

CHAPTER III

ANALYZING INDONESIA SOVEREIGN WEALTH FUND, STATE POSITION IN INVESTMENT AND LEGAL ISSUES RELATED WITH ESTABLISHMENT OF INDONESIAN INFRASTRUCTURE FINANCING AGENCY (LPPF)

A. Inappropriateness of Indonesia Investment Agency (PIP) in form of Public Service Agency (BLU) as Indonesia Sovereign Wealth Fund

1. Indonesia Investment Agency (PIP) as Indonesia Sovereign Wealth Fund

PIP or Indonesia Investment Agency (IIA) is the institution under Ministry of Finance, Republic of Indonesia that formed by Ministry of Finance Decree (KMK) Number 1005/KMK.05/2006 concerning the establishment of Government Investment Agency at the Ministry of Finance as Government Institution that implementing the financial management of Public Service Agency.

Based on article 41 Law Number 1 of 2004 concerning State Treasury, Government can conduct long term investment that gave economic benefit, social benefit, and other benefit. This mandate is followed by the issuance of Government Regulation Number 8 Year 2007 concerning Government Investment (PP 8/2007) as it is amended with Government Regulation (PP) No.1

year 2008 concerning Government Investment. The change is conducted as the development of situation in order to give a bigger opportunity of cooperation in investment by adding the form of government investment and as the representation, government established special unit that operates government investment. Acting as the Operator, this special unit called as Government Investment Unit or GIU under Minister of Finance with technical assistance from Directorate General of Treasury and administrative assistance from Secretariat General of Ministry of Finance.

The establishment of GIU was held by the enactment of The Regulation of Ministry of Finance Number 52/PMK.01/2007 on Organization and Work Order of GIU as legal basis. Based on that PMK (The Regulation of Ministry of Finance), GIU is a public service agency that operates Indonesia government investment. After that, in order to give more alternative investment, government determined revising Government Regulation number 8 of 2007 and as the result, the Executive issued Government Regulation Number 1 of 2008 on Government Investment as the revision of the previous regulation. Based on Government Regulation number 1 of 2008 concerning Government Investment, what it means by Government Investment is the placement of the funds and / or goods for long term investment in the purchase of securities and direct investment in order to gain some benefits in economic, social, and/or other benefits. The authority of government investment management conducted by Ministry of Finance as State Treasurer.

The fundamental difference between Government Regulation number 1 of 2008 and the previous regulation is in how the new regulation accommodates kinds of investment that continually grow in line with global economic condition.¹⁹⁴ Subsequently, based on Ministry of Finance Regulation Number 52/PMK.01/2007 concerning Organization and standard operating procedure of Indonesia Investment Agency (PIP), the Indonesia Investment Agency (IIA/PIP) has a task to conduct the operational authority of central government investment according to the policy that issued by Ministry of Finance, and based on rule of law. The new regulation is functioned as legal basis in doing investment cooperation between Indonesia and other countries, so GIU could become Indonesia Sovereign Wealth Fund (SWF),¹⁹⁵ equal with Temasek in Singapore and Khazanah in Malaysia.¹⁹⁶ In the future, GIU will continue to make adjustments to the organization along with the increasing of duties and responsibilities to embrace (PIP history).¹⁹⁷

Indonesia Investment Agency (PIP) was tasked with the following role: "Becoming a catalyst of economic growth, especially in accelerating infrastructure development and investing in any strategic sectors." (PIP

¹⁹⁴ Larry Catá Backer, *Indonesia Investment Agency-Reimagining the State in the Global Sphere: An Inventory of Sovereign Wealth Funds as Regulator and Participant in Global Markets, Law at the End of the Day*, February-11-2014, available at <http://lcbackerblog.blogspot.co.id/2014/02/part-8-indonesia-investment-agency.html> last accessed 7 March 2016.

¹⁹⁵ Also according to SWF Institute, Indonesia Investment Agency of known as Pusat Investasi Pemerintah (PIP) is categorized as Sovereign Wealth Fund. Available at <http://www.swfinstitute.org/swfs/government-investment-unit/> last accessed 7 March 2016

¹⁹⁶ Larry Catá Backer, *op. cit.*

¹⁹⁷ *Ibid.*

Assignment, Function and Role).¹⁹⁸ It is tasked to stimulate national economic growth through investment in strategic sectors.¹⁹⁹ PIP, which is part of the government also supports programs to reduce the impact of global warming through the establishment of a subsidiary which engaged in a green field investment.²⁰⁰ To that extent it mimics other development funds, and perhaps Vietnam's SCIC most.²⁰¹

PIP (Indonesia Investment Agency) was the Sovereign Wealth Fund (SWF) of Republic of Indonesia and used to be investment operator of Indonesia Government. The range of Investment sector of IIA (PIP/Indonesia Investment Agency) covered infrastructure area and other fields.²⁰²

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

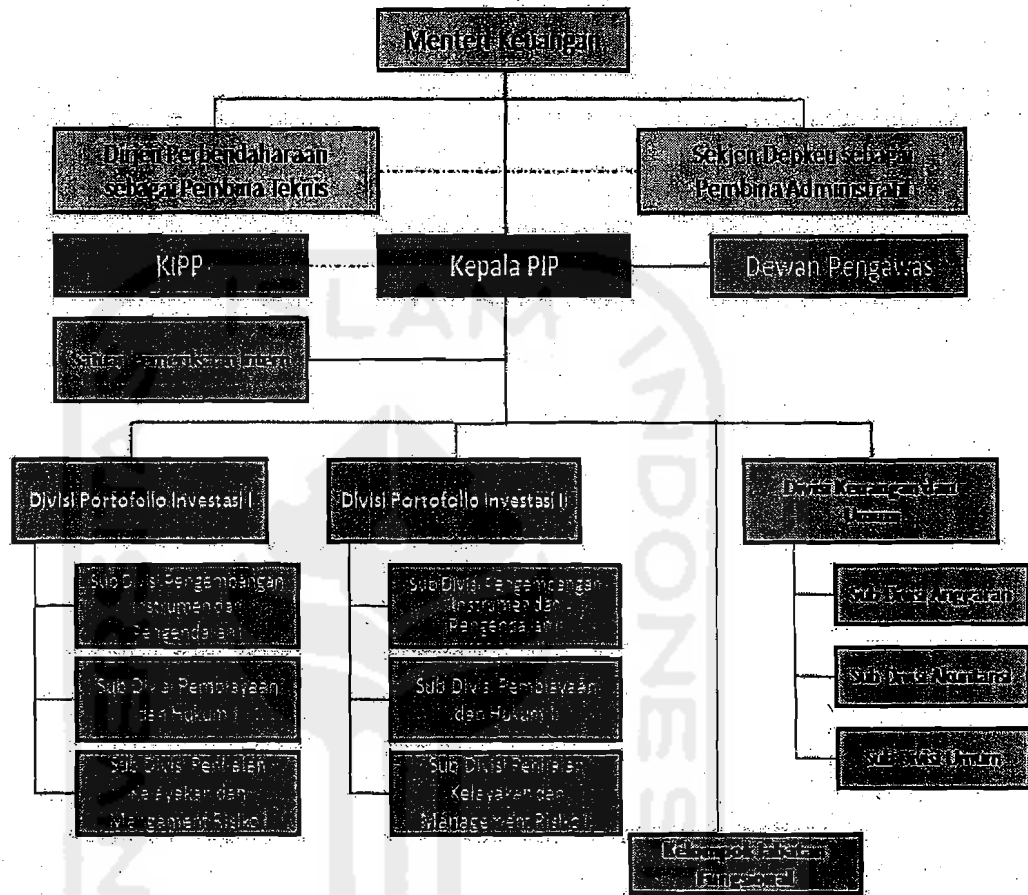
²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² [http://www.setjen.kemenkeu.go.id/content/dasar-hukum-dan-pelaksanaan-](http://www.setjen.kemenkeu.go.id/content/dasar-hukum-dan-pelaksanaan-tugas.html)

[tugas.html](http://www.setjen.kemenkeu.go.id/content/dasar-hukum-dan-pelaksanaan-tugas.html) last accessed 5 March 2016

PIP (Indonesia Investment Agency) organizational chart:²⁰³



2. Investment Mandate and Investment Objectives of Indonesia Investment Agency (PIP)

Investment in infrastructure sector was one of Indonesia Investment Agency (PIP) focus, based on the philosophical reason that building the infrastructure is one of the drive wheels for economic growth and it sees as the

²⁰³ *Ibid.*

national and local development locomotive.²⁰⁴ Infrastructure is also a vital part for the life quality improvement and society prosperity, that consist of as improvement of consumption value, labor productivity and access to job field.²⁰⁵ Also improvement of prosperity and realization of macro economic stability such as fiscal continuity, market expansion, and the influence towards labor market.²⁰⁶

Therefore the role of PIP in infrastructure sector as expected to improve the liquidity of financing, stimulate the economic growth and provide the job field (pro growth, pro job and pro poor), and also expected become a catalyst for the involvement of private sector along with government in infrastructure development in Indonesia.²⁰⁷

The Indonesia Investment Agency or PIP tends to leverage its own investment by alliances with other funds (see also Russia and Korea).²⁰⁸ For example, it has been reported that PIP has aggregated investment with the Qatar Investment Authority, another SWF, on infrastructure development (Sovereign Wealth Fund Institute, Indonesia). It also used as an investment vehicle for the funding of specific purpose funds, especially those that touch on the effects of climate change.²⁰⁹ This builds on a trend in SWF management of creating

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ Larry Catá Backer, loc.cit.

²⁰⁹ *Ibid.*

networks of connected functionally differentiated funds that together constitute the universe of sovereign investment vehicles.²¹⁰

PIP has set out its strategic investment policy as one grounded in leveraging its assets in the shadow of other finds, but especially of working with other development agencies and financial facilities.²¹¹

1. Making a clarity of investment playing field (market interest rate, risk rate, syndication, etc) between GIU and other state owned entities, such as PT Sarana Multi Infrastructure (PT SMI), PT Indonesia Infrastructure Finance Facility (PT IIFF), and PT Sarana Multigriya Finansial (PT SMF).
2. Following up domestic investment (such as public private partnership) and also investment cooperation between GIU and Brunei Investment Agency (BIA), Islamic Development Bank (IDB), UK Department For International Development (DFID), and Khazanah. (PIP, Strategic Investment).

3. Government as Legal Subject

It has been a *communis opinio doctorum* that legal subject consist of human (natuurlijk persoon) and legal entity (rechtspersoon). E.M. Meijers stipulated, *niet allen de mens treedt als subjekt van rechten en plichten op, maar tal van andere rechtsfiguren. Men vat deze te zamen onder de naam van*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

*rechtspersonen*²¹² (not only human that can act as subject of rights and obligations, but also another legal figures. We named the other legal figures as legal entity). Legal entity is the proponent of rights and obligations based on law which is not human, that can sue and be sued by other law subject before the court.²¹³ F.R. Bothlingk stipulated that *de rechtspersoon, zo kunnen wij besluiten, is de juriëse personificatie van een uit de maatschappelijke werkelijkheid geconstrueerde identiteit, die daden kan verrichten*²¹⁴ (legal entity is juridic manifestation of the identity that is formed by social reality, which can performed various actions). Legal entity can performed various legal actions (*rechtschandeligen*) through person or management (*beheer*) acting as the representative (*vertgenwoodiger*) of related legal entity. This legal entity has these elements:²¹⁵

1. Association of people (presentable organization);
2. Can perform legal actions related with legal relations;
3. Separated property ownership;
4. Owned it own interests;
5. Has managements;
6. Has some goals;

²¹² E.M. Meijers, *de Algemene Begrippen van het Burgelijk Recht*, Universitaire Pers Leiden, Leiden, 1948, p. 170.

²¹³ Mochtar Kusumaatmadja and B. Arief Sidharta, *Pengantar Ilmu hukum*, Buku I, Alumni, Bandung, 2000, p. 82.

²¹⁴ F.R. Bothlingk, *Het Leerstuk der Vertegenwoordiging en Zijn Toepassing op Ambtsdragers in Nederland en in Indonesia*, Dissertatie, de Rechtsgeleerheid aan de Rijksuniversiteit, Leiden, 1954, p. 26

²¹⁵ This elements followed from Chidir Ali, *Badan Hukum*, Alumni, Bandung, 1987, p. 21, Ali Ridho, *Badan Hukum dan Kedudukan Badan Hukum Perseroran, Perkumpulan, Koperasi, Yayasan, Wakaf*, Alumni, Bandung, 1986, p. 45, Wirjono Prodjodikoro, *Hukum Perkumpulan, Perseroan, dan Koperasi di Indonesia*, Dian Rakyat, 1985, p. 9

7. Has it rights and obligations;
8. Can sue and be sued before the court.

There are two kind of legal entity which one of them is public legal entity (*publiekrechtelijke rechtspersonen*) such as State, province, regency, and private legal entity (*privaatrechtelijke rechtspersonen*) such as Corporations and Foundation. Therefore, its obvious that state is legal subject of public legal entity category. J.B.J.M. ten Berge wrote this:

*“De overheid die deelneemt aan het privaatrechtelijke rechtsverkeer en als deelnemer aan dat rechtsverkeer aansprakelijk kan worden gesteld voor bepaalde vorderingen, moet beschikken over rechtspersoonlijkheid naar privaatrecht. Ook hier geldt, dar waar gesproken wordt over de overheid als deelnemer aan het rechtsverkeer, in wezen wordt bedoeld op een conglomeraat van rechtspersonen die tot de overheid gerekend moeten worden. De overheid is als het ware opgesplitst in een kleine duizend rechtspersonen. Welke entiteiten binnen de overheid beschikken over privaatrechtelijke rechtspersoonlijkheid, kan men, althans ten dele, lezen in artikel 1, boek 2 BW: de staat, de gemeenten, provincies, en waterschappen, andere lichamen met verordenende bevoegdheid en organisaties waaraan de rechtspersoonlijkheid bij of krachtens de wet is toegekend, zoals universiteiten, bepaalde zelfstandige bestuursorganen, e.d. Daarnaast zijn er stichtingen die als overheidsstichtingen zijn aan te merken, omdat zij onder overwegende invloed van de overheid staan. De rechtspersonen binnen de overheid worden, net als andere rechtspersonen, vertegenwoordigd door hun organen”.*²¹⁶ (Government that involved in the traffic of civil law relationship and as the member of that kind of activity is possibly liable for certain liability, the legal entity should be decided based on private law. It also applied, what have been stipulated about Government as one of participant in that legal association, essentially mean as a set of legal entities that have to be considered as Government. The government itself divided into thousands of smaller legal entities. The Entity inside of government permanence the legal entity in private character, at least for a half we can read in Article 1 book 2 of BW: State, Regency, Province, and the water agency, other agencies with authorities making the regulations and organizations that legal entity status suitable or based on valid Law, such as universities, certain independent government organs, and etc. Beside that, there is foundation which is known as government foundation, because the existence of this foundation is under government supervision. Legal

²¹⁶ J.B.J.M. Ten Berge, *Bescherming tegen de Overheid*, Derde Druk, W.E.J. Tjeenk Willink, Zwolle, 1995, p. 79.

entity of government is like the rest of legal entities, it also represented by the organs.

As legal subject, state can do legal actions through the representatives which is government. In other words, government can do anything related with private legal activity (privaatrechtelijke rechtschandeligen).

J.B.J.M. Ten Berge stipulated *“de overheid kan net als natuurlijke personen en privaatrechterlijke rechtspersonen deelnemen aan het privaatrechtelijke rechtsverkeer. De overheid koopt en verkoopt, huurt en verhuurt, pacht en verpacht, sluit overeenkomsten en bezit eigendom”*²¹⁷ (Government as person and private legal entity involved in private legal relationship traffic. Government can sell and purchase something, rent and lease, pawn and hypothecate, make an agreement, and have right to possessed).

Related with what have been stipulated by J.B.J.M. Ten Berge, it also need to concern about F.A.M. Stroink and J.G. Steenbeek opinion:

*“Wanneer openbare lichaam-rechtspersonen aan het privaatrechtelijk rechtsverkeer deelnemen doen zij dat niet als overheid, als gezagsorganisatie, maar nemen zij rechtens op gelijke voet met de burger deel aan dat verkeer. Deze openbare lichamen-rechtspersonen zijn, deelnemende aan het privaatrechtelijke rechtsverkeer, in principe op dezelfde wijze onderworpen aan de rechtsmacht van de gewone rechter als de burger”*²¹⁸.

(when the Government as legal entity engage with civil law activity, it's no longer acting on behalf of Government, neither as authority, but it involved along with citizens according to private law. Public legal entity that involved in

²¹⁷ J.B.J.M. Ten Berge, *Besturen door de Overheid*, W.E.J. Tjeenk Willink, Deventer, 1996, p. 85.

²¹⁸ F.A.M. Stroink and J.G. Steenbeek, *Inleiding In Het Staats-en Administratief Recht*, Alphen aan den Rijn : Samsom H.D. Tjeenk Willink, 1985, p. 28.

legal association based on private law, basically have to abide to jurisdiction of ordinary judges, as well as citizens).

To make it clear, the opinion that Government can involved in legal actions with civil characteristics, it explained by Philipus M. Hadjon:

“Mostly Institution or State administrative official also did various things related with civil law (*privaatrechtelijke handeling*), just like other citizens (in term of a person as individual/*natuurlijke persoon*) and private legal entities. As a legal person (*rechtspersoon*), institution or State administrative official is bind themselves to various private contracts, such as sell and purchase agreements, lease agreements, contractor agreements, and even a grant. The institution or State administrative official in order to do the obligation running the role as civil actor. Legal actions that can be done by the institution or State administrative official is not regulated based on public law, but it based on the civil law (*privaatrecht*), like the common practices of rule of law as the basis of private legal actions that can be done by a citizen or private legal entities”.²¹⁹

From public law perspective, State is the office organization, “*de staat is ambtenorganisatie*”.²²⁰ what is meant by office is an institution with the scope of it own work that established for long term and it has task and authority *een ambt is een instituut met eigen werking waaraan bij de instelling duurzaam en*

²¹⁹ Philipus M. Hadjon, *Pengantar Hukum Administrasi Indonesia*, Gadjah Mada University Press, Yogyakarta, 1993, p. 166.

²²⁰ J.H.A. Logemann, *Over de Theorie van een Stellig Staatsrecht*, Saksama, Jakarta, 1954, p. 88.

*welomschreven taak en bevoegdheden zijn verleend.*²²¹ Inside the state itself there are various state and government institution, where the duties and authority run by good governance in broad sense and in the narrow sense, as it is mentioned previously.

N.E Algra and friends stipulated that if Government act on behalf of the Executive branch then the public law that applied, but if government act not in the sense of Executive authority then the private law that applied.²²² As government it mean as the State instruments,²²³ as it is stipulated:

“That the government fulfill its public duties which is not only through public law, but instead (progressively) through private law as well. This time government entity exposed itself as the instrument of public law. (for instance at the time of issued or reject a permit/license), another time as private legal subject (for instance Government conducting an agreement with citizen) that there were times both of it conducted at the same time”.²²⁴

When Government do the legal action which only focusing on public authority (*publik bevoegdheid*) and without using the civil law instrument, that action is purely characterized as public law (*puur publiekrechtelijke*), for instance in legal drafting (*regeling*) or making a decision (*beschikking*). If Government do that action on behalf of public authority and also applying the civil law.

²²¹ N.E. Algra and H.C.J.G. Janssen, *Rectsingang, een Oriëntasi in het Recht*, H.D. Tjeenk Willink bv, Groningen, 1974, p. 175.

²²² N.E. Algra, *Mula Hukum*, Binacipta, Jakarta, 1983, p. 173-174

²²³ *Ibid.*

²²⁴ *Ibid.*, p. 186.

instrument, that legal action known as mixed of public and private (de gemengd publiek - en privaatrechtelijke).²²⁵ Government actions that have a mixed characteristic known as *oplostheori* (merge theory) or *ketentheorie* (circuit theory).²²⁶

what has been done by Government through Public Service Agency is one of the implementation of mixed public and private (de gemengd publiek - en privaatrechtelijke) that also has mixed characteristic of merge theory (*oplostheori*) or circuit theory (*ketentheorie*). Where the BLU itself are not separate legal entity that do the legal action on behalf of public authority and also applying the civil law instrument when conducting their business activities.

The existence of BLU itself is inseparable from the wave of New Public Management (NPM) that based on the experiences of Some Europe Countries, United States of America, and other developed countries that gradually adopted into good governance in various countries, including Indonesia. NPM is a public management theory which believed that the private sector management practices are better compare to management practices in public sector, and because of that in order to fix the performance of public sector is necessary to adopt some of practices and management technique that all this time applied in private sector into public organizations, such as adoption of market mechanism,

²²⁵ H.D. Van Wijk/Willem Konijnenbelt, *Hoofdstukken van Administratief Recht*, Uitgeverij LEMMA BV, Culemborg, 1988, p. 188.

²²⁶ *Ibid.*, p. 197. *Oplostheorie* definition followed by this merge theory based on Indroharto translation. Some examples mentioned by Indroharto related with this merge theory. See Indroharto, *Usaha Memahami Undang-Undang tentang Peradilan Tata Usaha Negara*, Buku I, Pustaka Sinar Harapan, Jakarta, 1993, p. 117-118.

Compulsory Competitive Tendering-CCT, and privatization of State-Owned Enterprises.²²⁷ To have a better understanding, we will analyze BLU and New Public Management and the implication, below.

4. Analyzing Public Service Agency (BLU) and New Public Management.

The NPM movement began in the late 1970s and early 1980s with first practitioners emerged in the United Kingdom under Prime Minister Margaret Thatcher.²²⁸ In the literature, the effect of economic factors on the emergence of NPM has been widely recognized, albeit in varying degrees.²²⁹ For example, Caiden (1988) argues that the administrative reform programs of the 1980s around the globe were prompted largely by a worldwide decline in public finances and the need to get more for less.²³⁰ Aucoin (1990) similarly points to the influence of changes in the international economic system on the initiation of administrative reforms in developed countries.²³¹ Furthermore, Zifcak (1994) considers the international recession as a significant factor in shaping administrative reform programs in Britain and Australia.²³² The recession forced governments to reduce

²²⁷ Hughes, O E 1998. *Public Management & Administration*. 2nd ed, London: MacMillan; Jackson, P. M. (Ed.), *Measures for Success in the Public Sector*, London 1995; Broadbent, J., & Guthrie, J. (1992). Changes in the public sector: A review of recent "alternatives" in accounting research. *Accounting, Auditing and Accountability Journal*, 5(2), 3-31.

²²⁸ Gernod Gruening, Origin and theoretical basis of New Public Management, Hamburg, Germany, *International Public Management Journal* 4 (2001), 1-25.

²²⁹ Süleyman Sözen, NEW PUBLIC MANAGEMENT REFORMS: The British Experience, *Ankara Üniversitesi SBF Dergisi*. 57-2

²³⁰ Caiden, G. E., 'The Vitality of Administrative Reform,' *International Review of Administrative Sciences*, (1988), 54/3: 331.357.

²³¹ Aucoin, P., 'Administrative Reform In Public Management: Paradigms. Principles, Paradoxes and Pendulums,' *Governance*, (1990) 3/2: 1J 5.137.

²³² Zifcak, S., *New Managerialism: Administrative Reform in Whitehall and Canberra* (Buckingham: Open University Press), 1994.

the rate of growth in public expenditure and to make heavy cuts in many areas of governmental activity.

Hoggett (1996) argues that public sector restructuring in Britain has been deeply influenced by the country's relative economic decline and fiscal crisis.²³³ In a similar vein, Kirkpatrick and Ludo argue through referring to the previous works of O'Connor²³⁴ and Offe²³⁵ that any modern state is characterized by a 'tension between the state's role as a provider of welfare services and its role as a stabilizer of the economy'. In Britain, since the 1970s these pressures have been felt through a state fiscal crisis, which imposed constraints on resources at a time when new, and increasingly politicised consumer demands and expectations were beginning to emerge. As a result of these contradictory pressures, governments were forced to seek ways in which to 're-commodify' 'non-productive' public services, to increase their efficiency and reduce costs.

According to an OECD report, NPM-style reforms have been rooted by:

Public choice, agency and transaction-cost theories on the one hand, and private management experience on the other. They introduce a change in the (positive and negative) incentives to which public servants respond, often with the introduction of material rewards. There is an underlying assumption that organizational form

²³³ HOGGETT, P., 'New Modes of Control in the Public Service.' *Public Administration* (1996), (Vol. 74, Spring): 9-32.

²³⁴ O'Connor, J., *The Fiscal Crisis of the State*, Macmillan, London, 1973.

²³⁵ Offe, Claus (1984), "Ungovernability: On the Renaissance of Conservative Theories of Crisis" In: Habermas, Jürgen (ed.) (1984), *Observation on "The Spiritual Situation of the Age"*, Cambridge: MIT Press. Pp: 67-88.

and management style-be they public or private-are malleable; they can be used in many different circumstances and ways to pursue a wide variety of goals while minimizing economic costs.²³⁶

Although the exact content of New Public Management is varied across nations and between organizations in individual countries Hood (1991:4-5) argues that it is possible to identify its core elements and offers seven overlapping principles which appear in most discussions of NPM. These are as follows:

1. Hands-on professional management in the public sector. This means freeing the managers to manage, or as Hood puts it 'active, visible, discretionary control of organizations from named persons at the top'. The justification for this is that 'accountability requires clear assignment of responsibility for action, not diffusion of power'.
2. Explicit standards and measures of performance. This requires goals to be defined and performance indicators to be set. The typical justification for this is that 'accountability requires clear statement of goals; efficiency requires a 'hard look' at objectives'.
3. Greater emphasis on output controls. Resources are allocated to areas according to measured performance, due to the 'need to stress results rather than procedures'.

²³⁶ OECD, *Serving the Economy Better, Occasional Papers on Public Management* (Paris: OECD), 1991.

4. A shift to disaggregation of units in the public sector. This involves breaking up large entities into 'corporatised units around products, operating on decentralized 'one-line' budgets and dealing with one another on an 'arm's-length' basis'. The typical justification for this is a 'need to create manageable units' and 'to gain efficiency advantages of use of contract'.
5. A shift to greater competition in public sector. This requires 'the move to term contracts and public tendering procedures'. 'Rivalry as the key to lower costs and better standards' is seen as the typical justification for this point.
6. A stress on private sector styles of management practice. This involves a 'move away from military-style 'public service ethic' and 'flexibility in hiring and rewards'. This is justified by 'need to use 'proven' private sector management tools in the public sector'.
7. A stress on greater discipline and parsimony in resource use. This involves 'cutting direct costs, raising labor discipline, resisting union demands, limiting 'compliance costs' to business' and is justified by the 'need to check resource demands of public sector and 'do more with less'.

Dunleavy and Hood point out that the new public management is a movement making the public sector less distinctive as a unit from the private sector (in personnel, reward structure, methods of doing business) and reducing

the extent to which discretionary power (particularly over staff, contracts and money) is limited by uniform and general rules of procedure.²³⁷

According to Vigoda,²³⁸ there are 5 important principles in implementation of NPM:

- a) Decentralized system, intended to make the decision maker closer to society as customer;
- b) privatization, to allocated goods and public services to private sector;
- c) downsizing, through reducing and simplifying the scope of organization and government structure;
- d) debureaucratization, to do restructurisation in government bureaucracy that emphasizes more to result rather than process, and
- e) managerialism, the adoption of private working ethos to the government organization.

This New Public Management (NPM) is the model of management of public services that has characteristics more to “inside the organization”, such as.²³⁹

²³⁷ Dunleavy, P. / HOOD, C., 'From Old Public Adnistration to New Public Management,' *Public Money & Management*, (1994), (Vol. 14, No. 3, July-September): 9- 16.

²³⁸ Fadel Muhammad, *Reinventing Local Government : Pengalaman dari Daerah*, Elex Média Komputindo, 2008

- a) Focus only at the management activity, not on the policy activity;
- b) NPM is trying to serve the public service management on performance and efficiency, not at the political side;
- c) Solution of public services management become smaller organizations and more simple that directly connected with user-pay bases interest;
- d) Using market principles as driving force in order to create competency;
- e) Trimming high cost economy so the cost to receive services become cheaper.

In order to have a better frame about the spirit of the New Public Management answering the challenges and problems related with Government activity as Sovereign Investor that used Sovereign Wealth Fund vehicle specifically Indonesia Investment Agency (Pusat Investasi Pemerintah) as Government Investment operator which in form of BLU, it will be discussed further in the strength and weaknesses of Indonesia Investment Agency.

²³⁹ Purwanto, Erwan Agus. *Pelayanan Publik Partisipatif*, Yogyakarta: Gadjah Mada University Press, 2005.

B. The Ideal Concept of Indonesia Sovereign Wealth Fund.

1. The Strength and Weaknesses of Indonesia Investment Agency (Pusat Investasi Pemerintah) as Indonesia Sovereign Wealth Fund

Public Service Agency is the organization in public sector that operated by central government and local government as well with the main function to sell services and/or goods in order to serve the society.²⁴⁰ Based on agencification theory, the Public Service Agency is the government agent that has the wider authorities such as organization management, financial management and even in report and performance accountability.²⁴¹

Law Number 1 of 2004 concerning State Treasury has given the mandate in any various fundamental reforms, as it is stipulated in Articles 68 and 69 that Public Service Agency or BLU established in order to improve the efficiency and effectiveness of state finance management in order to improve the performance of public services.²⁴² Law Number 1/2004 mandate have been explained in further in Government Regulation Number 23 of 2005 concerning the Financial Management of Public Service Agency as it is changed with Government Regulation Number 74 of 2012 and 5 (five) Ministry of Finance Regulation that related with administrative requirements in order to proposing and

²⁴⁰ see more

<http://www.blu.djpbk.kemenkeu.go.id/index.php?r=publication/article/view&id=4> last accessed 27 March 2016

²⁴¹ *Ibid.*

²⁴² Badan Pemeriksa Keuangan Republik Indonesia, Laporan Hasil Pemeriksaan BPK RI atas Laporan Keuangan Pemerintah Pusat Tahun 2013. available at http://www.bpk.go.id/assets/files/lkpp/2013/lkpp_2013_1402973186.pdf last accessed 27 March 2016

determining government working units to apply PPK BLU, procurement authority goods/services on Public Service Agency, the establishment of Supervisory Board in Public Service Agency, the guidelines of remuneration on Public Service Agency, Procedures for the Preparation of Business Plan and Budget (RBA) also Budget Implementation Document of Public Service Agency.²⁴³

BLU is the concept implementation of enterprising the government and performance-based budgeting in government circle. Public Service Agency is given the flexibility in term of pengelolaan keuangan to support the productivity, efficiency and effectiveness of public service, but not solely profit oriented.²⁴⁴ Public Service Agency (BLU) Flexibility inter alia directly managed the operational revenue, it is not mandatory for them to deposit the year-end surplus to State treasury account, their employee can be the civil Servant and non civil servant, also the remuneration is based on level of responsibilities and professionalism.²⁴⁵ The source of financing investment that applied Financial management of Public Service Agency (PK BLU) derived from State Budget (APBN), revenue from the services, operational cooperation, grant and other income source.²⁴⁶ Public services that conducted by instance of Financial Management of Public Service Agency are government activities that are operational in conducting public service that give the result quasi public goods,

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

which also covered the supply for service/goods, regional manager, and manager of special funds to elevate the social economic.²⁴⁷ In general explanation of Government Regulation (PP) Number 23 of 2005 on Public Finance Management of Public Service Agency, explicitly explained that Public Service Agency (BLU) is not only just a new format in State Finance Management but also as a new platform for public sector reform in financial managements.

Many of us wondering what really differ Public Service Agency (BLU) from the conventional of government working units. Some of BLU unique features that made it different from conventional government working units and they are:

1. The aspect of financial management, where the central government particularly set the mechanism of Public Service Agency financial management. The basic principles of Public Service Agency financial management are:

(a) flexibility, where the Public Service Agency is expected to implement fair business practices (best practice) in conducting the organization functions. Moreover, Public Service Agency can charge the customers for the services;

(b) Public Service Agency is managed with calculating the cost efficiency in every single operational activities. Meaning that Public Service

²⁴⁷ *Ibid.*

Agency is compulsory to do cost accounting calculation on every single product units;

(c) Public Service Agency is managed to elevate the the quality of services as one of the resource of operational revenue. These three basic principles are supported with the wider delegation of authority through paradigm 'let the managers manage'. With that privileged, the managers of Public Service Agency are expected can managed the resources in finance and non-finance synergistically in order to achieve the expectations.

2. The second aspect is management aspect of organization, where BLU doing the fair business practices is necessary for them to do supervision and performance measurement. The whole performance output of BLU is need to be measured in order to see how the organization worked to achieved the target. Beside that, BLU management conducted professionally through management control instruments even though the business core is not prioritizing the profit. So in this case is highly expected Public Service Agency adopting management planning tools that applied by private sector to supervise the work in performance measurement that more comprehensive. With performance management that more comprehensive, beside it elevate the service to society and improve the competency of employee, Public Service Agency (BLU) also will be able to achieve the short-term goals and can compete to achieve the long-term goals. Therefore, Head of executive Public Service Agency is

required to have higher managerial level that in charge on achievements that stipulated in performance contract.

3. Third aspect is performance budgeting, where BLU is expected to be a prototype of working units of Government Agencies with the model budgeting of business plan that conducted in the process of budgeting and budget implementation. This thing is based on the idea that BLU are capable to defined the vision and mission of organization into the goals and purposes of organization that will be achieved in performance target. Therefore, in terms of budgeting, BLU can do better in connecting the number of budget that will be allocated in order to achieved the targets.

Indonesia investment Agency (PIP) itself like the other BLU was not a legal entity, but PIP investment activities like corporations in common. It based on Minister of Finance Regulation Number 178/PMK.01/2008 Article 2 where the minimum standard of Indonesia Investment Agency or Pusat Investasi Pemerintah covered the substance of services on Government Investment Agency (Pusat Investasi Pemerintah), that consist of:

1. Long term investment;
2. Divestment on long term investment;
3. Investment on short term instruments; and

4. Divestment on short term instruments.

This particular BLU has unique services characteristic which is really different from the other BLU with same categories. The social values that contain in BLU PIP much lower compare to the other Institution that managed the fund for financing the economically weak groups, Small Medium Enterprises, etc. Minister of Finance Regulation Number 178/PMK.01/2008 is not mentioned standard of services which is suppose to be given to society as public services. But, based on Minister of Finance Decree Number 91/KMK.05/2009 on establishment of Indonesia Investment Agency in Ministry of Finance as government agency that applied Financial Management of Public Service Agency (PK-Badan Layanan Umum), stipulated such as based on assessment result from assessment team, it was decided that Indonesia Investment Agency (PIP) established as government agency in Ministry of Finance that meets the criteria from substantive requirements, technical and even administrative that applied full PPK-BLU.

Based on that, the activity of Indonesia Investment Agency (PIP) was not that much difference from the rest private financial institution, in order to provide financing for Government institutions and Corporation either in form of direct investment or indirect investment.

But the works of Indonesia Investment Agency was not without obstacles, we can see it in the case of divestment of Newmont shares. The

purchase of 7 percent of PT NNT divestment share in 2010 was the implementation of Article 24 Paragraph (3) and (4) contract of work (kontrak karya) between Government of Republic Indonesia and PT NNT which obliges foreign shareholders of PT NNT to divested their share to Indonesian Government as embodiment of Constitution mandate related with control of natural resources as embodied in Article 33 paragraph (2) and (3) Constitution of 1945.

In Constitutional Court verdict about Dispute on Constitutional Authorities between State Institutions (hereinafter Sengketa Kewenangan Antar Lembaga Negara or SKLN),²⁴⁸ concerning divestment of 7 percent of share PT Newmont Nusa Tenggara (PT NNT), the lawsuit proposed by President through his attorney Minister of Justice and Human Rights, and Minister of Finance, towards House of Representatives Republic Indonesia (DPR RI as Defendant I) and The Audit Board of The Republic Indonesia (BPK RI as Defendant II) related with the purchased of 7 Percent of PT NNT share that planned buying by government through Indonesia Investment Agency (PIP). Government argumentation was, the purchased of 7 percent of share was include in State Budget (APBN) at subject of government investment through Indonesia Investment Agency (PIP) that already approved by House of Representatives at amount 1 trillion in the State Budget (APBN) 2011, and the rest using the accumulation of Indonesia Investment Agency revenue from previous year, but in

²⁴⁸ Dispute on Constitutional Authorities between State Institutions (SKLN) are cases where the petitioners are state institutions whose authorities are granted by the 1945 Constitution and which have direct interest in the authorities disputed.

this case House of Representatives (DPR) stated not yet approved for the use in detail.²⁴⁹

One of the argumentation from Constitutional Judge, His Honour Mohammad Alin who took part in decided on this case is the use of Indonesia Investment Agency (PIP) fund without the approval from Defendant I have the potential risk that will give an impact to national economic and potential misuse if the accumulation of Indonesia Investment Agency (PIP) fund that growing and getting bigger managed by President c.q Minister of Finance without involving House of Representatives (DPR).

It showed how even the Indonesia Investment Agency (PIP) in form of Public Service Agency (BLU) has autonomous and adequate discretion, according to Law and regulation giving the service in term of government investment, but still has the constraints on mechanism and deliberation process of State Budget (APBN) where the role of executive and Commission/Budget Agency of House of Representatives (DPR) in State Budget (APBN) that stipulated in Law Number 17 of 2003 on State Budget and Law Number 27/2009 concerning The People's Consultative Assembly of the Republic of Indonesia (Majelis Permusyawaratan Rakyat Republik Indonesia / MPR RI), The People's Representative Council, sometimes referred to as the House of Representatives (Dewan Perwakilan Rakyat Republik Indonesia / DPR RI), The Regional Representative Council (Indonesian: Dewan Perwakilan Daerah, DPD), and

²⁴⁹ See more http://perpustakaan.bappenas.go.id/lontar/file?file=digital/117433-%5B_Konten_%5D-Perlu%20tahu0001.pdf last accessed 29 march 2016.

Regional House of People's Representatives (Dewan Perwakilan Rakyat Daerah, DPRD). The Audit Board of the Republic of Indonesia (Badan Pemeriksa Keuangan/BPK) authority regulated in Law Number 15/2004 on The State Financial Management and Accountability, and also in the amendment of Constitution 1945.

2. Analysis about transfer assets of PIP to PT SMI and The Government Plan to Create the Infrastructure Financing Agency (LPPI) and the Relevancy with Sovereign Wealth Fund.

The transfer of assets from Public Service Agency/Badan Layanan Umum (BLU) Indonesia Investment Agency or Pusat Investasi Pemerintah (PIP) to PT Sarana Multi Infrastruktur (PT SMI) is accomplished.²⁵⁰ This is in line with the mandate of Law Number 3 of 2015 concerning Revised State Budget (APBN-P) of 2015 , as it is mentioned in Article 23A paragraph 1 that the whole Government Investment managed by Indonesia Investment Agency (PIP) transferred to be additional state capital investment of Indonesia Republic for PT SMI which is then written in Government Regulation Number 95 of 2015

²⁵⁰ See more <http://www.kemenkeu.go.id/Berita/pengalihan-aset-pip-kepada-pt-smi-melalui-penyertaan-modal-negara%3Ftag%3D> last accessed 5 march 2016.

concerning Additional State Capital Investment of Indonesia Republic into Company Capital Stock Perseroan (Persero) PT SMI.²⁵¹

Quoted from official information of Indonesia Investment Agency (PIP), total value of transfer asset is Rp18.356.600.000.000 that consist of cash assets in amount Rp9.607.031.911,20 and Non Cash total Rp8.749.568.088.920,80 as it is audited by Finance and Development Supervisory Agency or locally known as Badan Pengawasan Keuangan dan Pembangunan (BPKP).

The transfer of assets signed at 23/12/2015, witnessed by Director General of State Assets and Secretary General of the the Ministry of Finance.²⁵² Active portfolio asset Non Cash Indonesia Investment Agency (PIP) that have been transferred to PT SMI consists of financing loan for 19 Local Government and loan to PT PLN.²⁵³ With the transferred of assets from PIP to PT SMI, the contribution of PT SMI is expected can overcome the challenges of infrastructure financing development that is cheap and measured in the near future.²⁵⁴ Including the nearest challenges to help the preparation of legal drafting (which is include in national legislative programs/prolegnas) of the Indonesian Infrastructure Financing Agency or locally known as Lembaga Pembiayaan Pembangunan

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

Indonesia (LPPI) is expected can be finished in 2016 and soon can be operated effectively in 2017.²⁵⁵

This Government initiative to form Indonesian Infrastructure Financing Agency or LPPI is not contradicted with the idea of Sovereign Wealth Fund. As described earlier about the form of Sovereign Wealth Fund, Government can be choose what the most suitable form of SWFs, whether it's still public legal entity (public but private like manner), Agency or separate legal entity in form of State-Owned Enterprises like Singapore SWF, Temasek. Temasek is an investment holding company with characteristic of SWFs and with a portfolio of investments covering a wide range of countries and industry sectors.²⁵⁶ Temasek was established to create and maximize long-term shareholder value as an active investor and shareholder of successful enterprises.²⁵⁷ Temasek was formed by the Singapore Government in 1974 to separately hold and manage its investments in companies and joint ventures (Temasek is wholly-owned by the Government through the Minister for Finance – MOF, under the Singapore Companies Act).²⁵⁸

1. The Role Sovereign Wealth Funds in Infrastructure Sector.

A study by Fatemi, Fooladi, and Kayhani, while allowing that data is limited, appears to indicate that Sovereign Wealth Funds are oriented more toward

²⁵⁵ *Ibid.*

²⁵⁶ Jozef Komornik and Martin Vozar, Investment Strategy of the Temasek

Holding, available at

http://www.cutn.sk/Library/proceedings/mch_2012/editovane_prispevky/Komorn%C3%ADk_Vozar%20C3%A1r.pdf last accessed 28 March 2016

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

long-run success than are investment funds in general,²⁵⁹ and they are key engines of development finance within their homelands.²⁶⁰ Some very explicitly involved in national strategies of industrial diversification, such as Malaysia's Khazanah, which is actively involved in financing long term projects and infrastructures throughout the country.²⁶¹ The same applies for Kazyna, one of Kazakhstan's SWFs, mandated to promote innovative industrial projects and contribute to diversification toward more value added and employment-intensive industries for the oil rich country.²⁶²

Sovereign Wealth Funds have the potency to be an important source of funding especially for developing countries. Sovereign Wealth Funds can be an important source of financial capital and investment expertise.²⁶³ Infrastructure projects are typically large capital projects. In some cases there are multiple sources of financing, but not in all cases.²⁶⁴ Even where there are multiple sources of infrastructure finance, Sovereign Wealth Funds are likely to be the best arbiters of value in the Public Sector. As noted, it is the goal of Sovereign Wealth Funds

²⁵⁹ See Walt Schubert, *The Role Sovereign Wealth Funds Can Play in Developmental Finance: The Investment in Infrastructure and Entrepreneurial Activities, the Development of Financial Institutions and the Creation of a Business Friendly Environment*, La Salle University, *Journal of Applied Business and Economics* Vol.17(3) 2015.

²⁶⁰ Javier Santiso, *OECD Emerging Markets Network Working Paper Sovereign Development Funds: Key financial actors of the shifting wealth of nations, 2008*, available at <http://www.oecd.org/dev/41944381.pdf> last accessed 27 March 2016

²⁶¹ Radhi, N. (March 2008), "Driving the Malaysian economy: GLC transformation and Iskandar development region", Khazanah, Presentation prepared for the OECD Emerging Markets Network (EmNet), Paris, OECD, March 2008.

²⁶² Nurbek, S. (November 2007), "The case for SWFs: Kazyna sustainable development fund", SWF of Kazakhstan, Presentation prepared for the OECD Emerging Markets Network (EmNet), Paris, OECD, November 2007.

²⁶³ Schubert, *The Role Sovereign Wealth Funds*, loc. cit.

²⁶⁴ *Ibid.*

to maximize the utility of their citizen owners and this is generally thought to mean excellent returns for the risk undertaken.²⁶⁵

Sovereign Wealth Funds, in order to be successful, need to be managed professionally. With the focus on maximizing wealth for any given risk level, Sovereign Wealth Fund managers are likely to be less distracted by other political issues than are other managers of public investment money.²⁶⁶ Of course, if the Sovereign Wealth Fund is the only major capitalist in the economy, then it becomes imperative that they lead the investment in public infrastructure.²⁶⁷ There can be private sources of capital as well and we would expect private investors to be as savvy as are Sovereign Wealth Fund investors, but we think that Sovereign Wealth Funds' needs dovetail well with the infrastructure needs of developing economies.²⁶⁸

Sovereign Wealth Funds are likely to face pressure to make infrastructure investments domestically.²⁶⁹ This is especially true, where there is a high need for such investments. Infrastructure investments have the potential to throw off external benefits not captured in the return on investment.²⁷⁰ When investments in infrastructure improve private sector productivity, private sector firms become more profitable, more jobs are created in those areas, and more

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ Schubert, Walt and Barenbaum, Les. Ethics and Sovereign Wealth Fund Investing, *Journal of Leadership, Accountability and Ethics*, Vol. 8 #2, 2010.

²⁶⁸ Schubert, The Role Sovereign Wealth Funds, loc. cit.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

taxes collected.²⁷¹ In short, the investment in public infrastructure domestically is desirable to the Sovereign Wealth Fund citizens beyond the return to the Sovereign Wealth Fund portfolio.²⁷²

It is relevant with Mediyana Lukman opinion, he believes that PIP or Indonesia Investment Agency in form of BLU will be better if converted to State Owned Enterprise, therefore the business activity (investment and financing) especially in financing the infrastructure sector more effective, independent and autonomous.²⁷³ The idea is not only fixated to the form of State-Owned Enterprises but more to how to make this Indonesia Investment Agency be more independent, effective and flexible to run the business and investments. As it is described previously the transformation of Indonesia Investment Agency and PT SMI to be a special finance institutions of infrastructure development, or infrastructure bank is really crucial and need to be accelerated for the sake of infrastructure development in Indonesia.

Based on the explanation of Ministry of Finance, the projects of the infrastructure later will become the underlying assets for obligation, as one of the sources of revenue for the financing.²⁷⁴ Just like what World Bank and ADB did.²⁷⁵ The grand designed, which will be regulated in Government Regulation

²⁷¹ *Ibid.*

²⁷² *Ibid.*

²⁷³ Mediya Lukman, *Badan Layanan Umum - Dari Birokrasi Menuju Korporasi*, Bumi Aksara, 2013.

²⁷⁴ Minister of Finance Bambang P.S. Brodjonegoro, 6 April 2015, available at <http://www.kemenkeu.go.id/Berita/proyek-pembangunan-jadi-aset-penjamin-obligasi-bank-infrastruktur> last accessed 28 March 2016.

²⁷⁵ *Ibid.*

(PP), will make it even possible for the institution to use the fund from global sources and domestic-multilaterally, even though the scheme of loan still under the supervision of Ministry of Finance.²⁷⁶

This institution later will distribute the fund to State-Owned Enterprises in order to cut the high cost and inefficient time in the status quo, that need multilateral financing scheme to be signed from Government to Government (G-to-G) the scheme before distributed to SMI.²⁷⁷ The new institution will be capable to issue the obligation with incentive, such as tax free and interest subsidy, meanwhile looking for alternative funding, for instance securities and equity investment. The new institution will have bigger capacity to wider financing access for Local Governments and Local State-Owned Enterprises in order to solved the problems of stagnancy of infrastructure development in provinces.²⁷⁸

The idea was good, but Indonesia Government should consider about the legal problems related with transformation of Indonesia Investment Agency and PT SMI to the new institution called Indonesian Infrastructure Financing Agency or locally known as Lembaga Pembiayaan Pembangunan Indonesia

²⁷⁶ *Ibid.*

²⁷⁷ Dirjen aset negara Vincentius Sonny Loho, available at <http://www.octafx.web.id/forex/pendanaan-infrastruktur-harus-direformasi-dipercepat/> last accessed 28 March 2016.

²⁷⁸ CEO PT SMI Emma Sri Martini, See more <http://www.octafx.web.id/forex/pendanaan-infrastruktur-harus-direformasi-dipercepat/> last accessed 28 March 2016.

(LPPI). The problems will be faced by Government when the request²⁷⁹ from PT SMI management are granted. The biggest challenged is when the PT SMI wish related with bankruptcy fulfilled by Government. Why is that so? It will be explained further.

1. Fallacy of PT SMI regarding the requests of bankruptcy-Remote

PT Sarana Multi Infrastruktur (SMI) asking for guarantee from government if the company changes to be Indonesian Infrastructure Financing Agency (Lembaga Pembiayaan Pembangunan Indonesia/ LPPI). One of the request is asking for bankruptcy remote, and it has been attempted in the making process of draft law (RUU) of Indonesian Infrastructure Financing Agency (LPPI).²⁸⁰ The request from PT SMI to make themselves “bankruptcy-remote” or in the other words to enjoy the immunity from bankruptcy is certainly a fallacy. The following will explain the reasons.

The traditional bankruptcy procedures in many other developed countries including the United Kingdom, Germany, Japan, and Sweden are described, in contrast, as “creditor-friendly,” favoring the liquidation of the

²⁷⁹ See more <http://www.cnnindonesia.com/ekonomi/20151211154826-78-97597/sarana-multi-minta-jaminan-pemerintah-sebelum-jadi-lppi/> last accessed 28 March 2016

²⁸⁰ See more <http://www.cnnindonesia.com/ekonomi/20151211154826-78-97597/sarana-multi-minta-jaminan-pemerintah-sebelum-jadi-lppi/> last accessed 28 March 2016

debtor's assets to pay off creditors in the order of their priority.²⁸¹ Levinthal explained the purpose of bankruptcy:²⁸²

“All bankruptcy law, however, no matter when or where devised and enacted, has at least two general objects in view. It aims, first, to secure and equitable division of the insolvent debtor's property among all his creditors, and, in the second place, to prevent on the part of the insolvent debtor conducts detrimental to the interest of his creditors. In other words, bankruptcy law seeks to protect the creditors, first, from one another and, secondly, from their debtor. A third object the protection of the honest debtor from his creditors, by means of the discharge, is sought to be attained in some of the systems of bankruptcy, but this is by no means a fundamental feature of the law.”

²⁸¹ Early contributions include Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, *Columbia Law Review*, Vol. 83, No. 3, April, 1983; Baird, Douglas G., “The Uneasy Case for Corporate Reorganizations,” *Journal of Legal Studies* 15, 1986, 127-47; Jackson, Thomas H., *The Logic and Limits of Bankruptcy Law*, Harvard University Press, Cambridge, 1986; Jensen, Michael C., *Active Investors, LBOS, and the Privatization of Bankruptcy*, *Journal of Applied Corporate Finance*, Vol. 2, No. 1, pp. 35-44, Spring 1989; Harvard NOM Research Paper No. 00-08; *A THEORY OF THE FIRM: GOVERNANCE, RESIDUAL CLAIMS AND ORGANIZATIONAL FORMS*, Harvard University Press, December 2000. Available at SSRN: <http://ssrn.com/abstract=244152> or <http://dx.doi.org/10.2139/ssrn.244152>, and Aghion, Philippe, Oliver Hart, and John H. Moore, 1992, “The Economics of Bankruptcy Reform,” *Journal of Law and Economics* 8, 523-46. More recently, see PER STRÖMBERG, *Conflicts of Interest and Market Illiquidity in Bankruptcy Auctions: Theory and Tests*, *THE JOURNAL OF FINANCE* • VOL. LV, NO. 6 • DEC. 2000., Armour, Cheffin, and Skeel, *Corporate ownership structure and the evolution of bankruptcy law: lessons from the United Kingdom*, *Vanderbilt Law Review*, 55, 1699-785., and Baird, Douglas G. and Rasmussen, Bob, *The End of Bankruptcy*. *Stanford Law Review*, Vol. 55, 2002. Available at SSRN: <http://ssrn.com/abstract=359241> or <http://dx.doi.org/10.2139/ssrn.359241> last accessed 28 March 2016

²⁸² Louis E. Levinthal, “The Early History of Bankruptcy Law”, in Jordan, et al., *Bankruptcy*, (New York: Foundation Press, 1999), p. 17.

In Indonesia, the understanding of bankruptcy explained by Law Number 37 of 2004 on Bankruptcy and Suspension of Obligation for Payment of Debts in Article 1 point:

bankruptcy shall mean general confiscation of all assets of a bankrupt debtor that will be managed and liquidated by a curator under the supervision of Supervisory Judge as provided for herein;

The term 'bankruptcy-remote' was used to characterize SPVs and the transactions that use them.²⁸³ However, there is still much confusion because 'bankruptcy-remote' is a commercial term rather than a legal term.²⁸⁴ Perhaps the greatest effort to draw the legally significant elements out of it was done by Judge Schmetterer in the 2013 case of *Re Doctors Hospital of Hyde Park Inc.*²⁸⁵ In that case the issue at stake was the legitimacy of the vehicle as a 'normal' bankruptcy-

²⁸³ David Ramos Muñoz, *Bankruptcy-remote transactions and bankruptcy law—a comparative approach (part 1): changing the focus on vehicle shielding*, Published by Oxford University Press, *Capital Markets Law Journal*, 2015

²⁸⁴ *Ibid.*

²⁸⁵ From Ramos Mun Paper, see *Re Doctors Hospital of Hyde Park, Inc.*, 2013 WL 5524696 (Bankr ND Ill 2013). Previous to this case two others had been decided on the same bankruptcy. See *Re Doctors Hospital of Hyde Park, Inc.*, 360 BR 787 (Bankr ND Ill 2007), affirmed in appeal by the district court in *Paloian v LaSalle*, 406 FSupp2d 299 (ND Ill 2007), but reversed in further appeal by the Court of Appeals of the Seventh Circuit in *Paloian v LaSalle*, 619 F3d 688 (2010). Other court decisions that have discussed the concept, see *Re General Growth Properties, Inc.*, 409 BR 43, 49 (Bankr SDNY 2009); *Re LTV Steel Co Inc.*, 274 BR 278, 280 (Bankr, ND Ohio 2001), or *Roseton OL, LLC v Dynegy Holdings Inc.*, CA No 6689-VCP, 2011 Del Ch LEXIS 113 (Del Ch 29 July 2011) in the USA, or *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc and others* [2010] EWHC 2005 (Ch), per Morritt J; *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc and others* (BNY Ltd v Eurosail plc (CA)) [2011] EWCACiv 227; or *Re Golden Key Ltd (In Receivership) v Re the Insolvency Act 1986* [2009] EWHC 148 (Ch) in the United Kingdom.

remote SPV; which required that the nature of a bankruptcy-remote SPV be established first.²⁸⁶

In that case the issue at stake was the legitimacy of the vehicle as a 'normal' bankruptcy-remote SPV;²⁸⁷ which required that the nature of a bankruptcy-remote SPV be established first. In a lengthy analysis of evidence and legal sources—to which we cannot do justice here—the judge concluded that:²⁸⁸

Although a 'bankruptcy remote entity' is not defined in the Bankruptcy Code or other statute, it is recognized in the business world and literature as a structure designed to hold a defined group of assets and to protect those assets from being administered as the property of a bankruptcy estate in the event of a bankruptcy filing.²⁸⁹

The court then focused on the problem at stake (fraudulent transfers, re-characterization and veil piercing) and did not examine the fact that this concept encompasses, at least, two possible definitions; which are here characterized as 'basic' bankruptcy-remoteness, which emphasizes vehicle shielding (and where we will focus our efforts); and 'enhanced' bankruptcy-remoteness, which emphasizes the contracting out of bankruptcy proceedings.²⁹⁰

²⁸⁶ David Ramos Mun oz, op. cit.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ Re Doctors Hospital of Hyde Park, Inc, 2013 WL 5524696 (Bankr ND Ill 2013)

at 203.

²⁹⁰ See more David Ramoz, op. cit.

Another explanation about bankruptcy-remote entity is a 'special-purpose vehicle'²⁹¹ (SPV or special-purpose entity) that is formed to hold a defined group of assets and to protect them from being administered as property of a bankruptcy estate.²⁹² Standard & Poor's defines an SPE in the most basic terms: An SPE is an entity which is unlikely to become insolvent as a result of its own activities and which is adequately insulated from the consequences of any related party's insolvency.²⁹³

How may an Special Purpose Entity or SPE be "unlikely to become insolvent as a result of its own activities"?²⁹⁴ An SPE is unlikely to become insolvent as result of its own activities if it ²⁹⁵

- (i) maintains its assets in a way which segregates and identifies such assets separate and apart from the assets of any other person or entity,
- (ii) holds itself out to the public as a separate legal entity distinct from any other person or entity,

²⁹¹ SPVs can be used to relocate the risk of a venture from the parent company to a separate orphan company (the SPV) and in particular to isolate the financial risk in the event of bankruptcy or a default. This relies of the principle of 'bankruptcy remoteness' whereby the SPV operates as a distinct legal entity with no connection to the sponsor firm. This has been challenged recently, post financial crisis with several court rulings that SPV assets and funds should be consolidated with the originating firm. See more PWC, The next chapter Creating an understanding of Special Purpose Vehicles, 2011 available at www.pwc.com/financialregulation last accessed 28 March 2016

²⁹² Sarah K. Kam, Bankruptcy-Remote Does Not Mean Bankruptcy-Proof, available at <http://www.law360.com/articles/624838/bankruptcy-remote-does-not-mean-bankruptcy-proof> last accessed 28 March 2016.

²⁹³ Gordon L. Gerson, ESQ., SPECIAL-PURPOSE BANKRUPTCY-REMOTE ENTITIES, available at http://www.gersonlaw.com/download/real-estate-finance/loan-origination-closing/specialpurpose_bankruptcyremote_entities.pdf last accessed 28 march 2016.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

(iii) conducts business solely in its own name, and

(iv) has no indebtedness other than a loan being made secured by a particular parcel property, and indebtedness for trade payable incurred in the ordinary course of business. The foregoing is an abbreviated version of an extensive list of "limited purpose and separateness covenants made by a borrower in loan documents and/or its organizational documents (e.g., bylaws of corporation, partnership agreement of limited partnership, or operating agreement of limited liability company).

3. Sovereign Investment Should have Removed the State Immunity.

State in the position of public legal entity has the authority to separate the State Budget to be the capital for establishment of private law bodies, for instance established Foundation, State-Owned Enterprises (BUMN), etc. That action is necessary in order to make State flexible to do investment. Because when the State and Local Government as legal entity "sui generis," conducting private legal action with the third party, at that moment State or Local Government as Public legal entity should abide the private legal norms or civil law, where at the same time occurred transformation of the function and the legal status on legal action that have been done by State and Local Government.²⁹⁶ This legal transformation not only applied to the "object" of legal action, but also applied to

²⁹⁶ 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 Practices)*, (Jakarta, 2010), p. 19

the parties that involved as the “subject” of law in that legal action.²⁹⁷ With the shift of State fund to be private fund, it cause the change of State function from Public Law Bodies that perform the duties and authorities (taak en bevoegdheid) to be Private Law Bodies that perform rights and obligations.²⁹⁸ If the legal transformation can be consistent, then it is not that hard to put central government officials/local government officials in the field of business, because the public immunity is no longer applies.²⁹⁹

Even if the Indonesian Infrastructure Financing Agency (LPPI) established by the Law of Republic Indonesia, but it will not enjoy the immunity according to International law. Because States are said to have enjoyed complete immunity from domestic legal proceedings only applied in the eighteenth and nineteenth centuries that has been called the period of absolute immunity.³⁰⁰ But, absolute immunity caused unjust and unfair circumstances on private enterprises trading with governmental entities.³⁰¹ Therefore, in the early twentieth century, when Western nations adopted a restrictive approach to immunity in response to the increased participation of state governments in international trade.³⁰² So-called “restrictive” doctrine of state immunity is more suitable: a foreign state will be able to use immunity only for claims arising out of sovereign acts (acta jure

²⁹⁷ Arifin P. Soeria Atmadja, “Format Fungsi Publik Pemerintah dan Implikasinya Terhadap Badan Hukum,” this paper delivered for Public Finance Training, (Jakarta 21 Juli 2005).

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*

³⁰⁰ Neringa Toileikyte, THE CONCEPT OF STATE IMMUNITY AND THE MAIN CHALLENGES available at http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Toleikyte.pdf last accessed 30 March 2016

³⁰¹ *Ibid.*

³⁰² L. M. Caplan, ‘State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory’, AJIL 97 (2003), 741 et seq. (745)

imperii), but there will not be a possibility to use immunity to the claims arising out of “private law” acts (*acta jure gestionis*).

As States became involved in commercial activities, national courts began to apply a restrictive law of immunity.³⁰³ One purpose of the commercial exception is to protect the legitimate expectations of business partners that engage in commercial transactions with foreign States.³⁰⁴ The restrictive approach is now widely reflected in case law, national statutes and international conventions, although it cannot yet be said to be universally recognized.³⁰⁵ Under this theory, states are immune from suit in respect of acts of government, but not in respect of commercial activities.³⁰⁶

Under the normative hierarchy theory, a state’s jurisdictional immunity is abrogated when the state violates human rights protections that are considered peremptory international law norms, known as *jus cogens*.³⁰⁷ The doctrine of international *jus cogens* was developed under a strong influence of natural law concepts, which maintain that states cannot be absolutely free in establishing their contractual relations.³⁰⁸ States were obliged to respect certain

³⁰³ Neringa Toleikytė, *loc. cit.*

³⁰⁴ *Ibid.*

³⁰⁵ D. Gaukrodger, *loc. cit.*

³⁰⁶ Neringa Toleikytė, *loc. cit.*

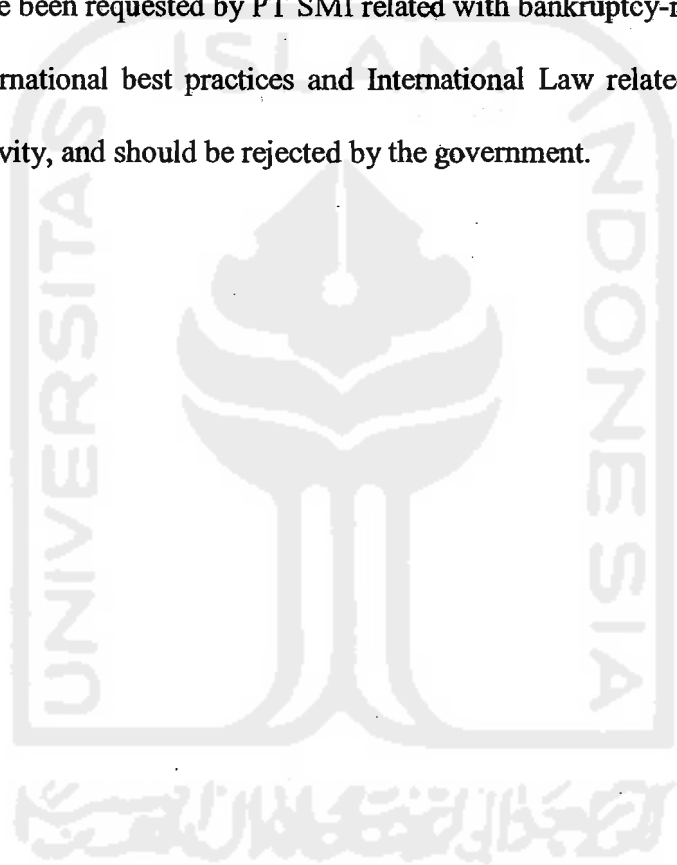
³⁰⁷ L. M. Caplan, *loc. cit.*

³⁰⁸ Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under The*

U.N. Charter, 3 *Santa Clara J. Int’l L.* 72 (2005). Available at:

<http://digitalcommons.law.scu.edu/scujil/vol3/iss1/3> last accessed 1 April 2016.

fundamental principles deeply rooted in the international community.³⁰⁹ The power of a state to make treaties is subdued when it confronts a super-customary norm of jus cogens,³¹⁰ in other words international law obviously limits the legal ability of states to determine the scope of sovereign immunity within their legal orders: states may not award immunity for acts iure gestionis.³¹¹ Therefore, what have been requested by PT SMI related with bankruptcy-remote is not in line with international best practices and International Law related with State investment activity, and should be rejected by the government.



³⁰⁹ See Gennady M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 2 *EUR. J. INT'L L.* 42, 44 (1991), available at <http://www.ejil.org/journal/Vol2/No1/art3.html>. last accessed 1 April 2016.

³¹⁰ DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* 26-27 (Nomos ed., 1987). Under the stewardship of its fourth Rapporteur, Weldock, the International Law Commission [hereinafter ILC] undertook in-depth discussion of jus cogens. As reflected in the relevant ILC Yearbooks, that there was agreement in regards to the existence of the rules of jus cogens and the peremptory norms.

³¹¹ Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, *The European Journal of International Law* Vol. 21 no. 4, 2011.