu pro rata parte* or creditor structure basis (distribution based on classes of creditors' claims). This principle also includes regulations in the bankruptcy system, especially relating to how bankrupt assets must be divided among creditors. The elaboration of this system

is related to the institutions involved in the bankruptcy process, starting from the judicial institutions that have authority over the procedural law, as well as the presence of judicial oversight, commissioners, and curators in declaring bankruptcy. The principle of debt pooling is an articulation of the specific characteristics inherent in the bankruptcy process, both with regard to the characteristics of bankruptcy, such as unusual collections (*oneigenlijke incassoprocedures*).

8. The principle of debt forgiveness. This principle holds that bankruptcy is a legal institution that can be used as a tool to lighten the burden when one is unable to make payments on one's debts, because of financial difficulties, in accordance with the original agreement and even to the point of discharge of his debts.
9. Universal Principle. This principle stipulates that bankruptcy applies to all assets of the bankruptcy debtor, both within the country and abroad. This principle emphasizes the international aspect of bankruptcy (cross-border insolvency). Generally, it can be said that most legal systems adopted by many countries do not allow their courts to execute foreign court decisions. Refusal to recognize foreign court decisions is closely related to the concept of state sovereignty. In this line, Rachmat Bastian articulated that foreign decisions cannot be directly implemented in the territory of another country. This also relates to the principle of legal sovereignty preventing from the implementation of foreign decisions in the territory of another country.
10. Territorial Principle. This principle explains that a bankruptcy decision is only valid in the country where the bankruptcy decision is made and a bankruptcy decision by a court in a foreign country cannot be enforced in the country concerned. This territorial principle can become a deadlock for business debtors who conduct business across a country's borders. In the case of a conflict between territorial principles, the territorial principle will be applicable, because a country's sovereignty will be above any foreign jurisdiction and the original approach to cross-border insolvency is the territorial principle.[6]
11. The principle of commercial exit from financial distress. This principle holds that bankruptcy is a commercial exit strategy resolve debts and receivables oppressing a debtor, which renders the debtor unable to pay these debts to his creditors due to

[6] Rahmad Bastian, *Prinsip Hukum Kepailitan Lintas Yurisdiksi* (Pusat Pengkajian Hukum, 2005) in Emmy Yuhassarie (ed), Undang-Undang Kepailitan dan Perkembangannya (Pengkajian Hukum, 2005) 229; Andhika Prayoga, *Solusi Hukum Ketika Bisnis Terancam Pailit (Bangkrut)* (1st edn, Pustaka Yustisia 2014).

difficult financial conditions resulting in a decline in the company's financial performance. Bankruptcy is not a mere solution to a business owned by an individual or a corporation, but it is an effort to overcome business bankruptcy, especially corporate insolvency. In principle, it also serves as a way out of financial difficulties or unresolved financial problems.

In order to protect the interests of creditors harmed by legal actions of the debtors, the Indonesian Bankruptcy Law provide legal protections to help creditors to claim their rights against debtors based on the following principles:

1. General Confiscation

   The confiscation of all of a debtor's assets after the declaration of bankruptcy is aimed to prevent a debtor from committing acts that could harm the interests of his creditors. To determine this need, the Bankruptcy Law must provide a method for collecting debtor assets fairly and efficiently. General confiscation should be carried out directly of all of a debtor's assets for the benefit of all creditors, as opposed to the Indonesian Bankruptcy Law, which can force creditors to stop executing their own rights.[7]

2. *Actio Pauliana*

   Actio Pauliana is the legal protection for creditors against all actions of bankrupt debtors that are detrimental to creditors.[8] An application for cancellation of legal actions carried out by the debtor is submitted in the context of settling the bankruptcy estate. This is aimed to increase the bankruptcy estate assets, so that creditors receive maximum payments according to the number of claims. In the current practice of Bankruptcy Law, it turns out that the principle of *Actio Pauliana* have not been able to fully protect creditors' interests for several reasons. First, it is evident that proving the applicability of *actio pauliana* is far from simple. *Actio pauliana* burden of proof is different from simple proof in bankruptcy. The District Court examination usually complicates bankruptcy settlement. In fact, generally debtors immediately transfer their movable assets, including their bank accounts, after a bankruptcy declaration to avoid the curator from settling the claims.

[7] Rahmad Bastian (n 11) 217

[8] Siti Anisah, 'Perlindungan Terhadap Kepentingan Kreditor Melalui Actio Pauliana' (2009) 16 Jurnal Hukum Ius Quia Iustum 205 <http://journal.uii.ac.id/index.php/IUSTUM/article/view/3848> accessed 5 February 2024; I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum / I Made Pasek Diantha* (Prenada Media Group 2016).

3. *Gizjeling*

   Gizjeling is a legal measure to ensure that the bankrupt debtor, or the directors and commissioners in the case of the bankrupt limited liability company, truly assist the curator in managing and settling the bankrupt assets. However, there is a general problem in the application of *gizjeling*, due to legal disharmony among the provisions on *gizjeling* as stipulated in the Indonesian Bankruptcy Law, Supreme Court Regulation, and HIR (*Herzien Inlandsch Reglement*). However, M Hadi Shubhan believed that despite the legal disharmony in the provisions governing this body's authority, however, it is still possible to regulate *gizjeling* implementation issues. In the case of a conflict of legal norms, it is necessary to return to the legal principles of *lex superiori derogat legi inferiori* and *lex specialist derogat lex legi generalis*.

2. *Ratio Decidendi* of Judges' Decisions to Ensure the Satisfaction of State-Owned Enterprise (Persero)'s Liabilities

Issues in the bankruptcy administration of State-Owned Enterprises (*Persero*) in Indonesia are mostly attributed to legal inconsistencies and disharmony among laws and regulations related to the bankruptcy of State-Owned Enterprises (*Persero*).[9] Legal and regulatory disharmony has resulted in different views and interpretations of judges regarding the legal position of State-Owned Enterprises in bankruptcy and state finances. These differences also give rise to inconsistent judicial decisions regarding the application for bankruptcy of the State-Owned Enterprises (*Persero*), both within the scope of the Commercial and District Courts as courts of original jurisdiction and the Supreme Court.

This study constructed various decisions in this subchapter using an approach derived from the *ratio decidendi* of judicial decisions, both from the *judex facti* level to the *judex juris* level. Terminologically, *ratio decidendi* is defined as the reason for the decision. Zender, in his book *The Law-Making Process,* defined *ratio decidendi* as "a

[9] This situation is proven by the conflict of interpretations in declaring the State-Owned Enterprise Persero bankruptcy, among Law No.17/2003 on State Finances and Law No.1/2004 on State Treasury, Law No.19/2003 on State's Own Enterprises, Law No.37/2004 on Bankruptcy and Postponement of Debt Payment Obligations, and Law No.40/2007 on Limited Liability Companies; Muhammad Yasin and Harsanto Nursadi, 'Miracle 14: Transparency in Indonesia's State-Owned Enterprises' (2021) 28 BISNIS & BIROKRASI: Jurnal Ilmu Administrasi dan Organisasi <https://scholarhub.ui.ac.id/jbb/vol28/iss3/5>.

proposition of law which decides the case, in the light or in the context of the material facts."

The *ratio decidendi* format in a judge's decision is a part of legal proportionality. This principle serves as a premise that contains judicial consideration expressed explicitly and implicitly. This definition is similar to the definition of *ratio decidendi* by Sir Rupert Cross in his book *Precedent in English Law,* which states that "any rule expressly or impliedly treated by the judge as a necessary step in reaching his conclusion." The term "rule" here shall be interpreted from the perspective of the common law system in England, and thus, it is not a mere statutory rule, but rather a legal proposition as the result of a judge's rational considerations. Therefore, *ratio decidendi* requires judges to compare previous cases with the current case.

The Indonesian legal system does not recognize the principle of binding precedent. Therefore, judges must be more careful in selecting and reconciling previous decisions, which in fact have been claimed as jurisprudence. Judges need to examine the *ratio decidendi* of each judge's decision labeled as jurisprudence by examining the material facts that occurred in previous cases and comparing them with the material facts of the current case. They are not advised to directly quote jurisprudential rules without clearly understanding the material facts, since making a reckless decision without clear analysis means adding the prescriptive dimension without passing through the descriptive dimension of a decision. It is also noteworthy that the rules of jurisprudence essentially follow rules of legal discovery.

3. Ratio Decidendi in Bankruptcy Cases of State-Owned Enterprises (*Persero*)

a. The Case of PT Kertas Leces (*Persero*)

Judex facti in the decision of case Number 05/PKPU/2014/PN.Niaga.Sby is considered by referring to Article 281 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations based on the results of voting on a proposal (plan of reorganization). This plan shall be carried out with the creditors' approval to ensure the peace agreement is formally valid and binding on the parties, namely the debtor and creditor. In this case, *judex facti* considers that a declaration of bankruptcy by law indicates that all assets of the Respondent for cancellation of debts can be placed in general confiscation and override the provisions of Article 50 of Law Number 1 of 2004 concerning State Treasury. This is because the assets of the Debtor or the

Respondent for Cancellation of Debts, PT Kertas Leces (*Persero*), are not state assets and cannot be categorized as state finances as intended in Article 2(g) of Law Number 17 of 2003 concerning State Finances. This rule is in line with the provisions of Article 4(1) of Law Number 19 of 2003 concerning State-Owned Enterprises, which stipulates that the capital of State-Owned Enterprises is and originates from separated state assets and the provisions of Article 11 of the *a quo* Law, which states that all provisions and principles that apply to Limited Liability Companies apply to all Limited Liability Companies. In addition, Article 2A(1) of the Law also states that "state-owned shares in State-Owned Enterprises or Limited Liability Companies are essentially state assets which have been separated from the state revenue and expenditure budget so that the transfer of shares is to be used as an investment in the Business Entity. State-owned or Limited Liability Companies are not carried out through the state budget mechanism."

Judex juris considers this because the application for review from the Applicant for Judicial Review is declared inadmissible, the Applicant for Judicial Review is ordered to pay the court costs for this review examination. *Judex juris* also notes some relevant laws, namely: Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, Law Number 48 of 2009 concerning Judicial Power, Law Number 14 of 1985 concerning the Supreme Court as amended by Law Number 5 2004 and the Second Amendment to Law Number 3 of 2009, as well as other relevant laws and regulations.

b. The Case of PT Pelayaran Nasional Indonesia (*Persero*)

This case was about the fulfilment of the liabilities of State-Owned Enterprise, PT Pelayaran Nasional Indonesia (PT Pelni (*Persero*)). In Court Decision Number 168/Pdt.G/2008/PN.Jkt.Pst *jo.* Decision Number 537/PDT/2009/PT.DKI.JKT *jo.* Decision Number 76 K/Pdt/2009 in conjunction with Decision Number 496 PK/PDT/2013, the respondent, PT Pelni (*Persero*), had been ordered to pay the claimant's losses amounting to IDR 10.230.000.000. However, PT Pelni (*Persero*) failed to pay off this debt. It was followed with a submission of request for execution against the assets of PT Pelni (Persero), which was responded to by Pelni (Persero)/Ministry of State-Owned Enterprises by filing an opposition as registered in the case register Number

110/Pdt.Plw/2015/PN.Jkt.Pst. and was decided on June 16 2015. Against this decision, PT Pelni (*Persero*) submitted an appeal to the Jakarta High Court and the application was decided on June 2, 2017. Based on Decision Number 127/PDT/2017/PT.DKI, the appeal was accepted. When granting the request for execution and ordering the Registrar of the Central Jakarta District Court to execute on the assets of PT Pelni (*Persero*) in the form of the account of Bank Mandiri, Jakarta Branch, Pelni Building belonging to PT. Indonesian National Shipping Persero, the Chairman of the Central Jakarta District Court considered the following points:

1) Article 4 paragraph 1 of Law Number 19 of 2003 concerning State-Owned Enterprises states that the capital of State-Owned Enterprises is and originates from separate state assets (in the explanation the development and management is not based on the state budget system but based on sound corporate principles).

2) State-Owned Enterprises are Business Entities that have separate assets from state assets, and thus the authority to manage such assets and business, including settlement of debts of State-Owned Enterprises is subject to Limited Liability Company Law (Indonesian Company Law). Thus, the State-Owned Enterprise provided compensation to the Petitioner on the legal basis of a Limited Liability Company based on the Company Law and not according to the state budget. Additionally, based on the results of the National Working Meeting of the Supreme Court on October 8, 2009, the assets of a Limited Liability Company (*Persero*) are not state assets, but rather the assets of a Limited Liability Company (*Persero*). Specifically, "PT Pertamina (*Persero*)'s assets are no longer deemed as state property but are considered as PT Pertamina's assets, thereby excluding it from the scope of Article 50 of Law Number 1 of 2004 concerning State Treasury."

3) The Constitutional Court Decisions Numbers 46 and 62/PUU indicate that the Limited Liability Company (PT), since obtaining approval from the Department of Law and Human Rights (HAM), a Legal Entity. In this way, its assets are separated from the assets of the Shareholders (State). In terms of the implementation of the *a quo* execution, based on the disposition of the

Chairman of the Central Jakarta District Court, the case was remanded, and summonses issued to the Parties in the case to request clarification/explanation need to be made.

c. The Case of PT Dirgantara Indonesia (*Persero*)

The petitioners in the PT Dirgantara Indonesia (PT DI (*Persero*)) bankruptcy case were 6.561 workers who were fired by PT DI based on the decision of the Central Labor Dispute Settlement Committee (P4P) Number 142/03/02-8/X/PHK/1-2004 dated 29 January 2004 which has permanent legal force. Based on Ruling III of the P4P Decision, PT DI is obliged to provide pension compensation based on the amount of the last worker's wages and old age security in accordance with Law Number 3 of 1992 concerning Social Security for Workers.

Judex Facti considers that the bankruptcy applicant has legal capacity/legal standing (*persona standi in judicio*) to submit an application for a bankruptcy declaration against PT DI. According to the panel of judges, this opinion was based on the State Gazette of the Republic of Indonesia regarding the Approval of the Deed of Amendment to the Articles of Association of Limited Liability Companies dated 25 October 2005, Number 85 by the Ministry of Law and Human Rights of the Republic of Indonesia (HAM) and based on the decision of the Minister of Law and Human Rights Number C04670.HT.01.04 of 2005, of which Article 1 paragraph (1) states that this limited liability company is called the Limited Liability Company (Persero) PT DI. Meanwhile, Article 4 paragraph (2) and paragraph (3) states that the shareholders of PT DI are the Minister of State-Owned Enterprises of the Republic of Indonesia and the Minister of Finance of the Republic of Indonesia of the Republic of Indonesia. However, the Panel of Judges was of the opinion that PT DI was not a State-Owned Enterprise as intended in the provisions of Article 2 paragraph (5) of the Bankruptcy Law, namely a State-Owned Enterprise which operates in the field of public interest whose entire capital is not divided into shares.

Judex juris considers whether *judex facti* has misapplied the law or has violated the applicable law, which in this case referred to the law of evidence relating to evidence on the part of the Cassation Respondents (formerly the Petitioners) regarding the maturing debt, which was collectable based on the

provisions of Article 2 paragraph (1) of the Bankruptcy Law and was linked to the provisions of Article 8 paragraph (4) of the Bankruptcy Law regarding simple proof regarding the terms of a bankruptcy decision. *Judex facti* was also ruled not to provide sufficient arguments (*onvoldoende gemotiveerd*) by not providing sufficient consideration to the evidence submitted by the Cassation Respondents (formerly the Petitioners) and not connecting the evidence with the evidence submitted by the First Cassation Applicant (formerly the Respondent). *Judex facti*, according to *judex juris*, did not have the authority or exceeded the limits of authority to examine and try the *a quo* case because it has been proven that the evidence of the *a quo* case did not meet the simple evidentiary requirements as determined by Article 8 paragraph (4) of the Bankruptcy Law.

d. The Case of PT Istaka Karya (*Persero*)

One of the creditors of PT Istaka Karya (*Persero*), PT Japan Asia Investment Company Indonesia (PT JAIC), filed a bankruptcy petition, because there was an outstanding debt of US$7,645,000. The dispute between the two began when PT Istaka Karya (Persero) issued 6 (six) Negotiable Promissory Notes (bearer bonds) with a total value of US$ 5.5 million. According to PT JAIC, the securities were issued on December 9, 1998, and matured on January 8, 1999. However, when they matured, PT Istaka Karya (Persero) did not pay of the debt obligations. Given this situation, PT JAIC, as the party holding the securities, filed a lawsuit at the South Jakarta District Court in 2006. PT Istaka Karya (*Persero*)'s debt to PT JAIC is proven by the Supreme Court Decision Number 1799 K/PDT/2008 dated 9 February 2009. This Supreme Court decision has permanent legal force and can be executed. The Chairman of the South Jakarta District Court has also issued decision Number 1097/Pdt.G/2006/PN.Jkt.Sel dated 29 July 2010. On 18 August 2010, the Chairman of the South Jakarta District Court summoned PT Istaka Karya (*Persero*) to be warned (*aanmaning*) to implement the Supreme Court's decision, which has permanent legal force. Furthermore, PT JAIC stated that it would not hesitate to exercise its right to ask the court to confiscate PT Istaka Karya (*Persero*)'s assets, including freezing projects, if the company still refused to satisfy the Supreme Court's decision voluntarily.

PT Istaka Karya (*Persero*) did not follow the orders of the Chairman of the South Jakarta District Court, which forced PT JAIC to file for a bankruptcy petition through the Central Jakarta Commercial Court against PT Istaka Karya (*Persero*) on October 25, 2010, under case number 73/Pailit/2010. In this phase, PT JAIC is the Petitioner and PT Istaka Karya (*Persero*) is the Respondent.

The verdict of the Panel of Judges at the Central Jakarta Commercial Court in its Decision No. 73/PAILIT/2010/PN.JKT.PST dated 16 December 2010 stated that PT Istaka Karya (*Persero*) was not declared bankrupt with all the legal consequences attaching thereto. *Judex facti* considers that Article 50 of Law Number 1 of 2004 prohibits any party from confiscating, among other things, money or securities, movable goods and immovable property belonging to the state so that according to Article 1 of Law No. 37 of 2004, all state assets are not subject to general confiscation unless a bankruptcy petition is submitted by the Minister of Finance as the Government in separate ownership of state assets and the state general treasurer (Article 6 paragraph (2) letter a jo. Article 8 of Law Number 17 2003). Therefore, the Petitioner did not have the capacity to submit a petition for a bankruptcy declaration (legal standing) because Article 2 paragraph (5) of Law Number 37 of 2004 stipulates that in the event that the debtor is an insurance company, reinsurance company, pension fund, or state-owned business entity for countries operating in the public interest sector, bankruptcy applications can only be submitted by the Minister of Finance. This decision was also confirmed by *Judex Juris* in the Judicial Review Decision Number 678PKJ/Pdt/2010 dated March 22 2011 which stated the following:

1) To grant the request for review from the Petitioner for Review of PT Istaka Karya (*Persero*);
2) To cancel Supreme Court Decision Number 1799K/Pdt/2008 dated February 9, 2009;
3) To declare the Creditor's claim unacceptable. Considering, that with the annulment of Supreme Court Decision 1799K/Pdt/2008 dated 9 February 2009, the debt cannot yet be collected as required by Article 2 paragraph (1) in conjunction with Article 8 paragraph (4) of the Bankruptcy Law.
4) That the opinion and legal considerations of the Commercial Court decision at the Central Jakarta District Court Number 73/Pailit/2010/PN.Niaga.Jkt.Pst

dated 16 December 2010 are correct and valid. Therefore, this can be taken into consideration in this decision.

e. The Case of PT Iglas (*Persero*)

PT IGLAS (*Persero*) is indebted to PT INTERCHEM PLASAGRO JAYA for chemical purchases. PT. IGLAS (*Persero*) was previously the chemical distributor and PT INTERCHEM PLASAGRO JAYA was the party that procured and delivered the chemicals. Chemical prices had been agreed based on purchase orders. The agreed price for this order was IDR 102.531.936.000.00 (US$ 165.816.38). Apart from that, PT. IGLAS (*Persero*) also had other debts from PT AKR CORPORINDO. Due to the financial inability of PT IGLAS (*Persero*) to meet its debt obligations to PT INTERCHEM PLASAGRO JAYA and PT AKR CORPORINDO, the two companies submitted a bankruptcy petition to the Commercial Court of the Surabaya District Court.

The Commercial Court of the Surabaya District Court issued Decision Number 01/Pailit/2009/PN.Niaga.Sby. The Court stated that it rejected the bankruptcy petition submitted by PT INTERCHEM PLASAGRO JAYA and PT AKR CORPORINDO based on the following considerations. First, that the Panel of Judges was guided by Article 5 of the Indonesian Bankruptcy Law which states that "in the case that the debtor is an Insurance Company, Reinsurance Company, Pension Fund, or State-Owned Enterprise which operates in the public interest, the application for a bankruptcy declaration can only be submitted by the Minister of Finance." Second, the Panel of Judges concluded that although the capital of PT IGLAS (*Persero*) was owned by the Minister of State-Owned Enterprises and PT Bank Negara Indonesia, all of the capital basically belongs to the State. The panel of judges related this to Article 1 number 1 and Article 2(g) of the State Finance Law, which states that "State finances as referred to in Article 1 number 1 are state assets/regional assets managed by themselves or by other parties in the form of money, letters valuables, receivables, goods and other rights that can be valued in money, including assets separate from State Companies/Regional Companies."

Judex juris then considered that the Petitioner for Judicial Review, PT IGLAS (*Persero*) was a State-Owned Enterprise whose capital was 100% owned by the State and therefore the entire capital of PT IGLAS (*Persero*) currently

belonged to the State. Thus, as a consequence, with reference to Article 2 paragraph (5) of Law Number 37 of 2004, a Bankruptcy Application can only be submitted by the Minister of Finance and a bankruptcy application in the *a quo* case was not submitted by the Minister of Finance. In other words, this Petition did not fulfill the provisions of Article 2 paragraph (5) of Law Number 37 of 2004.

f. Case of Execution of International Arbitration Decision for Karaha Bodas Company against PT Pertamina (*Persero*)

PT Pertamina (*Persero*) entered into a contractual relationship with Karaha Bodas Company (KBC) through a Joint Operation Contract (JOC). This contract stipulated that PT Pertamina was responsible for managing geothermal operations in the Karaha project and KBC was to act as contractor. KBC was required to develop geothermal energy in the project area and build own and generate electric power. Based on this contract, PLN agreed to purchase electricity from Pertamina, supplied and provided by a power plant built by KBC. As a contractor for Pertamina, based on the JOC, KBC on behalf of Pertamina and based on the Energy Sales Contract had the right to supply and sell electricity with a capacity of up to 400 Mw to PLN from the Karaha Project.[10]

The *ratio decidendi* used as the basis for the judge's consideration in this case was as follows. The arbitration panel had misinterpreted *force majeure* and thus, Pertamina could not be held liable for circumstances beyond its capabilities. In addition, the arbitration panel was considered to have exceeded its authority because it did not use Indonesian law even though Indonesian law was the only applicable law according to the agreement of the parties. In this case, the arbitral tribunal only used its own conscience based on *ex aequo et bono* considerations.

There was a prohibition by the Indonesian Government through Presidential Decree Number 39 of 1997 concerning Suspension/Reassessment of Government, State-Owned Enterprises and Private Projects relating to the Government/State-Owned Enterprises as efforts to secure the sustainability of the economy and the course of national development and based on the constitutional authority of the President. This makes it clear that the interpretation, expansion and meaning of

[10] Dodik Setiawan Nur Heriyanto, 'Strengthening Indonesian Judges' Understanding of the Refusal and Annulment Grounds of Foreign Arbitral Awards' (2015) 56 Acta Juridica Hungarica 167 <https://akjournals.com/view/journals/026/56/2-3/article-p167.xml> accessed 5 February 2024.

public interests and halal causes are very situational and contextual, which can be and have been extended beyond the realm of law and cover the realm of politics and economics.

4. **Characteristics of Judicial Decisions in Bankruptcy of State-Owned Enterprises (*Persero*)**

The research examination of several cases of execution of civil decisions, execution of arbitration decisions, and bankruptcy decisions against State-Owned Enterprises (*Persero*), revealed obstacles to the legal protection for creditors to ensure the fulfilment of State-Owned Enterprises' (*Persero*) liabilities in resolving bankruptcy claims. This is mainly related to the unsynchronized and disharmonious regulations, especially between regulations regarding state finances, the institutions of State-Owned Enterprises (*Persero*), and state assets which are separated as capital of State-Owned Enterprises (*Persero*). This condition does not guarantee legal protection to ensure the fulfilment of State-Owned Enterprises (*Persero*)'s liabilities. The analysis on the decisions on bankruptcy applications in this study disclosed three characteristics derived from these decisions as described below:

a. Bankruptcy Petition Granted by Commercial Court Judge and Accepted by Supreme Court Judge

   PT Kertas Leces (*Persero*) was the first State-Owned Enterprise (*Persero*) to be granted bankruptcy protection by the Commercial Court and the Supreme Court. The Supreme Court accepted a rejection of obligation agreement at the cassation level.

b. Bankruptcy Petitions Granted by Commercial Court Judges but Rejected by the Supreme Court

   The different interpretations regarding capital participation in State-Owned Enterprises (*Persero*) results in different opinions of parties having the right to declare bankruptcy. In *judex facti*'s consideration, bankruptcy may be filed by anyone by submitting the bankruptcy application, which has met the requirements. However, in the consideration of *judex juris*, the consideration of *judex facti* is considered an error and does not use another approach.

c. Bankruptcy Application Rejected Outright

   The judge may reject a bankruptcy petition. In the considerations of judges at the Commercial Court (*judex facti*) and the Supreme Court (*judex juris*), this usually is based on the percentage of shares owned by the state. The rejection of bankruptcy is

based on the consideration that the shares in a State-Owned Enterprise (*Persero*) are fully owned by the state. They cannot be placed into bankruptcy by any party other than the Minister of Finance.

5. Future Legal Protection for Creditors to Ensure that State-Owned Enterprises (Persero) Fulfil Their Liabilities

a. Disharmony in Legislative Regulations in Capital Participation in State-Owned Enterprises (Persero)

Achievement of state objectives is inseparable from the role of state finance that ensures financial operation of government administration. However, there are many problems related to implementation, particularly due to the management of state finances, especially in terms of the capital of State-Owned Enterprises (*Persero*) as currently addressed in this study. Hence, it is necessary to understand that state finances serve as a tool to achieve state goals.[11]

In this case, however, State-Owned Enterprises have different legal characteristics in terms of their finances. The governance and liabilities of State-Owned Enterprises are based on civil legal capacity, and thus they are regulated by civil law. The State in the context of State-Owned Enterprises is classified as a subject of civil law whose duties and authority (*taak en bevoegdheid*) are accompanied by rights and obligations (*rechten et plicthen*). Therefore, the state as a subject of public law does not have any authority and cannot intervene in State-Owned Enterprises as subjects of civil law, which could result in State-Owned Enterprises not being independent and unable to compete in the market. In relation to legal entity theory, it is obvious that the state no longer has governing authority over State-Owned Enterprises. This is attributed to changes in status and transformation of State or regional legal functions as well as wealth/finances in State-Owned Enterprises from duties and authority to rights and obligations, as a result of horizontal transactions and the legal transformation

[11] Rahayu Hartini, *BUMN Persero: Konsep Keuangan Negara Dan Hukum Kepailitan Di Indonesia* (Setara Press 2017); Satya Arinanto and Dian Parluhutan, 'Holding of the Indonesian State-Owned Enterprises and Analysis of the Judicial Review Over the Government Regulation Number 47/2017 Juncto Law Number 19 Year 2003 on the BUMN', *Proceedings of the 3rd International Conference on Law and Governance (ICLAVE 2019)* (Atlantis Press 2020) <https://www.atlantis-press.com/article/125937709> accessed 12 March 2024.

of public money into private money, which serves as the juridical basis for State-Owned Enterprises to become legal entities.[12]

Juridically, the capital included in a limited liability company is no longer deemed as assets of the individuals who contributed the capital but becomes the limited assets of the Company. This ownership is represented by a share certificates, which state the name of the company and the names of the share owners. It can be concluded that the State's equity interest in the State-Owned Enterprise is the asset of the legal entity, and that the State only functions as a shareholder in the State-Owned Enterprise.

There is legal disharmony in the regulation of procedures for State capital participation in State-Owned Enterprises due to different basic considerations for the formation of governing laws and regulations. In this case, the government has taken steps to facilitate the use of state finances through State-Owned Enterprises and capital participation by issuing PP RI No. 43 of 2016 in order to increase and maximize value and optimize the role of State-Owned Enterprises as national development agents in order to support and accelerate the government agenda or programs. Meanwhile, the Law on State Finance was enacted to realize state goals to satisfy the interests of all Indonesians, and thus because it concerns state assets or people's assets, the management of state finances must adhere to strict legal procedures. The Law on State-Owned Enterprises stipulates the issuance of a government regulation to implement procedures for State capital participation in State-Owned Enterprises through PP RI No. 44 of 2005, which regulates that all State capital participation derived from the state budget is invested according to the provisions of State finance, because funds for State capital participation in State-Owned Enterprises are generated from separated State assets conducted through the state budgeting process to be directly handled by the management of state finances. Thus, there is obvious legal disharmony in the regulation of procedures for State capital participation in State-Owned Enterprises in the management of State finances, in laws and regulations at different levels,

[12] Arifin P Soeria Atmadja, *Pola Pikir Hukum (Legal Mindscapes) Definisi Keuangan Negara Yang Membangun Praktik Bisnis Badan Usaha Milik Negara (BUMN) Yang Mengakar (Deep Rooted Bussines Practice)* (Universitas Indonesia Press 2011); Arie Siswanto and Marihot Janpieter Hutajulu, 'Government-Owned Enterprises (GOEs) in Indonesia's Competition Law and Practice' (2019) 8 Yustisia Jurnal Hukum 93 <https://jurnal.uns.ac.id/yustisia/article/view/21740>.

particularly between the government regulation and the Law. The provisions of article 2A paragraph (1) PP RI No. 72 of 2016 states that the mechanism for State capital participation in State-Owned Enterprises is carried out and implemented by the central government alone without going through the state budget process or mechanism, which contradicts the regulations in the State Finance Law, stipulating that all State financial management is carried out through the state budget mechanism as a form of management and accountability for state finances.

As a consequence, the disharmony in the regulation of procedures for State capital participation in State-Owned Enterprises in the management of State finances has led to legal uncertainty in society. Article 2A paragraph (1) PP RI No. 72 of 2016 shall be ignored because it conflicts with or is not in accordance with the provisions of the State Finance Law. This ignorance is based on the principle of applicable laws and regulations of *lex superior derogate legi inferior*, which requires that the higher rules of law are superior to the lower rules based on the regulations regarding the types and hierarchy of statutory regulations and their applicable formation in Indonesia. As an effort to harmonize legal norms related to these laws and regulations to avoid legal disharmony, judicial review shall be carried out at the Supreme Court as a state institution with the constitutional authority to review all laws and regulations of the lower provisions against the higher provisions. This legal harmonization is carried out to create laws that are in harmony and do not overlap with each other concerning the same subjects at different levels.

b. Harmonization of State-Owned Enterprise Legislation

Harmonization of laws and regulations is pivotal to ensure that the existing laws and regulations are interrelated and interdependent and can form a complete legal framework. The vertical and horizontal legal harmonization ensures that the meaning of state finances and state assets, which are separated from the assets of State-Owned Enterprises (*Persero*).[13]

[13] The vertical harmonization of laws and regulations is significant in the Indonesian legal system as these laws and regulations can be tested by the judiciary. Meanwhile, Horizontal Harmonization of statutory regulations is carried out based on the principle of *Lex Posterior Derogat Legi Priori* towards a statutory regulation, which is in the same and equal hierarchy and in practice is regulated in the closing provisions of a statutory regulation.

The legal harmonization shall be based on three aspects that influence the harmonization process (Alignment/conformity/balance). The first aspect to consider is philosophical value, which demands that legislation can only be enacted if the legal rules are in accordance with legal ideals as an essence of high positive value. The second aspect is the juridical perspective after the formal requirements for the formation of a legal regulation have been fulfilled. The third aspect is sociological value, which relates to the effectiveness or results of legislative regulations in society. In addition, these aspects are also correlated with the economic aspect, since the legal substance of statutory regulations should be prepared by taking into account the efficient implementation of the provisions in statutory regulations. From the abovementioned, it is apparent that harmonization of laws and regulations refers to the process of harmonizing and aligning laws and regulations as an integral part or sub-system of the legal system in order to achieve legal objectives.

Harmonization of statutory regulations is not only limited to the type of statutory regulations and their sequence is ideally carried out in an integrated manner, covering all aspects of statutory regulations, namely: a) General understanding of statutory regulations; b) Meaning sequence of statutory regulations; c) Function of the sequence of statutory regulations; d) Naming of each statutory regulation; e) Definition of each statutory regulation; and f) Relationship between norms of statutory regulations and norms of other laws.[14]

For this subject, legal disharmony among various regulations in the State-Owned Enterprises Law makes it necessary to conduct legal harmonization by aligning the provisions of Article 11 of Law No. 19 of 2003 concerning State-Owned Enterprises with Article 50 of Law No. 1 of 2004 concerning the State Treasury in the context of bankrupting the State-Owned Enterprise (*Persero*). Law No. 19 of 2003 concerning State-Owned Enterprises has identified the State-Owned Enterprise Persero as a “Limited Liability Company” (PT). The provisions of Law No. 40 of 2007 are concerned with Limited Liability

[14] Susanto, ‘Harmonisasi Hukum Makna Keuangan Negara Dan Kekayaan Negara Yang Dipisahkan Pada Badan Usaha Milik Negara (Badan Usaha Milik Negara) Persero’ (Pamulang University Postgraduate 2017); Dodik Setiawan Nur Heriyanto. “Legal Challenges to Improve and Reform the Privatized Water Services in Indonesia.” Public Goods and Governance 1, no. 1 (2016); Tatu Aditya, ‘Reforming Criminal Impacts in The Law of State Finance: Legal Certainty for State-Ownerd Enterprise’ (2022) 15 Indonesia Law Journal.

Companies. In other words, the State-Owned Enterprise Persero also applies to Law No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations. Nonetheless, Law No. 1 of 2004 concerning the State Treasury states that state assets cannot be confiscated for any reason (Article 50), so that in formal juridical terms it is necessary to clarify the definition of "a public company operating in the public interest" as a State-Owned Enterprise in the form of a Public Company. Therefore, State-Owned Enterprises in the form of Persero are not included in the category of "state companies operating in the public interest," and that their legal status is the same as other companies. This also indicates that the Limited Liability Company Law, the Bankruptcy and Suspension of Debt Obligations Law applies, and other laws apply to the Company. The question remains however, whether the state-owned capital which has been delineated and invested in the name of the State in the State-Owned Enterprise Persero shall be deemed as having the "private" (business) status or as the "public (state)" status?

Hence, it is crucial to add another paragraph to explicitly emphasize that state capital invested in the State-Owned Enterprise (*Persero*) is no longer an asset of the State but serves as an asset of the State-Owned Enterprise (*Persero*), which is private, thus rendering the State merely as the owner of the shares. It is possible to apply the piercing the corporate veil norm to ensure that the Limited Liability Companies (PT) will no longer be limited in order to prioritize aspects of justice, especially to deal with the bankruptcy of a State-Owned Company (*Persero*) when the assets cannot satisfy the liabilities.

c. Future Legal Protection to Ensure that State-Owned Enterprises (Persero) Fulfil Their Liabilities

The problems in the bankruptcy proceedings of the State-Owned Enterprise Persero are related to the position of the state as a shareholder in a civil legal entity, for which the state should only be responsible to the extent of the number of shares included in the State-Owned Enterprise Persero. From a basic legal perspective, state assets are separated into company assets and managed based on the principles of sound company management. Based on the provisions of Article 11 of the State-Owned Enterprises Law, "all provisions and principles applicable to limited liability companies apply to Persero." The State-Owned Enterprise

(*Persero*) is identical to a Limited Liability Company and thus all provisions of the principles applicable to Limited Liability Companies also apply, including in the event of bankruptcy.

The status of assets of the State-Owned Enterprise Persero as an independent legal entity means that State-Owned Enterprises are equal with a private individual (legal personage), or an entity that has assets regardless of its members. It is considered a legal subject with the ability to take legal action, as well as have responsibilities, rights, and obligations similar to those of an individual. In order to deal with this problem, it is necessary to ensure future legal structures or construction (*ius constiduendum*) related to the protection of creditors to ensure the fulfillment of liabilities of State-Owned Enterprises (*Persero*) as debtors. Thus, it must receive juridical recognition based on the independence status of State-Owned Enterprises (*Persero*) as a legal entity. This is because a State-Owned Enterprises (*Persero*) are independent legal entities that have their own rights and obligations, which are separate from personal assets and their management, including when the state holds and equity interest.

The perfect framework for providing creditors with the legal protection to ensure the fulfilment of liabilities of State-Owned Enterprise (*Persero*) is made through a legislative reformulation approach, which shall be divided into 2 legislative phases.

1) **Reformulation of Law Number 17 of 2003 concerning State Finances and Law Number 1 of 2004 concerning the State Treasury**

Article 2(g) of Law no. 17/2003 stipulates that "State finances.. include state assets/regional assets managed by themselves or by other parties in the form of money, securities, receivables, goods and other rights that can be valued in money, including assets separated from state companies/regional company." With the existence of the State-Owned Enterprises Law, these provisions no longer have legal binding force.

There is confusion surrounding the regulations regarding investment dispute resolution designed to provide legal protection for creditors by ensuring that State-Owned Enterprises (Persero) fulfill their obligations in the Indonesian legal system. This occurs because public finances and private finances are comingled, resulting in a prohibition on the confiscation of

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everything deemed to be state finances based on Article 50 of Law No. 1 of 2004 concerning State Treasury. This provision also becomes the basis of views and considerations for the majority of judges at the courts of original jurisdiction and all justices at the Supreme Court level in supporting the provisions of Article 1 number 1 of the State Finance Law. In simple terms, Article 50 of the State Treasury Law provides support for judges to pay particular attention to the State Finance Law, compared to other laws including the Bankruptcy Law and Suspension of Debt Payment Obligations, the State-Owned Enterprises Law, and the Company Law amidst the inconsistencies and disharmony in between various laws, especially in looking at whether or not State-Owned Enterprises (*Persero*) can be put into bankruptcy. As a result, most judges at the *judex facti* and *judex juris* levels prefer not to declare bankruptcy of the State-Owned Enterprise (Persero) in order to preserve the state's asset and finances.

A judge's attitude in deciding bankruptcy cases insinuates unmet legal protection for creditors. The absence of guarantees for creditors in receiving satisfaction of claims against from State-Owned Enterprises (*Persero*) will hamper the development of the State-Owned Enterprise in the long run. This is because businesses will be reluctant to engage with State-Owned Enterprises given the unclear legal protection. In order to solve this problem, the provisions of Article 1 number (1) and Article 2 of the State Finance Law need to be amended to be followed by an amendment to the provisions of Article 50 of the PN Law, as well as the provisions of other articles which are deemed to contradict with the Bankruptcy and Suspension of Obligations Law, Debt Payment, State-Owned Enterprises Law, and Company Law. This relates specifically to the definition of state asset and/or finances. The definition needs to be harmonized with the provisions of Article 4 paragraph (1) of the State-Owned Enterprises Law, which states that the capital of State-Owned Enterprises is and originates from state assets which are separated from the State Revenue and State Budget (APBN), the guidance and management of which is no longer based on state budget system but to healthy company principles. Thus, a state-owned enterprise (*Persero*), can be put into

bankruptcy proceedings to fulfil the rights of creditors, without having to sacrifice state finances.

This change implies that all assets owned by the State-Owned Enterprises (*Persero*) are no longer part of the state's assets and/or finances. Thus, the Minister of Finance is no longer the absolute authorized party to file a bankruptcy application on behalf of State-Owned Enterprises (*Persero*). In this case, the creditor has the right and has legal standing to act as a bankruptcy creditor of the bankruptcy debtor. This arrangement also needs to be supported by changes to the requirements for filing a bankruptcy declaration application in the Bankruptcy Law and Suspension of Debt Payment Obligations, which will be further explained in the section of "Reformulation of the Bankruptcy Law and Postponement of Debt Payment Obligations."

Amendments to the State Finance Law and the State Treasury Law need to be harmonized with the Bankruptcy Law and Suspension of Debt Payment Obligations, the State-Owned Enterprises Law, and the Indonesian Company Law. Such amendment will not only provide benefits for the state, but also guarantee the fulfillment of justice for businesses when they have become creditors of a State-Owned Enterprise that is going bankrupt. This explanation reflects the development of economic and business law in Indonesia because true legal development must also build a healthy economic and business climate and guarantee the fulfillment of rights and justice for every interested party.

Amending the State Finance Law and the State Treasury Law and aligning them with the Bankruptcy Law and Suspension of Debt Payment Obligations, the State-Owned Enterprises Law, and the Indonesian Company Law does not mean sacrificing state finances to fulfill the rights of some people. However, the philosophical basis is that the state should be an institution or organization that not only guarantees the safety and comfort of citizens but must also participate in seeking the welfare of citizens, with a spirit of mutual cooperation, which includes the participation of investors in state-owned enterprises (*Persero*). This amendment is needed not with the intention of eroding the state's finances and/or assets for investors in State-

Owned Enterprises (*Persero*), but to put in place more humane, just, and certain methods and processes in safeguarding and protecting the state's finances and/or assets without simplifying the process and the goals of justice to be achieved by justice seekers, particularly the investors who act as the creditors of the bankrupt State-Owned Enterprise (*Persero*).

2) **Reformulation of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations**

Bankruptcy is intended as a general marshalling of all the Bankrupt Debtor's assets, the management and settlement of which is carried out by the Curator under the supervision of the Supervisory Judge. The debtor may file for bankruptcy protection when it has two or more creditors and has not paid in full at least one debt that is due and collectible. The application for bankruptcy can be made by the debtor or at the request of one or more creditors. In this case, the Law on Bankruptcy and Suspension of Debt Payment Obligations regulates that State-Owned Enterprises, whether in the form of a public company (*Perum*) or in the form of a Limited Liability Company (*Persero*), can be put into bankruptcy. However, in practice, the decision of the court of original jurisdiction which accepts the bankruptcy petition of a State-Owned Enterprise (*Persero*) was completely annulled by the Supreme Court. This condition has become a polemic, especially in terms of protecting the rights of bankruptcy creditors.

This condition makes it necessary to amend the Bankruptcy Law and Suspension of Debt Payment Obligations. Such changes are related to the need to regulate additional conditions for petition for bankruptcy protection by a creditor against a debtor, where the debtor being bankrupted must be in a state of simple insolvency or in a state of not paying the majority (50%) of his debts, as stipulated in Article 1 *Failisessment Verordening* (FV). In other words, the provisions of Article 1 FV, which were previously annulled and were not included in the Bankruptcy and Suspension of Debt Payment Obligations Law need to be accommodated again in the Amended Bankruptcy and Suspension of Debt Payment Obligations Law. This provision guarantees certainty and protection for bankruptcy creditors for the bankruptcy claims against debtors.

The adoption of these provisions changes the requirements for filing a bankruptcy petition by a creditor against a debtor, namely from the initial requirements of having a minimum of 2 (two) creditors and not paying off at least 1 (one) debt to having a minimum of 2 (two) creditors and having to be in an insolvent state, or not paying most of the debts by at least 50% (fifty percent). This idea opens up wider space for creditors to enforce their rights over bankruptcy claims. Apart from that, in 2006, the Supreme Court issued a ruling at the request of the Minister of Finance.[15] The Supreme Court stated that the capital of State-Owned Enterprises comes from state assets, which have been separated from the State Budget and furthermore their guidance and management is not based on the State Budget system but rather on healthy corporate principles. From this fatwa, it is clear that the provisions of Article 2 letter g of the State Finance Law are no longer legally binding on State-Owned Enterprises. Apart from that, another opinion from the Ministry of State-Owned Enterprises in 2007 also stated that state assets in State-Owned Enterprises were limited to capital/shares which were then managed in accordance with corporate law rules, instead of state property law rules.[16]

Thus, in principle, the State-Owned Enterprise (*Persero*) is an independent entity and has its own assets. If a State-Owned Enterprise disputes in court as a defendant, its assets can be confiscated by the court, either by collateral or by execution. If a State-Owned Enterprise has unpaid and overdue receivables, the bankruptcy mechanism for which the application is submitted by the bankruptcy creditor can be justified. Thus, the novelty of this research lies in the fact that it systematically prioritizes the renewal of the characteristics of a State-Owned Enterprise (*Persero*) as a business entity, the capital of which comes partly or entirely from the state and is not managed is not in accordance with the State Budget system as a consequence of the separation of state assets. In other words, the future legal construction (*ius*

[15] See, Supreme Court Letter Number: WKMA/Yud/20/VIII/2006, Date: 16 August 2006 Regarding Request for Legal Fatwa, reads as follows, referring to the Letter of the Minister of Finance of the Republic of Indonesia Number S-324/MK.01/2006 dated 26 July 2006.

[16] Opinion from the Ministry of State-Owned Enterprises in 2007 as stated in No. S-298/S.MBU/2007 25 June 2007 dated 25 June 2007 addressed to the Directors, Commissioners and Supervisory Board of State-Owned Enterprises regarding the relationship between the State Finance Law and the State-Owned Enterprises Law.

constituendum) to resolve debts of State-Owned Enterprises (*Persero*) can be realized in accordance with the applicable civil law.

D. Conclusion

Bankruptcy regulations in Indonesia are yet to guarantee legal protection for creditors to ensure the satisfaction of the State-Owned Enterprise's (*Persero*) liabilities. This condition is due to inconsistent regulations, especially regarding the legal status of *Persero* and separate state finances, which results in a vague interpretation of the assets of the State-Owned Enterprise, thereby causing creditors to receive little legal protection, especially when using bankruptcy mechanisms. In practice, three characteristics are seen from the judge's decision regarding the bankruptcy application of the State-Owned Enterprise (*Persero*), namely granting it in *judex facti* and strengthening it in *judex juris*, granting it in *judex facti* but canceling it in *judex juris*, and the application being rejected both in *judex facti* and *judex juris*. The judge's *ratio decidendi* in deciding cases and carrying out executions to fulfil the liabilities of State-Owned Enterprises in judicial practice in Indonesia, thus far, has generated two interpretations regarding state assets held in State-Owned Enterprises. This leads to different interpretations between judges regarding whether or not the assets of State-Owned Enterprises can be confiscated. In this case, the first view equates the status of State-Owned Enterprises with Limited Liability Companies so that the assets of State-Owned Enterprises can be confiscated by the court and the company can be bankrupted. The second view argues the opposite, by holding that the assets of State-Owned Enterprises cannot be confiscated because the assets belong to the state.

The future legal framework (*ius constituendum*) for protecting creditors against the fulfillment of achievements by debtors of State-Owned Enterprises (*Persero*) can thus be realized by revising regulations, namely by clearly stating the fulfillment of liabilities of State-Owned Enterprises. It is necessary to emphasize that the changes to the regulations shall confirm that capital included in a State-Owned Enterprise (*Persero*) becomes the assets of the State-Owned Enterprise and is no longer included in state finances managed in the State Budget. Thus, the debt settlement of the State-Owned Enterprise can be settled in accordance with civil law mechanisms. In addition, several regulations related to the establishment of State-Owned Enterprises can regulate state action to separate its assets and deposit them as capital in State-Owned Enterprises. This action aims to create legal

certainty for creditors to ensure the satisfaction of the claims against a State-Owned Enterprise (*Persero*) regarding the state assets separated from the State-Owned Enterprise (*Persero*).

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