

# WHEN BUMN SUBSIDIARIES BECOMES THE "ALTER EGO" OF THE STATE: ANALYSIS OF THE SUPREME COURT CIRCULAR LETTER NUMBER 10 OF 2020 (SEMA 10/2020) REGARDING THE CORRELATION BETWEEN "BUMN SUBSIDIARIES LOSS" AND "STATE LOSS"

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## Abstract

*There is a clear distinction between the legal character of the State and that of the Company. While the state's purpose is to serve the public, a company is ultimately formed for the purpose of gaining Profit. The theories of legal entities and Corporate Law argue that the formation of a legal entity, especially a Limited Liability Company (PT) is intended to separate assets and liabilities between a Legal Entity (Company) and its Shareholders. If the shareholders (State) do not intend to segregate both assets and liabilities, the state does not need to establish a Company from the beginning. Since the issuance of Law 17/2003 on State Finances, the legal extent pertaining to state assets has become increasingly blurred, because Law 17/2003 states that "State assets that have been segregated remain within the scope of state finances". This regulation complicates the legal status of BUMN<sup>1</sup> assets. Furthermore, the wealth status of BUMN Subsidiaries (AP BUMN)<sup>2</sup> experiences the same issue. Hence, one question arises: are Segregated Assets (Paid up Capital Injection by BUMN) still considered assets of the state or are they fully owned by the Company? The Supreme Court (Mahkamah Agung/MA), as of 18 December 2020, issued SEMA<sup>3</sup> 10/2020. Therein, point 4 of the Summary of the Criminal Chamber outlines that "Losses arising from BUMN/BUMD subsidiaries whose capital is not sourced from the APBN/APBD or through capital injection by the BUMN/BUMD and does not receive/utilize state facilities, will not constitute a part of the State's financial loss". This adds to the uncertainty because, from a legal perspective, the Shareholder of an AP BUMN is the BUMN itself (and not the State), thus creating a legal correlation that extends to considering AP BUMN Loss as State Loss, and creates a legal uncertainty.*

**Keywords:** *BUMN, BUMD, Indonesia SOE, Legal status of BUMN Subsidiaries, Segregated Assets of The State Finance, State Companies, Regional Companies*

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<sup>1</sup> BUMN (Badan Usaha Milik Negara) is State Owned Enterprises (SOE)

<sup>2</sup> AP BUMN (Anak Perusahaan BUMN) is the SOE Subsidiary Company

<sup>3</sup> SEMA (Surat Edaran Mahkamah Agung) is a Circular Letter (Administrative Policy) from Supreme Court to all courts in Indonesia.

## RESEARCH METHODS

This research was conducted using Library Research, analyzed using the descriptive-analytical method.

## BACKGROUND

On 18 December 2020, the Supreme Court of Indonesia (hereinafter referred to as "*Mahkamah Agung*" or "*MA*") ratified the Supreme Court Circular Letter Number 10 of 2020 on the *Implementation of the Summary of the Results of the 2020 Supreme Court Plenary Meeting as a Guideline for the Implementation of Duties for Courts* (hereinafter referred to as "*SEMA 10/2020*"). This SEMA set forth the Summary of the Criminal Chamber point 4, which stipulates guidelines regarding State Loss associated with BUMN Subsidiaries (hereinafter referred to as "*AP BUMN*").

This paper will specifically outline point 4 of the Summary of the Criminal Chamber which states that "*Losses arising from BUMN/BUMD subsidiaries whose capital is not sourced from the APBN/APBD or through capital injection by the BUMN/BUMD and does not receive/utilize state facilities, will not constitute a part of the State's financial loss.*"<sup>4</sup>

This paper will also outline point 4 of the Summary of the Criminal Chamber from the perspective of Legal Theory, particularly by employing the Public Finance Law Theory and Corporate Law Theory approaches. From the investigation and analysis, there exist several rationales why point 4 of the summary of the criminal chamber of SEMA 10/2020 has the potential to cause *legal uncertainty* and future issues.

### A. THE MA DETERMINES AP BUMN (CORPORATION) AS THE "ALTER EGO" OF THE STATE

With the ratification of point 4 of the criminal summary of SEMA 10/2020, we can draw the following conclusions: *First*, the MA did not provide a clear legal definition or an elucidation on what and how the legal character of an AP BUMN is. *Second*, the MA Court also did not nullify any existing laws Law (UU)<sup>5</sup>, Government Regulation (PP)<sup>6</sup>, Presidential Regulation (PERPRES)<sup>7</sup> or Ministerial Regulation (PERMEN)<sup>8</sup> which mentions, regulates or defines Subsidiaries or AP BUMN). *Third*, the MA also did not declare that an AP BUMN constitutes a State (or a part thereof). *Fourth*, and the most interesting point herein, is that *SEMA 10/2020* establishes a "*legal correlation*" between "*AP BUMN loss*" and "*State Loss*".

Using the legal reasoning of *Argumentum a Contratio*<sup>9</sup>, we can conclude that the MA has determined that "*Losses incurred by BUMN/BUMD subsidiaries whose capital is sourced from the APBN/APBD<sup>10</sup> or through capital injection by the BUMN/BUMD<sup>11</sup> and receive/utilize state facilities, constitutes a part of the State's financial loss.*"

The MA has established guidelines, which states that there is a correlation between the AP BUMN losses and State losses (supplemented by specific legal requirements such as (1) the capital of the AP BUMN must be sourced from the State Budget, or (2) capital injection by the BUMN/BUMD and (3) the AP BUMN must receive/utilize state facilities. Ultimately, the AP BUMN Loss, which are considered as State Loss, may form the basis for determining whether a Criminal Act of Corruption has occurred or not, because one of the criminal elements in the Criminal Act of Corruption under the Indonesian Corruption Law is the occurring of "State Loss". This "Legal Correlation" between AP BUMN Loss

<sup>4</sup> In Bahasa Indonesia, point 4 of the Summary of the Criminal Chamber of the Supreme Court states that "*Kerugian yang timbul pada anak perusahaan BUMN/BUMD yang modalnya bukan bersumber dari APBN/APBD atau bukan penyertaan modal dari BUMN/BUMD dan tidak menerima/menggunakan fasilitas Negara, bukan termasuk kerugian keuangan Negara.*"

<sup>5</sup> Law is *Undang-Undang* (UU) in Indonesian Legal System (Bahasa)

<sup>6</sup> Government Regulation is *Peraturan Pemerintah* (PP) in Indonesian Legal System (Bahasa)

<sup>7</sup> Presidential Regulation is *Peraturan President* (PERPRES) in Indonesian Legal System (Bahasa)

<sup>8</sup> Ministerial Regulation is *Peraturan Menteri* (PERMEN) in Indonesian Legal System (Bahasa)

<sup>9</sup> Refer to <https://www.hukumonline.com/klinik/a/arti-penafsiran-hukum-argumentum-a-contrario-lt58b4df16aec3d/> Diakses pada 1 Mei 2023.

The *argumentum a contrario* is a logical argument that utilizes the reasoning of contraposition (The Opposite or Negation), where the truth of a statement is inferred from the falsity of its contrary. In other words, it is an argument used to draw conclusions by considering the opposite or negation of a given proposition.

A simple example is if a regulation prohibits indoor smoking, on an a *contrario* basis, outdoor smoking is permitted (unless there is an explicit ban on smoking outdoors). However, it is important to note that the *argumentum a contrario* does not always apply perfectly in every legal context. The interpretation of the law must still take into account the purposes and intentions of the lawmaker as well as the overall context of the law.

<sup>10</sup> Anggaran Pendapatan dan Belanja Negara (APBN) is a State Budget, and Anggaran Pendapatan dan Belanja Daerah (APBD) is a Regional Government Budget

<sup>11</sup> Badan usaha Milik Negara (BUMN) is state owned enterprises, Badan usaha Milik Daerah (BUMD) is Regional Government Owned Enterprises (in Provincial, City or Regency Government)

with the State Loss is what constitutes the ground for debates, whether from an academic or from a legal implementation perspective, and which will be further discussed below.

The legal scheme which stipulates that AP BUMN Loss are also State Loss, as provided in SEMA 10/2020, creates an impression that the AP BUMN is the "Alter Ego" of the state, and therefore any losses suffered by the AP BUMN (if it meets certain requirements) will be considered as losses suffered by the state. The term "*Alter Ego*" in this paper can be interpreted as "*the other side of me*" or "*my second personality*" because the MA indirectly believes that AP BUMN is the other side or another personality of the State.

### **B. Issue of Difference in Legal Definition regarding AP BUMN between the Regulations**

One of the issues when drafting policies (guidelines) under SEMA is the absence of academic texts, theories serving as the basis for the guideline, legal comparisons with other regulations, or legal discussion on the development of Court Decisions regarding issues for which the guideline is made. The issue of public information disclosure (outreach to affected parties) is also still being debated, although in recent years the MA has begun to open itself to discussions prior to the enactment of the SEMA. Another issue is that the policies/guidelines (SEMA) are used to waive regulations enacted by the Legislative (Law) and regulations enacted by the Executive (PP, PERPRES, PERMEN and otherwise) whereas in fact, the MA has no legislative power to enact Legislations. The MA also does not have the requisite authority to amend Law. The MA (whose function is solely Judicative) only has the authority to conduct Judicial Review to repeal articles in regulation below the Law (ie. PP, PERPRES, PERMEN, PERDA (Regional Regulation)). However, the aforementioned authority of the MA should be exercised in the realm of Judicial Review (and not with respect to the creation of Guidelines/SEMA). In order to focus on the main legal discussion of this paper, the formality issues of the SEMA should be discussed in a separate paper.

Another issue lies in the *definition* of AP BUMN itself since there are two different definitions of AP BUMN in the PP and the PERMEN BUMN. The MA, as the institution holding Judicative power with the authority to hold a Judicial Review, should establish a legal certainty on the matter. By way of example, the MA can repeal irrelevant regulations, thus creating a certain and solid definition. However, SEMA 10/2020 does not resolve the primary issue in the "Legal definition" of the AP BUMN. Instead, the MA established a new correlation between AP BUMN and State Loss.

Regarding the "*Definition of AP BUMN*" in a positive legal perspective, throughout this study, the term Subsidiary was only "*mentioned*" but not explained (defined) at the level of Law (UU), even when the terms parent or subsidiary are mentioned under several Laws. The definition of "Subsidiary" itself is only mentioned at the level of *Government Regulation (Hereinafter referred to as Peraturan Pemerintah or PP)*, namely PP 18/2021 regarding Management Rights, Land Rights, Multistory Housing Units and Land Registration,<sup>12</sup> in the elucidation of article 6. However, this definition is still ambiguous and results in more than one interpretation of the term. The definition of a Subsidiary is only explicitly provided at the level of Ministerial Regulation, through PERMEN BUMN Number PER-2/MBU/03/2023.

Our study of the PPs and '*Presidential Regulations*' ("*PERPRES*") show that most of the aforementioned regulations only mention '*BUMN subsidiary*', in various legal schemes. For example regulation on the granting of permission for the Director of BUMN/D who plan to establish a new Subsidiary, equity participation in subsidiaries, regulation on the financial statement of subsidiaries or assignment of duties from the government to Subsidiaries, or regulation pertaining to the register of Dutch-Owned companies and Subsidiaries that will be Nationalized such as those set out in PP 3/1959 on the *Determination of Large Dutch-Owned Trading Companies as well as Their Branches and Subsidiaries Which Are Subject to Nationalization*. There is also a PP that requires BUMN Subsidiaries to receive the same treatment as regulated in PP 28/2020 concerning the Amendment to Government Regulation Number 27 of 2014 on the Management of State/Regional government-owned Assets.

Most of the PP and PERPRES did not provide a detailed explanation of the nature and operations of BUMN Subsidiaries. Additionally, most of them failed to include a clear definition of BUMN Subsidiaries. The reviewed PP and PERPRES include:

1. PP 38/2018 on Public Enterprise (Perum) *DAMRI*;<sup>13</sup>
2. PP 13/2016 on Public Enterprise (Perum) *Bulog*;<sup>14</sup>
3. PP 25/2022 on Public Enterprise (Perum) *Jasa Tirta II*;<sup>15</sup>

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<sup>12</sup> PP 18/2021 tentang Hak Pengelolaan, Hak Atas Tanah, Satuan Rumah Susun Dan Pendaftaran Tanah. (English: Government Regulation 18/2021 on Management Rights, Land Rights, Multistory Housing Units and Land Registration)

<sup>13</sup> SOE, its services in Transportation.

<sup>14</sup> SOE, for logistic Agency.

<sup>15</sup> SOE, about Water Management.

4. PP 35/2018 on Public Enterprise (Perum) *Jaminan Kredit Indonesia*;<sup>16</sup>
5. PERPRES 62/2022 on Nusantara Capital City Authority;<sup>17</sup>
6. PP 12/1998 on Limited Liability State Owned Enterprise (persero);
7. PERPRES 69/2021 on the Second Amendment of Presidential Regulation Number 191 of 2014 on the Provision, Distribution and Retail Price of Oil Fuel;
8. PP 15/2004 on Public Enterprise (PERUM) National Housing Development;
9. PP 16/1984 on Transfer of Ownership/Control of State Capital of the Republic of Indonesia in PT Pelita Indonesia Djaya Corporation to PT. Indonesian National Shipping Limited Liability Company;
10. PP 43/2005 on Mergers, Consolidations, Acquisitions, and Changes in Legal Entities of SOE;
11. PP 14/2018 on Foreign Ownership of Insurance Companies;
12. PP 103/2000 on Public Enterprise (Perum) *Pegadaian*;<sup>18</sup>
13. PP 7/2021 on the Ease, Protection, and Empowerment of Cooperatives and Micro, Small, and Medium Enterprises;
14. PP 5/2021 on Implementation of Risk-Based Business Licensing;
15. PP 133/2000 on Public Enterprise (Perum) Indonesian National State Printing;<sup>19</sup>
16. PERPRES 40/2023 on the Acceleration of National Sugar Self-sufficiency and Provision of Bioethanol as Biofuel;
17. PP 39/2021 on the Implementation of Halal Product Guarantee;
18. PP 86/2019 on Food Safety;
19. PP 61/2009 on Seaports;
20. PP 12/2023 on the Granting of Business Permits, Ease of Doing Business, and Investment Facilities for Business Players in the Capital City of the Archipelago;
21. PP 13/1998 concerning Public Enterprise (Perum);<sup>20</sup>
22. PP 5/2021 on the Implementation of Risk-Based Business Licensing;
23. PERPRES 70/2021 on Amendment to Presidential Regulation Number 104 of 2007 on the supply, distribution and pricing of 3-kilogram cylinders of Liquefied Petroleum Gas;

This study found that only one PP describes the definition of *AP BUMN*, which is PP 18/2021 *tentang Hak Pengelolaan, Hak Atas Tanah, Satuan Rumah Susun Dan Pendaftaran Tanah*. (English: Government Regulation Number 18 of 2021 concerning Management Rights, Land Rights, Multistory Housing Units and Land Registration). Article 5 thereof also governs the granting of *Hak Pengelolaan* (English: Land Management Right) from the State to BUMN. Furthermore, article 6 states that the granting of *Hak Pengelolaan* to BUMN/BUMD will also lead to the granting thereof to BUMN/D Subsidiaries.<sup>21</sup> Elucidation of PP 18/2021, Article 6 paragraph (3) states that:

*“What is meant by “a subsidiary owned by a state-owned enterprise/regional government-owned enterprise” is that in the event that state assets in the form of state-owned shares in a state-owned enterprise/regional government-owned enterprise used as state capital participation in another state-owned enterprise/regional government-owned enterprise, such that the majority of shares are owned by another state-owned enterprise/regional government-owned enterprise, such state-owned enterprise/regional government-owned enterprise shall become a subsidiary of the state-owned enterprise/regional government-owned enterprise provided that the state owns preference shares as set out in the articles of association.”*

*“For example, the merging of PTPN I to PTPN XII forms a holding plantation company with PTPN III as parent, PTPN I, therefore PTPN XII as subsidiary of the state- owned enterprise shall be granted Management Rights”*

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<sup>16</sup> SOE for Credit Assurance;

<sup>17</sup> PP concerning State Capital Authority;

<sup>18</sup> PP concerning Pawnshop;

<sup>19</sup> PP concerning SOE for National State Printing

<sup>20</sup> PP concerning Perum (SOE) General Company;

<sup>21</sup> See PP 18/2021 on Right Management, Land Rights, Multistory Housing Units and Land Registration, article 6 which states

- 1) Right Management over the State Land is granted throughout task principal and function direct relate with land management.
- 2) Central Government Agency as mention in Article 5 paragraph (1) letter a is the task principal and function No direct relate with Land management can given Right Management after get agreement minister in charge affairs government in the field finance.
- 3) Business entity owned by the state/ business entity owned by area as meant in Article 5 paragraph (1) letter c also includes **subsidiary** owned by business entities owned by the state/ business entity owned by area based on state equity participation in business entities owned by the state/ business entity owned by another area.
- 4) Legal entity appointed by the Central Government as meant in Article 5 paragraph (1) letter f, is a legal entity that receives assignment specifically by Presidential Regulation (PP).



The definition regarding Subsidiaries (specifically AP BUMN) is once again stated at the level of Regulation of the Minister of BUMN (Hereinafter referred to as "Regulation of the Minister of BUMN") PERMEN BUMN Number PER-2/MBU/03/2023 of 2023 concerning Guidelines for Corporate Governance and Significant Corporate Actions in State-Owned Enterprises, which states that *“an AP BUMN is a limited liability company in which more than 50% of its shares are owned by a BUMN or a limited liability company directly controlled by a BUMN.”*<sup>22</sup> Whereas in the previous Regulation of the Minister of BUMN, it was only stated that a BUMN Subsidiary is *“a limited liability company in which the majority of its shares is owned by a BUMN or a company controlled by a BUMN”*<sup>23</sup>. Without stating the percentage of shares held by the state.

<b>TABLE OF DIFFERENCES IN THE DEFINITION OF “BUMN SUBSIDIARY” BETWEEN PP AND PERMEN</b>	
<b>PP 18/2021 concerning Management Rights, Land Rights, Multistory Housing Units and Land Registration</b>	<b>PERMEN BUMN Number PER-2/MBU/03/2023 of 2023 concerning Guidelines for Corporate Governance and Significant Corporate Actions in State-Owned Enterprises</b>
<i>Elucidation of Article 6: “What is meant by “subsidiaries owned by a state-owned enterprise/regional government-owned enterprise” is in the event of state assets in the form of state-owned shares in a state-owned enterprise/regional government-owned enterprise used as state capital participation in another state-owned enterprise/regional government-owned enterprise, such that the majority of shares are owned by another state-owned enterprise/regional government-owned enterprise, such state-owned enterprise/regional government-owned enterprise shall become a subsidiary of the state-owned enterprise/regional government-owned enterprise provided that the state must hold preference shares as set out in the articles of association.”</i>	<i>Article 1, number 2: “a BUMN Subsidiary is a limited liability company in which more than 50% of its shares are owned by a BUMN or a limited liability company directly controlled by a BUMN.”</i>

If we refer to the ideal hierarchy of legislation, and the principle of *“lex superior derogate legi inferiori and lex specialis”*, the lower-level regulation (PERMEN) should refer to the higher-level regulation (PP). The lower-level regulation is not permitted to create regulations that differ from the higher-level regulation for the same legal subject, in this case the legal subject is *“the definition of AP BUMN”*, because such differences will result in legal uncertainty. The principle *“lex superior derogate legi inferiori ”* is a legal principle which means that a higher/superior law shall supersede an inferior regulation if there is a conflict or inconsistency between two regulations regarding the same object. The Constitution and Laws are the main regulations that serve as benchmarks and must be complied by the regulations under them (PP, PERPRES, PERMEN, PERDA). And following this principle, what should be made as the guideline is the definition of AP BUMN from PP 18/202, instead of the definition of AP BUMN in PERMEN BUMN Number PER-2/MBU/03/2023.

**C. Bias in the Definition of "Subsidiary" between the Financial Management Concept and Legal Concept**

Currently, there is a bias in the definition, where the *“Financial Management Concept”* is used in the formation of positive laws. This is because the *Legal Drafters* have adopted the terms from Financial Management *in verbatim* when formulating regulations in Indonesia. This leads to confusion and uncertainty in concepts, resulting issues in legal enforcement. The principles of financial management prioritize funding sources, asset management, asset optimization, and profit generation. This clearly differs from legal concepts, that prioritize the border of rights and obligations, differentiating individual rights/obligations from collective or corporate rights/obligations, as well as the authority of state officials. The utilization of Financial Management concepts does not resolve legal issues; instead, it might create uncertainties, particularly in terms of legal evidence standards. Several financial concepts, such as the concept of company ownership,

<sup>22</sup> PERMEN BUMN Number PER-2/MBU/03/2023 of 2023 concerning Guidelines for Corporate Governance and Significant Corporate Actions in State-Owned Enterprises. Defined on March 3 , 2023, and promulgated on March 24, 2023.

<sup>23</sup>PERMEN BUMN Number PER-04/MBU/06/2020 Concerning Amendments to Regulation of the State Minister for State Owned Enterprises Number Per-03/ Mbu /2012 Concerning Guidelines for Appointing Members of the Board of Directors and Members of the Board of Commissioners of Subsidiaries of State-Owned Enterprises

the concept of state loss (such as profit and loss statements), and others, will trigger a domino effect. This is because these elements are enforced as legal standards and become elements of legal evidence when determining "state loss," particularly in cases of corruption (Criminal Law).

From a *Financial management* concept, a subsidiary is defined as a business entity that is **wholly** or **substantially owned** by another company (referred to as the parent company).<sup>24</sup> Although Subsidiaries operate as separate legal entities, they are still under the control or at least influenced by the parent company. In financial management and corporate practices, Subsidiaries are bound by decisions and policies of the parent company and are also obligated to comply with regulations within the jurisdiction in which they operate.

On the other hand, the law holds a different concept. "*A legal subject cannot be owned by another legal subject*".<sup>25</sup> A human as a legal subject (*natuurlijk person*) cannot be owned by another human. Similarly, a Company as a legal subject (*rechts person*) cannot be owned by another person or company. Although in everyday language or financial management language, it is common to say that Person A is the owner of Company B. However, legally, "A is a **shareholder** or **owner of shares**" in Company B. The same applies to Companies. Legally, a company cannot own another company; it can only be a "**shareholder** or **owner of shares**" in another company.

In Law, every Legal Subject (Legal Entity/Company or Person) is free (independent), has their own rights and obligations in making their own decisions and is responsible for the decisions/choices they make. Legal Subjects can sue and be sued in defending their rights and obligations. If a person or a Company makes decisions under the control of another party (or under "duress"), then the controlling party or the coercing party shall be the one liable for the actions of the coerced party. The Positive Law of a country also acknowledges the legal entity status of a company. Indonesian law states that "*A Company obtains legal entity status after being registered to the Minister and obtaining proof of registration*". This is a change from the previous provision which states that "*a Company obtains legal entity status on the date of issuance of the Minister's decree*".<sup>26</sup> Therefore, when a Company (1) registers and (2) the Company obtains a proof of Registration, at that moment the Company shall become a Legal Entity and shall be recognized by the State. Consequently, the state should also recognize the existence of segregation of assets and responsibility between the Company and Shareholders (or Founder). This is commonly referred to as "*Corporate Veil*"

#### **D. Corporate Veil, Segregation of Assets and Liabilities (Between Shareholders and The Company)**

Upon review, SEMA 10/2020 has established a correlation where the Losses incurred by a Company (AP BUMN) are considered State Loss if the AP BUMN owns capital originating from a State or Regional Government Budget (APBN/APBD) and a Company (BUMN/BUMD).

From the perspective of legal entities (corporations), one of the purposes of establishing a corporation (company) is to achieve the segregation of assets (between Shareholders and the Corporation). A corporation is also established to limit the liability (between Shareholders and the Company). If the State does not intend to segregate assets and liabilities, the State should not have initially established the Corporation from the beginning and implemented segregation of the assets and responsibilities. This segregation is commonly referred to as the Corporate Veil, which is a key feature of a corporation. With the segregation of rights, obligations, and assets of the Corporation, legal certainty regarding the limits of assets and responsibilities (between the Company and Shareholders/State) shall be created. Corporations require certainty to distinguish between the shareholders' assets and the Corporations' assets, considering that a Corporation's Shareholders are not limited to one person. Moreover, for Public Companies with hundreds or even thousands of shareholders, it would be confusing if all shareholders were to claim the Corporation's assets as their personal assets. Additionally, it is necessary to separate the purposes and interests of the Corporation. Without this separation, the Corporation would be confused in pursuing all the interests/goals of the shareholders, as there are multiple shareholders.

In an ideal legal perspective of a company, Shareholders (whether Persons, Corporation, or the State) may not have control over another company (Subsidiary), thus Shareholders (both companies or persons) cannot be held accountable "*beyond*

<sup>24</sup> See <https://corporatefinanceinstitute.com/resources/accounting/subsidiary-definition/> Accessed on 1 May 2023.

"*a subsidiary (sub) is a business entity or corporation that is fully owned or partially controlled by another company, termed as the parent, or holding, company. Ownership is determined by the percentage of shares held by the parent company, and that ownership stake must be at least 51%.*"

<sup>25</sup> See <https://www.hukumonline.com/berita/a/subjek-hukum-lt62ece10f037ce/?page=all> accessed on 1 May 2023.

See also Article 1654 BW (Burgerlijk Wetboek voor Indonesie) - Civil Code – Book III Engagement - Chapter VIX Legal Entities . That states "*All legal entities that are legally established, as well as private individuals, have the authority to engage in civil actions, without prejudice to the legal provisions that modify, restrict, or subject that authority to specific procedures.*"

<sup>26</sup>PERPPU 2/2022, Article 7 point 4, *jo* Law Number 6 of 2023 concerning the Enactment of Government Regulation in Lieu of Law No. 2 of 2022 regarding Job Creation as a Law.

the subscribed capital".<sup>27</sup> This protection for Shareholders (both Companies or Persons) is commonly referred to as the "Corporate Veil."

*Corporate Veil* or often known as the "*Curtain of Incorporation*" is a term that refers to a legal principle which separates personal interests and responsibilities between shareholders and the legal entity. In this context, the corporate legal entity is considered as a separate and independent entity from any individual or any legal entity which establishes it. This principle is an important part of the company law and which has formed the foundation of modern business legal systems. With the corporate veil principle, the owners or shareholders of a company are not personally liable for any debts or losses of the company. As a result, the company may conduct business operations without personal liability, and the risk of business loss shall be borne by the company itself.

Therefore, the limits of legal liability of a Shareholder (whether individuals, companies or the State) becomes clear and certain. This Corporate Veil provides legal protection for the Shareholders who are in good faith. This is in accordance with the concept of basic law, which regulates "*limitation*" or "*distinction*".

The limitation of rights and obligations itself can be applied through various legal schemes, for example through the design of *Legal Definitions* in the legislation. *Naming schemes* (for example in the Certificate of Ownership to distinguish the rights between the certificate holders and others), *differentiation in legal treatment* (for example, providing different Legal Treatment in dividends for shareholders with varying percentage of shares) and even differentiation in sanctions for different actions, while the same action will result in the same sanction.

However, this Corporate Veil is not absolute, in certain conditions, it is possible to waive the Corporate Veil (commonly called as *Piercing the Corporate Veil*). If the *Piercing the Corporate Veil* takes place, the Shareholders will be personally liable for any actions made by the company and will liable for amount exceeding the paid-up capital.

In Indonesian Law there are several requirements for *Piercing the Corporate Veil* to take place, among others<sup>28</sup> ie. (a) "*Company requirements as a legal entity have not been met or are not fulfilled;*" (b) "*the relevant shareholder, either directly or indirectly, without good faith exploits the Company for his/her own personal interest;*" (c) "*the relevant shareholder is involved in a tort conducted by the Company; or*" (d) "*the relevant shareholder, either directly or indirectly, unlawfully utilize any assets of the Company, which causes the Company's assets to be insufficient to settle the Company's debts*".

#### **E. The Legal Correlation Issues from the "Loss of AP BUMN" to "State Loss"**

The SEMA 10/2020 point 4, raises several uncertainties related to the boundaries of the "State Finance", some of these uncertainties are as follows:

*First*, there is an issue regarding the uncertainty of the state finance boundaries (legal uncertainty) in Indonesia. The basic question is, where are the legal boundaries of the state's finances? (a) Is the state's finances limited to all finance managed by the State Treasurer (Ministry of Finance), or (b) does it also include "*segregated assets*" in BUMN or does it also include (c) "*status of assets segregated by the BUMN and that have been contributed into AP BUMN*"?

The SEMA 10/2020 broadens the scope of the "*segregated assets*" definition, making it more extensive and uncertain. Because if it encompasses the assets of AP BUMN and AP BUMD and all of its subsidiaries. By this policy, then we would have thousands of companies falling under this category. This will further burden the workload of state auditors, who are obligated to conduct audit on thousands of companies.

*Secondly*, in terms of financial statements, this also creates uncertainty. In the legal theory of "*segregated state assets*," once it has been deposited to the company, it will become the "*company's assets*". Meanwhile, the Shareholder (State) only has the right to claim ownership of the shares (equal to the paid-up capital). If the state continues to claim state assets including shares and the "*segregated/paid-up assets*," then the act of "capital paid-up" to BUMN will double the state's assets, because the state could claim two assets (Shares plus the paid-up Capital). For example, if the state wishes to establish a BUMN with an authorized capital of IDR 100 billion, and the state intends to subscribe 60% shares, then the state must contribute an amount of IDR 60 billion. If the state claims the paid-up capital as state assets (IDR 60 billion) plus the Shares of IDR 60 billion as state assets, the state will automatically record assets of IDR 120 billion.

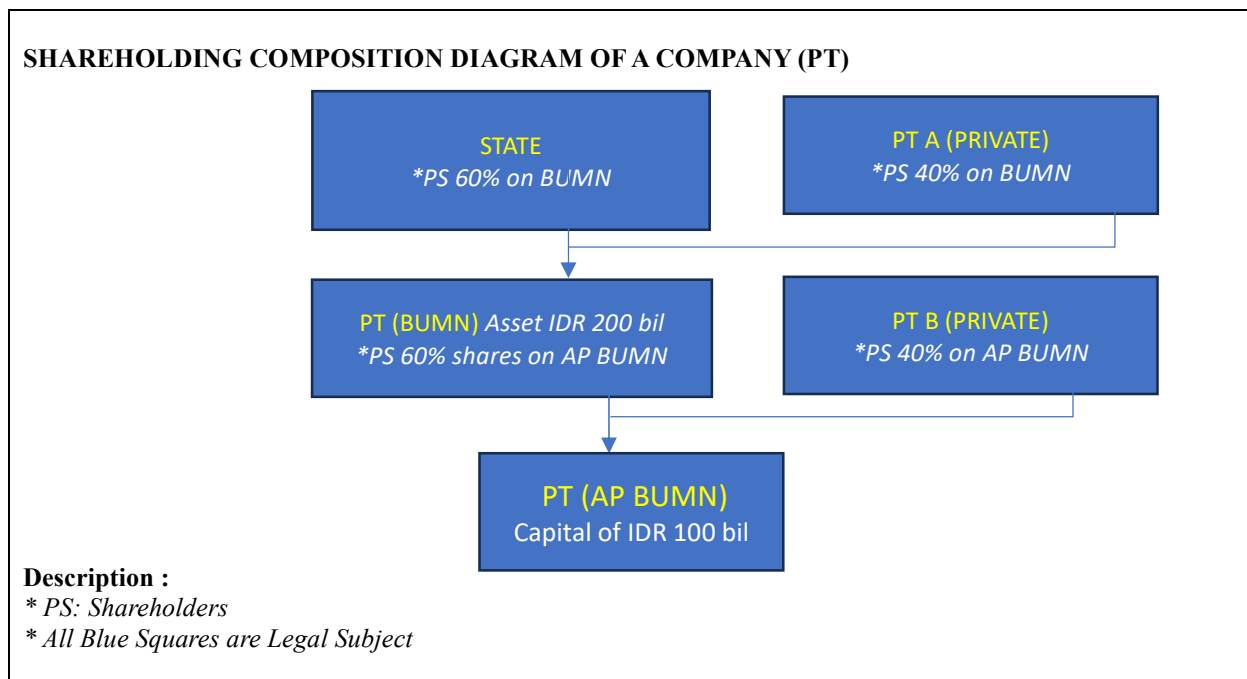
Furthermore, this will create the uncertainty regarding the scope of the company assets. What will the assets status of the BUMN be if the BUMN intends to establish an AP BUMN? Or what if the AP BUMN plans to establish a new company

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<sup>27</sup> See Law 40/2007 Limited Liability Companies , Article 3 point (1) that states "*Company shareholders shall not be personally liable for commitments made on behalf of the Company and shall not be liable for the Company's losses beyond the shares they own.*"

<sup>28</sup>Ibid, article 153J.

in the future? This will definitely become more complex. However, if we follow the basic corporate principles, with a clear separation of assets between the Shareholders (or founders) and the Legal Entity (Company), it will be definitive and certain, as explained in points C and D above.



In the above diagram, a simple scheme of controlling share ownership (60%) and other private shareholders (40%) is demonstrated. If the State together with PT A (Private) establishes a Company (BUMN), and the State intends to subscribe 60% of the Shares then the State has to deposit a capital of IDR 120 billion, then the State shall own 60% assets of the BUMN and the paid-up IDR 120 billion is the assets of the BUMN. If the BUMN then intends to establish a new company (AP BUMN) with an authorized capital of 100 billion and intends to subscribe 60% of the shares of AP BUMN, then BUMN will deposit the capital in cash in an amount of IDR 60 billion and owns 60% of the shares of AP BUMN. Thus, BUMN is only entitled to claim 60% shares of AP BUMN (equal to IDR 60 billion), while the capital (Cash) of IDR 60 billion that has been deposited will become the assets of AP BUMN.

If AP BUMN suffers loss in the future, or is sued for bankruptcy, then the Plaintiff cannot submit the lawsuit towards the BUMN, due to Limitation on Liability. This limitation on liability is the main character of a Limited Liability Company (*Perseroan Terbatas/ PT*). The shareholders are only liable for an amount “equal to the paid-up capital”. However, if the shareholder conducts any illegal actions, the “*Piercing the Corporate Veil*” may be applied, to seek personal accountability from the Shareholders.

**Conclusion**

The company (corporation) is established with the objective of making a profit with the principles of providing the best goods and services under fair competition conditions. This legal character of the company is completely different from that of the State, which is established to provide (non-profit) public services supported by monopoly of authority. Generally, the company raises funds from shareholders through Capital Contributions, Loans, and the sales of goods/services to consumers. This funding scheme is different from State funding, which are raised mainly through Tax (coercive authority).

To fulfil its role fairly and definitively, the company is equipped with a key feature, namely the segregation of Assets and Liabilities (between the Shareholders and Company), commonly known as “*Corporate Veil*”, whereby there is a limitation on liabilities for the Shareholders (either Individual, Company or State Shareholder). A Shareholder with good faith, may not be held liable beyond their capital contribution. This “Limited” liability of the Shareholder is the main characteristic of the Company, known as a “*Limited Liability Company*” or is known as *Perseroan Terbatas* (abbreviated as “PT”) in Indonesia.

The legal character between the Company and the State is totally different from each of its establishment until operations. Therefore, comparing the Company as State is a policy which incur legal uncertainty. If the State does not wish to conduct segregation of assets and liabilities, then from the beginning the State should not have established a Company (corporation). When the State has segregated its assets and contributed capital to BUMN, then the state is only entitled to claim ownership/assets in proportion to its own share percentage, while the paid-up cash/assets to the Company (BUMN)



is part of the Company (BUMN) assets. Similar with a BUMN which establishes an AP BUMN, BUMN is only entitled to claim to the extent of proportion of its shares, while the capital (cash/asset) paid up to the AP BUMN will be owned by AP BUMN.

BUMN and AP BUMN are independent separated legal entities (Company) and have rights and obligations separated from its Shareholders. A Company (either BUMN or AP BUMN) is not an *Alter Ego* (another personality) of the State. Therefore, a “*State Loss*” constitutes a “state’s loss”, BUMN’s loss remains “*BUMN’s loss*” (not State’s loss), similar with “*AP BUMN’s Loss*” remains “*AP BUMN’s loss*” (not the loss of a BUMN or State Loss). The expansion of state’s assets to AP BUMN, followed by expansion of “*state’s loss*”, will incur legal uncertainty.

The SEMA 10/2020, which stipulates that State Loss on AP BUMN should be considered as State loss (even with several requirements) is a policy that crosses the legal boundaries. Especially since Shareholders in AP BUMN are BUMN themselves (not the state). We can see this from the *Register of Shareholders* of AP BUMN kept by the Board of Directors<sup>29</sup>. Moreover, the Register of Shareholders is also submitted to the Minister of Law and Human Rights (as State Official)<sup>30</sup>. It is why the shareholders of AP BUMN are BUMN (not the State). Even the BUMN is only entitled to claim ownership of Shares (not claiming the assets of AP BUMN), while the Loss of AP BUMN is the loss of AP BUMN itself (not the loss of BUMN, and definitely not the loss of the State).

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<sup>29</sup> Law 40/2007 on Limited Liability Company (PT), Article 50

<sup>30</sup> Ibid, Article 56