



# Public-Private Partnership Investment Principles and Model for Improving the Development of Maritimetary Infrastructure

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## ABSTRACT

To support Indonesia's program as the world's maritime axis, it is necessary to increase maritime investment. Given the limited financial resources of the State Budget (APBN) in financing maritime infrastructure projects, it is essential to look for alternative financing and investment by involving the private sector through a public-private partnership scheme. This paper aims to examine studies on public-private partnership principles for development, improvement and modernization of maritime infrastructure. In addition, this paper analyzes an effective and efficient public-private partnership investment model in the context of the development, improvement and modernization of maritime infrastructure.

Keywords: PPP, performance-based contract, Value for Money, risk allocation, public service comparator

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## SARI PATI

*Untuk mendukung program Indonesia sebagai poros maritim dunia perlu dengan peningkatan investasi kemaritiman. Mengingat ada keterbatasan sumber daya keuangan Anggaran Pendapatan dan Biaya Negara (APBN) dalam membiayai proyek infrastruktur kemaritiman maka perlu dicari alternatif pembiayaan dan investasi dengan melibatkan swasta melalui skema kemitraan pemerintah dan swasta (public private partnership). Untuk itu tulisan ini bertujuan untuk ditelaah kajian mengenai prinsip public private partnership untuk pembangunan, pengembangan dan modernisasi infrastruktur bidang kemaritiman. Selain itu, tulisan ini menganalisa mengenai model investasi public private partnership yang efektif dan efisien dalam rangka untuk pengembangan, pembangunan dan modernisasi infrastruktur kemaritiman.*

Kata Kunci: *public private partnership, maritim, infrastruktur, investasi*

## INTRODUCTION

Geographically, Indonesia is an archipelago with two thirds of its ocean area larger land. With a coastline on almost every island in Indonesia (along 80,791 km), Indonesia ranks second after Canada as a country that has the longest coastline in the world. With an area of approximately 2.8 million km<sup>2</sup> and 17,508 islands,<sup>1</sup> Indonesia is the largest maritime country. As the largest maritime country, it is only proper for the government to declare the vision of Indonesia as the world's maritime axis. President Joko Widodo declared Indonesia's vision for the world's maritime axis during his inauguration on 20 October 2014, that:

“The oceans, seas, straits and bays are the future of our civilization. We have turned our back to the sea, to the ocean, to the straits and bays for too long.”

As the largest maritime country, Indonesia has tremendous fishery and marine potential which are ones of the main assets driving national economic growth. The sustainable potential of Indonesia's fish resources is 6.4 million tons per year with an allowable catch of 5.8 million tons per year (80% of the sustainable potential) with an export volume that continues to increase (almost 97.36%) of around 8.9 million tons per year as of 2016,<sup>2</sup> with exports to 90 destination countries and Japan (50%), the United States of America (17%), the European region (13%) as the main markets.<sup>3</sup> Based on data from the Food and Agriculture Organization (FAO), Indonesia is currently ranked the third largest in the world as

a fish producer behind China and India,<sup>4</sup> with a production of around 8.9 million tons consisting of catches on land and sea of 5.8 million tons and aquaculture products, amounting to 3.1 million tonnes coupled with seaweed production of 6.5 million tonnes. 95% of fishery production comes from the catch of fishermen, and nearly 6.4 million Indonesians depend on fishing and aquaculture for their livelihoods.<sup>5</sup> In addition, Indonesian waters potentially hold 70 percent of oil because there are approximately 40 oil basins in Indonesian waters.

By looking at the potential of the fisheries and marine sector, of course there are also various potential investments in the maritime sector in Indonesia, including investment in marine biotechnology, deep ocean water, marine tourism, marine energy, marine minerals, shipping, defense, and maritime industry, which can make a major contribution to the welfare and prosperity of the Indonesian people. But unfortunately, only about 10 percent of the investment potential is currently being developed.

The maritime wealth and potential must be managed properly and efficiently. In this regard, it is fundamental to increase human resources, strengthen management of marine utilization, spatial planning of maritime areas, diversify renewable energy sources in the sea, modernize maritime technology, increase research and development in the maritime sector, repair and modernize fishing and shipping fleets, increase capacity and investment in the maritime industry sector, infrastructure repair and modernization, and so on.

Improvement and modernization of maritime infrastructure can be done through the development of ports and sea transportation. The

1 Retno Muningar, “Public-Private Partnership dalam Manajemen Infrastruktur Pelabuhan Perikanan di Indonesia”, IPB-Faculty of Fisheries and Marine Science, 2007, h. 188 <http://repository.ipb.ac.id/handle/123456789/51716>,

2 FAO, Fishery and Aquaculture Country Profiles : The Republic of Indonesia,

<http://www.fao.org/fishery/facp/IDN/en>

3 Retno Muningar, *Loc. Cit.*

4 FAO, *Loc. Cit.*

5 *Ibid.*

development, improvement and modernization of ports are the key to increasing maritime activities that are more efficient and modern because ports have an important role as gateways for economic activities, as links between regions, and as the entry and exit points for goods. Even Article 4 of the Government Regulation No. 61 of 2009 concerning Ports (hereinafter referred to as Port Affairs) states that ports have important roles as: a. nodes in the transportation network according to the hierarchy; b. gateways to economic activities; c. transportation transfer points; d. supporting industrial and/or trading activities; e. distribution, production and consolidation points of cargo or goods; and f. pathways to Indonesian Archipelagic Vision and state sovereignty.

The development, improvement and modernization of maritime infrastructure need to be supported by sustainable investment and funds from both the State Budget or participation of the private sector that needs to be increased. The limited financial resources of the State Budget, which can only finance 40 percent of infrastructure projects, have urged the government to look for other alternatives to realize and finance investment plans in infrastructure.

With limited funds from the State Budget, the government needs to partner with private investors to develop infrastructure projects through an investment scheme in the form of public-private partnerships. Public-private partnership is a strategy to realize the development, improvement and modernization of maritime infrastructure, especially in port affairs by increasing the role of private investors. Public-private partnerships are normatively regulated in Presidential Regulation No. 67 of 2005 concerning cooperation between government and business enterprises in the provision of infrastructure (hereinafter referred to as Perpres 67/2005). The availability of

adequate and sustainable infrastructure is an urgent need to support the implementation of national development in order to improve the economy and people's welfare, as well as to increase Indonesia's global competitiveness. In order to accelerate infrastructure development, it is deemed necessary to take comprehensive steps to create an investment climate to encourage the participation of business enterprises in providing infrastructure based on sound business principles.

Public-private partnerships are generally based on a public-private-partnership agreement or contract as follows:<sup>6</sup>

- a. Build and Operate (BO), a model where the private sector finances, builds and manages without any time limit and the government only exercises control.
- b. Build, Operate and Transfer (BOT), a model where a concession is granted to the private sector to build and operate for a limited period of time.
- c. Build, Transfer and Operate (BTO), a model where ownership of project assets belongs to the public or the government before project operations. After construction is complete, the private sector rents the project or facility.
- d. Buy, Build and Operate (BBO), a model suitable for the development of damaged infrastructure to be made available for purchase and management to the private sector, which includes construction, repair or expansion.
- e. Lease, Develop and Operate (LDO), a model where the private sector leases certain government-owned assets and manages the repairs during the concession period.

6 Ana I. Irimia-Diéguez, Dolores Oliver-Alfonso "Models of Public-Private Partnerships in Megaprojects: the Spanish case", *Organization technology and management construction international journal*, Volume 4( 3), 2012, h. 611-612.

- f. Wraparound Addition (WAA), a model where the private sector extends public ownership and operationalize the infrastructure. Management is carried out on the main infrastructure or its auxiliary parts and when operation is complete, ownership is shared between the government and the private sector.

Meanwhile, in the service sector, there is the Design-Build-Finance-Operate (DBFO) or the Design-Build-Operate (DBO) model.<sup>7</sup> Of the above forms of partnership, this paper will analyze the principles and models of effective and efficient public-private partnership contracts for the development, improvement and modernization of port infrastructure in favor of maritime resilience and independence.

#### RESEARCH OUTLINE

Based on this background, the research outline in this paper will incorporate:

- a. Public-private partnership principles for maritime infrastructure development.
- b. Effective and efficient forms of public-private partnership investment for the development, improvement and modernization of port infrastructure in support of maritime resilience and independence.

#### DISCUSSION

##### Public Private Partnership Characteristics

According to Law No. 25 of 2007 concerning Investment (hereinafter referred to as the Law on Investment), it is stated that to accelerate

national economic development and realize Indonesia's political and economic sovereignty, it is necessary to increase investment to transform economic potential into real economic strength by using capital derived both from within and outside the country.<sup>8</sup>

Private capital is required in infrastructure investment for the following reasons:

- a. To provide additional capital for the government in increasing investment in the infrastructure sector.
- b. To reduce the burden on state financial expenditures given the limitations of government funds. Therefore, funds from the private sector are expected to be used for financing projects that cannot be funded by the State/Regional Budget.
- c. Private services may vary.
- d. To improve service quality and foster competition.
- e. To increase efficiency of operational activities.

Private capital can be utilized through a public-private partnership scheme regardless of its variety of definitions. According to Mohammed Ali Berawi and Bambang Susantono, a public-private partnership is an institutionalized cooperation of the public and private sectors that collaborate to achieve certain objectives and both parties bear investment risks on the basis of sharing the benefits and costs incurred.<sup>9</sup> This type of partnership is cooperation between the government and the private sector that produces products or services with the risks, costs and benefits shared based on the added value

<sup>7</sup> Design-Build-Finance-Operate (DBFO) is the most common model of public-private partnership which involves four (4) main activities, namely designing, building, financing and operating by one party. Meanwhile, another variant is the Design-Build-Operate (DBO), a model in which the public sector or government provides funds to design and build the facility, and then private tenants will rent to operate the facility. See Singapore Ministry of Finance, Public-private partnership Handbook, Version 2, 2012, p. 5-6

<sup>8</sup> Letter C under Section Considering of the Law of Investment.

<sup>9</sup> Bambang Susantono and Mohammed Ali Berawi, "Perkembangan Kebijakan Pembiayaan Infrastruktur Transportasi Berbasis Kerjasama Pemerintah Swasta Di Indonesia.", *Jurnal Transportasi*, Vol. 12 No. 2 Agustus 2012, p.95

each contributes.<sup>10</sup> A public-private partnership is a management reform when the functions of government and bureaucracy experience changes and enlightenment from their interactions with professional management usually owned by the private sector.

*Public-private partnerships (PPPs) are arrangements between government and private sector enterprises for the purpose of providing public infrastructure, community facilities and health services. Such partnerships are characterized by the sharing of investment, risk, responsibility and reward between the partners. The reasons for establishing such partnerships vary but generally involve the financing, design, construction, operation and maintenance of public infrastructure and services.*

The partnership between the government and the private sector is not only seen as cooperation carried out by the government and the private sector. But it is a triangular synergy between the government, the private sector/businesses and society.<sup>11</sup> This is because the parties involved in this partnership can be categorized into the following three (3) elements:<sup>12</sup>

1. The state, that serves to create a conducive political and legal environment.
2. The private sector, that drives creation of jobs and increase public income.
3. The public, that accommodates socio-political interactions, mobilizing groups in society to participate in social and political economic activities.

<sup>10</sup> *Ibid.*

<sup>11</sup> Asian Development Bank, "Public-Private Partnership (PPP) Handbook", 2008. (<http://www.adb.org/sites/default/files/pub/2008/Public-Private-Partnership.pdf>).

<sup>12</sup> United Nations Economic Commission for Europe, "Guidebook on Promoting Good Governance in Public-Private Partnerships," 2008. (<http://www.unece.org/fileadmin/DAM/ceci/publications/ppp.pdf>).

Public-private partnerships, particularly in the infrastructure sector, are regulated in Presidential Regulation No. 67 of 2005 concerning cooperation between government and business enterprises in the provision of infrastructure (hereinafter referred to as Perpres 67/2005). In 2010, changes were made through Presidential Regulation No. 13 of 2010 concerning amendments to Perpres 67/2005 (hereinafter referred to as Perpres 13/2010). In 2011, Perpres 67/2005 was amended again through Presidential Regulation No. 56 of 2011 concerning second amendment to Perpres 67/2005 (hereinafter referred to as Perpres 56/2011). Furthermore, in 2013, for the third time, Perpres 67/2005 was amended again through Presidential Regulation No. 66 of 2013 concerning the third amendment to Perpres 67/2005 (hereinafter referred to as Perpres 66/2013). In 2015, Presidential Regulation No. 38/2015 cooperation between government and business enterprises in the provision of infrastructure (hereinafter referred to as Perpres 38/2015) was issued as a substitute for Perpres 67/2005, Perpres 13/2010, Perpres 56/2011 and Perpres 66/2013.

According to Article 1 Number 6 of Perpres 38/2015, Public-private partnership, hereinafter referred to as PPP, is a cooperation between the government and business enterprises in the provision of infrastructure for the public interest by referring to the specifications previously determined by the Minister/Head of Institution/Head of Region/State-Owned Enterprise/ Regional-Owned Enterprise, which partly or wholly involves the utilization of resources of the business enterprises with due regard to risk sharing among the parties. Infrastructure provision needs to be carried out because there is an urgent need for adequate and sustainable infrastructure to support the implementation of national development in the context of improving the national economy, welfare of society, and increasing Indonesia's

global competitiveness.<sup>13</sup> Given the importance of infrastructure provision, the government has even issued Presidential Regulation No. 75 of 2014 concerning acceleration of priority infrastructure provision (hereinafter referred to as Perpres 75/2014) as an acceleration policy, which was later amended by Presidential Regulation No. 112 of 2016 concerning amendments to Perpres 75/2014 (hereinafter referred to as Perpres 112/2016).

Based on Perpres 75/2014 in conjunction with Perpres 112/2016, priority infrastructure that must be provided includes:<sup>14</sup>

- a. transportation infrastructure,
- b. road infrastructure,
- c. irrigation infrastructure,
- d. drinking water infrastructure,
- e. wastewater infrastructure,
- f. waste facilities,
- g. telecommunications and information infrastructure,
- h. electricity infrastructure,
- i. oil and gas infrastructure,
- j. educational facility infrastructure,
- k. regional infrastructure,
- l. tourism infrastructure, and
- m. health infrastructure.

The transportation infrastructure as referred to in above includes:

- a. railway facilities and infrastructure,
- b. port facilities and infrastructure,
- c. ferry port facilities and infrastructure,
- d. airport facilities and infrastructure, and
- e. land transportation facilities and infrastructure.

Mohammed Ali Berawi and Bambang Susantono define public-private partnership as an institutionalized cooperation of the public and

private sectors that collaborate to achieve certain objectives when both parties bear investment risks on the basis of sharing the benefits and costs.<sup>15</sup> This type of partnership is a cooperation between the government and the private sector that produces products or services with the risks, costs and benefits shared based on the added value each contributes.<sup>16</sup> Public-private partnership is a management reform when the functions of government and bureaucracy experience changes from their interactions with professional management usually owned by the private sector. The partnership between the government and the private sector is not only seen as a collaboration carried out by the government and the private sector, but is a triangular synergy between the government, the private sector/businesses and the society.<sup>17</sup> This is because the parties involved in this partnership consist of three (3) elements: (a) the state that functions to create a conducive political and legal environment; (b) the private sector that encourages job creation and increases in public income; (c) the public that accommodates socio-political interactions, mobilizes groups in society to participate in social and political economic activities.<sup>18</sup>

According to PT Sarana Multi Infrastruktur (Persero), 'Public-private partnership (PPP) is a long-term contract between the government and the private sector in terms of providing infrastructure or public services in which the private sector takes over some of the responsibilities and risks borne by the government. Thus, PPP has the following

<sup>13</sup> Section Considering of Perpres 38/2015.

<sup>14</sup> Paragraph 6 Article (1) of Perpres 75/2014 jo Perpres 112/2016.

<sup>15</sup> Bambang Susantono dan Mohammed Ali Berawi, *Loc.Cit.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Asian Development Bank, "Public-Private Partnership (PPP) Handbook", 2008. (<http://www.adb.org/sites/default/files/pub/2008/Public-Private-Partnership.pdf>).

<sup>18</sup> United Nations Economic Commission for Europe, "Guidebook on Promoting Good Governance in Public-Private Partnerships," 2008. (<http://www.unece.org/fileadmin/DAM/ceci/publications/ppp.pdf>).

characteristics:<sup>19</sup>

- a. PPP is a cooperation contract between the government and the private sector in the provision of infrastructure or public services in the long term (usually 15-20 years).
- b. The government has a role in the process of arranging Business Enterprises to select private partners who will carry out the construction of infrastructure projects, as well as provide support/incentives to improve the project's financial viability if needed.
- c. The private sector is responsible for the stages of project development (including the provision of financial, expertise and technology required) and/or carrying out operations and maintenance in accordance with the cooperation contract.
- d. The contract is '*win-win-win*' in nature (between the government, the private sector, and the public).

PPP is not the same as privatization because there are differences in the forms of cooperation, assets, risks and the role of the government. Based on the form of cooperation, PPP has characteristics as a mutually beneficial cooperation between the government, the private sector and the public, whereas in privatization scheme the private sector fully manages or controls assets. Based on the assets, they are still owned by the government, whereas in privatization the assets belong to the private sector. From the risk perspective, there is risk sharing between the government and the private sector in a PPP scheme, while in privatization there is no risk sharing because the risk is fully borne by the private sector. From the role aspect, the government acts as a facilitator/

payer for services provided by the private sector in the PPP scheme, while in privatization the government acts as a regulator.

In Indonesia, the term used normatively to refer to public-private partnership is the cooperation between the government and business enterprises as stipulated in Perpres38/2015, which is the legal basis for public-private partnerships for infrastructure provision. A public-private partnership according to Article 1 Number 6 of Perpres 38/2015, is a cooperation between the government and business enterprises in the provision of infrastructure for the public interest with reference to the specifications previously determined by the Minister/ Head of Institution/Head of Regions/ State Owned Enterprise/Regional Owned Enterprise, which partly or wholly involve the utilization of resources of the business enterprises by taking into account the risk sharing among the parties.

According to Perpres38/2015, the government is keen on accelerating infrastructure development because there is an urgent need for adequate and sustainable infrastructure to support the implementation of national development in order to boost the national economy, improve the welfare of society, and increase Indonesia's global competitiveness. Therefore, the government needs to accelerate the development of infrastructure provision, take comprehensive steps to create an investment climate, and encourage the participation of business enterprises in the provision of infrastructure and services based on sound business principles.

The provision of infrastructure is an activity that includes construction work to build or increase the capacity of infrastructure and/or infrastructure management and/or infrastructure maintenance activities in order

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19 PT Sarana Multi Infrastruktur (Pesero), "Panduan Penyelenggaraan Kerjasama Pemerintah-Swasta (KPS) dalam Penyediaan Infrastruktur", Panduan, October 2014, p.14.

to increase the utilization of infrastructure.<sup>20</sup> Meanwhile, what is meant by infrastructure is the required technical, physical, systemic, hardware, and software facilities to provide services to the public and support the structural network so that the economic and social growth of the society can remain well.<sup>21</sup> Institutionally, in order to provision infrastructure in Indonesia, the government established PT Sarana Multi Infrastruktur (Persero) which is a State-Owned Enterprise or BUMN under the Ministry of Finance which was mandated on 26 February, 2009 to become a catalyst, driver, and enabler in the accelerating the development of national infrastructure.

### Public-private partnership Objectives and Principles

According to Article 3 of Perpres 38/2015, Public-private partnership (PPP) is aimed at:

- a. Securing sufficient funds in a sustainable manner in the provision of infrastructure through mobilization of private funds.
- b. Realizing quality, effective, efficient, on point and on time provision of infrastructure.
- c. Creating an investment climate that encourages the participation of business enterprises in the provision of infrastructure based on sound business principles.
- d. Encouraging users to pay for the services they received, or in certain cases considering their ability to pay and/or
- e. Ensuring return on investment of Business Enterprises in infrastructure provision through a periodic payment mechanism by the government to Business Enterprises.

Furthermore, PPP incorporates the following underlying principles:

- a. Partnership. A cooperation between the government and business enterprises based on the laws and regulations and

requirements that consider the needs of both parties.

- b. Benefit. The provision of infrastructure by the government and business entities is for the social and economic benefits of the public.
- c. Competitive. The arrangement of partnering business enterprises is carried out through transparent selection stages, taking into account the principles of fair and open competition, as well as healthy business conduct.
- d. Risk control and management. The cooperation in the provision of infrastructure is carried out by assessing risk, developing management strategies and mitigating risks.
- e. Effective. The cooperation in the provision of infrastructure is capable of accelerating development while improving the quality of infrastructure management and maintenance services.
- f. Efficient. The cooperation in the provision of infrastructure meets funding needs in a sustainable manner through the support of private funds.

The PPP principles as stipulated in Article 4 Letter b of Perpres 38/2015 are different from the ones stipulated in the preceding Perpres 67/2005 as contained in Article 6, which states that the cooperation in providing infrastructure between Ministers/Heads of Institutions/Heads of Regions and the private sector is carried out based on the following principles:

- a. Fair. All private parties that participate in the procurement process must receive the same treatment.
- b. Open. The entire procurement process is open to private parties that meet the required qualifications.
- c. Transparent. All terms and information relating to the provision of infrastructure including technical requirements for selection administration, evaluation

<sup>20</sup> Article 1 Number 5 of Perpres 38/2015.

<sup>21</sup> Article 1 Number 4 of Perpres 38/2015.



- procedures and appointment of private parties are open to all private parties and the general public.
- d. Competitive. The selection of private parties is carried out through an auction process.
  - e. Accountable. The selection results of the private parties must be accounted for.
  - f. Mutually beneficial. The partnership with the private sector in the provision of infrastructure are carried out based on balanced terms and conditions so as to benefit both parties and the public by taking into account the basic needs of the society.
  - g. Mutually dependent. The partnership with the private sector in the provision of infrastructure is carried out based on terms and conditions that take into account the needs of both parties.
  - h. Complementarity. The partnership with the private sector in the provision of infrastructure is carried out by both parties with support reciprocally.

The implementation of the public-private partnership must adhere to the proportional principle to protect the interests of the government and the interests of the private sector. Proportionality according to William Trumble and Angus Stevenson is 'the quality, character of fact of being proportional, which in turn is defined as corresponding in degree, size, amount, etc'.<sup>22</sup> There are those who equate the notions of balance and proportionality, but there are those who distinguish them, although the distinction between the two terms is also unclear. Balance is often interpreted as equality, equivalent in number, size or position, while proportionality is often interpreted as the distribution or exchange of rights and obligations according to their respective proportions in a fair

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22 William Trumble, Angus Stevenson, *Shorter Oxford English Dictionary on Historical Principles*, 5 th Ed, 2002, p. 2371.

and reasonable manner.<sup>23</sup> The proportionality measure is based on the exchange of rights and obligations based on the values of equitability, freedom and proportionality distribution, which cannot be separated from the principles of accuracy, reasonableness and appropriateness.<sup>24</sup> The principle of proportionality does not question the balance (equality) of results mathematically, but rather emphasizes the proportion of the distribution of rights and obligations in a fair and reasonable manner.<sup>25</sup> The principle of proportionality holds the basic idea of balancing conflicting interests or rights.<sup>26</sup> The principle of proportionality generally provides guidance for balancing conflicting rights, interests, values or goals.<sup>27</sup> According to Mads Andenas and Stefan Zleptnig, proportionality is related to "necessity and balancing".<sup>28</sup> Peter Nygh states that proportionality refers to a proper and balanced relationship between competing considerations.<sup>29</sup> The principle of proportionality is based on the exchange of rights and obligations which refers to the value of equitability, freedom and proportionality distribution, which cannot be separated from the principles of accuracy, reasonableness and appropriateness.<sup>30</sup>

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23 Agus Yudha Hernoko, *Hukum Perjanjian : Asas Proporsionalitas dalam Kontrak Komersial, LaksBang Mediatama Yogyakarta*, 2009 p.75.

24 *Ibid*.

25 *Ibid*.

26 MeinhardHilf, "Power, Rules and Principles - Which Orientation for WTO/GATT Law?", *Journal of International Economic Law*, Vol. 4, 2001, p.121.

27 George Bermann, "The Principle of Proportionality", *American Journal of Comparative Law Supplement*, Vol. 26, 1977, p.415.

28 Mads Andenas, Stefan Zleptnig, "Proportionality: WTO Law in Comparative Perspective", *Texas Internatioanl Law Journal*, 2007, Vol. 42, p. 372.

29 Peter Nygh, Peter Butt (eds), *Australian Legal Dictionary*, 1997, p. 941.

30 Agus Yudha Hernoko, *Op. Cit.*, p.75.

In this case, it is also necessary to carry out three tests of proportionality, namely the reasonable test, the balancing test and the least drastic means test.<sup>31</sup> The first is a reasonableness test, in which an action that is too harsh/cruel or too restrictive can be aborted on the grounds that the action is inappropriate, arbitrary, inconsistent, or violates freedom of action. As stated by George Bermann, action that are too harsh or restrictive may be struck down on the basis that they are ‘unreasonable, arbitrary, capricious or abuses of discretion’.<sup>32</sup> The second is the balancing test, which requires balancing certain considerations when performing an action.<sup>33</sup> The third is the least drastic means test, where the state interferes least with other values.<sup>34</sup>

However, protecting a balance between foreign investors’ interests and government/national interests is not an easy task. It is difficult to balance between the two because there are conflicts of interest between foreign investors and the host country. One of the interests of foreign investors is to increase the value of assets and maximize profits (maximization of profit). As explained by Chan Ji Ki, ‘one major cause for overseas investment is the reasonable expectation of greater profits from foreign than domestic investment’.<sup>35</sup> There is no motivation to invest in a country if they are unable get income, profits, dividends or return on capital (earnings, profits, dividends, and principal).<sup>36</sup> On the one hand, the host country is keen to control foreign companies for reasons of national interests. However, excess of control over foreign investors’ companies will affect the acquisition of profit

that can reduce their desire to go through with their investment. Based on the principle of free enterprises that have two basic elements: free competition and the right to private property,<sup>37</sup> foreign investors intend to take full control and management of their companies in other countries to win the competition and implement private rights over their company assets. Significant control by investors is considered as another set of problems for the host country. As stated by Chan-Jin Ki, ‘the issue of control provides one of the most critical problems in foreign investment since many capital receiving countries are concerned with foreign domination in the economy’.<sup>38</sup> With the principle of free enterprises that allows private investors to fully manage and control their companies, it results in a private domination over the national economy, which is considered a threat to national or government interests.

#### **Public-private partnership Investment Scheme for Infrastructure Development, Improvement and Modernization**

Various challenges are faced by the government in infrastructure development that in turn can hinder the provision of public services. The use of public-private partnership scheme as an alternative in infrastructure provision is expected to be a solution to overcome these challenges.

In developing public-private partnership, it should be noted that<sup>39</sup>

- a. PPP is not a transfer of government obligations in providing services to the public, but PPP is financing for designing, building and operating infrastructure projects to the private sector.

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31 *Ibid*, p. 418-426.

32 *Ibid*.

33 *Ibid*, p.426-429.

34 *Ibid*, p.430-432.

35 Chan-Jin Ki, “Foreign Investment and National Interest”, *The Korean Journal of Comparative Law*, Vol. 2, 1974, p. 42.

36 *Ibid*, p.. 44.

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37 *Ibid*

38 *Ibid*

39 The Directorate of PPP of the Ministry of National Development Planning /Bappenas , “Pengembangan Kerjasama Pemerintah dengan Badan Usaha”, *Presentation, Sumatera Selatan Bappeda Regular Work Meetings*, Palembang, 8 April 2015.

- b. Private investment is not an act of charity to the government in the provision of public services.
- c. PPP is not privatization of public goods.
- d. PPP is not a source of government revenue that will burden the society in providing public services.
- e. PPP is not a government loan (debt) to the private sector.

According to Perpres 38/2015, a cooperation between the government and the private sector can be carried out through a Cooperation Project. However, the definition of a cooperation project is not contained in Perpres 38/2015. Its definition is contained in Article 1 Number 5 of Perpres 26/2010: a cooperation project is the provision of infrastructure carried out through a Cooperation Agreement or the granting of business permit between the Minister/Head of Institution/Head of Region and the business enterprise. Even in the former Perpres 67/2005, it was expressly regulated in Article 5 Paragraph (1) that, in principle, cooperation projects that could be carried out under the public-private partnership scheme were divided into:

- a. Cooperation Agreement  
A Cooperation Agreement is a written agreement for the provision of infrastructure between the Minister/Head of Institution/Head of Region and the business enterprise selected through a public auction.<sup>40</sup>
- b. Business Permit  
Business Permit is a permit for the provision of infrastructure that is granted by the Minister/Head of Institution/Head of Region to the business enterprise selected through an auction.<sup>41</sup>

The form of cooperation between the Minister/Head of Institution/Head of Region and the business enterprise in the provision of

infrastructure is determined based on an agreement among them as long as it does not conflict with the applicable laws and regulations.<sup>42</sup> In implementing the cooperation, the government—in this case represented by the Minister/Head of Institution/Head of Region—acts as the person in charge of the Cooperation Project (Article 6 Paragraph (1) of Perpres 38/2015). The person in charge of the Cooperation Project, hereinafter abbreviated as the PJKP, is the Minister/Head of Institution/Head of Region, or State Owned Enterprise/Regional Owned Enterprise as the provider or operator of infrastructure based on statutory regulations (Article 1 Number 3 of Perpres 38/2015). In the event that the PPP is a combination of two (2) or more types of infrastructure, the Minister/Head of Institution/Head of Region who has authority over the infrastructure sector that will be cooperated based on statutory regulations, shall act jointly as the PJKP.<sup>43</sup> The Ministers/Heads of Institutions/Heads of Regions who have the authority over the infrastructure sector that will be cooperated will sign a memorandum of understanding regarding the PJKP.<sup>44</sup> The memorandum of understanding shall at least contain:<sup>45</sup>

- a. agreement of the parties becoming the coordinating PJKP.
- b. agreement regarding the division of tasks and budgets in the context of PPP preparation, transactions and management.
- c. PPP implementation period.

Apart from the Minister/Head of Institution/Head of Region, State Owned Enterprises and/or Regional Owned Enterprises can also act as the PJKP, as long as it is regulated in the sector legislation (Article 8 of Perpres 38/2015). In

40 Article 1 Number 7 of Perpres 67/2005

41 Article 1 Number 6 of Perpres 67/2005.

42 Article 5 Paragraph (2) of Perpres 67/2005.

43 Article 7 Paragraph (1) of Perpres 38/2005.

44 Article 7 Paragraph (2) of Perpres 38/2005.

45 Article 7 Paragraph (3) of Perpres 38/2005.

the event that State-Owned Enterprises and/or Region-Owned Enterprises become PJKs, the PPP is implemented through an agreement with the Implementing Business Enterprises (Article 9 Perpres 38/2015). An Implementing Business Enterprise is a Limited Liability Company established by a Business Entity winning the auction or appointed directly (Article 1 Number 8 of Perpres 38/2015). Based on the provisions of Article 9 of Perpres 38/2015, it can be concluded that public-private partnership can be in the form of an agreement.

The Ministers/Heads of Institutions/Heads of Regions initiated the provision of infrastructure which will be cooperated with business enterprises through the PPP scheme (Article 14 Paragraph (1) of Perpres 38/2015). Business enterprises can submit PPP initiatives to the Ministers/Heads of Institutions/Heads of Regions to provide infrastructure (Article 14 Paragraph (2) of Perpres 38/2015). The provision of infrastructure can be initiated by a business enterprise that meets the following criteria:<sup>46</sup>

- a. is technically integrated with the master plan in the sector concerned.
- b. is economically and financially feasible.
- c. has sufficient financial capacity to finance the implementation of infrastructure provision.
- d. must prepare a feasibility study on the proposed PPP.

In carrying out the cooperation project, according to Article 7 Paragraph (1) of Perpres 67/2005, the government through the Minister/Head of Institution/Head of Region identifies infrastructure provision projects that will be cooperated with the private sector, by considering:

- a. conformity with the national/regional medium-term development plan and the

46 Article 14 Paragraph (2), Article 14 Paragraph 3, Article 14 Paragraph (3) of Perpres 38/2015

strategic plan for the infrastructure.

- b. suitability of the project location with the Regional Spatial Plan.
- c. linkages between infrastructure sectors and between regions.
- d. cost and social benefit analyses.

In identifying projects that will be cooperated, the Ministers/Heads of Institutions/Heads of Regions shall conduct public consultations.<sup>47</sup> Furthermore, Public-private partnership contract can be in the forms of:

- a. *Build and Operate* (BO), a model where the private sector finances, builds and manages without any time limit and the government only exercises control.<sup>48</sup>
- b. BOT (*Build, Operate and Transfer*), a model where a concession is granted to the private sector to build and operate for a limited period of time.<sup>49</sup> In BOT, after building a project the private sector then has the right to manage or operate the project within a certain timeframe, and earns profit through its operation. After an agreed period, the project is handed over to the private party without receiving payment from the government.<sup>50</sup>
- c. BTO (*Build, Transfer and Operate*), a model where ownership of project assets belongs to the public or the government before project operations. After construction is complete, the private sector rents the project or facility.<sup>51</sup> BTO is an agreement between the government and the private sector with the following conditions: (1) the government

47 Article 8 of Perpres 67/2005.

48 Ana I. Irimia-Diéguez, Dolores Oliver-Alfonso, "Models of Public-Private Partnerships in Megaprojects: the Spanish case", *Organization technology and management construction international journal*, Volume 4 ( 3), 2012, p. 611-612.

49 *Ibid.*

50 Zainal Asikin, "Perjanjian Kerja Sama antara Pemerintah dan Swasta dalam Penyediaan Infrastruktur Publik", *Mimbar Hukum* Volume 25, No. 1, February 2013, p. 60.

51 Ana I. Irimia-Diéguez, Dolores Oliver-Alfonso, *Loc. Cit.*

- (especially local governments) owns the assets (land); (2) the third party builds on government land; (3) after the construction is complete the third party will hand over the building to the regional government; (4) the third party operates the building during the cooperation; (5) the third party provides compensation in the form of money or other buildings to the regional government according to the agreement; (6) the risk during the cooperation period is borne by the third party; (7) after the end of the cooperation, the land and building shall be handed back to the regional government.<sup>52</sup>
- d. BBO (*Buy, Build and Operate*), a model suitable for the development of damaged infrastructure to be made available for purchase and management to the private sector, which includes construction, repair or expansion.<sup>53</sup>
  - e. BT (*Build and Transfer*), a model where the contractor only builds the project. After the completion of the project, the project in question is handed back to the bowler without the contractor's right to manage/ collect the proceeds from the project.<sup>54</sup> In practice, BT is commonly referred to as contract design and build or full finance sharing, turnkey projects.
  - f. BOLT (*Build, Operate, Leasehold, and Transfer*), a model where a cooperation agreement to build, operate, lease and transfer is made between the government and the private sector with the following conditions: (a) the government owns the assets (land); (b) a third party builds on land owned by the government; (c) the third party manages, operates by leasing to other parties or to the government itself; (d) the third party contributes from the rental proceeds to the government with an agreed amount stated in the agreement; (e) the cooperation period is accordance with mutual agreement; (f) after the end of cooperation the third party hands over the entire building to the government.<sup>55</sup>
  - g. LDO (*Lease, Develop and Operate*), a model where the private sector leases certain government-owned assets and manages the repairs during the concession period.<sup>56</sup>
  - h. ROT (*Renovate, Operate, and Transfer*), a model wherea cooperation agreement to renovate, operate and transfer is made between the government and the private sector with the following conditions: (1) the government owns the assets (land and building); (2) the third party owns the capital to renovate the building; (3) the third party operates the building during the cooperation; (4) the proceeds of operation are entirely the rights of a third party; (5) the third party must not pledge the building; (6) the maximum period of cooperation is set at five years; (7) after the end of the cooperation period, the land and building are handed over to the regional government in good condition.<sup>57</sup>
  - i. ROLT (*Renovate, Operate, Leasehold, and Transfer*), a model where a cooperation agreement to renovate, operate, lease and transferis made between the government and the private sector with the following conditions: (1) the government owns the assets (land and building); (2) a third party renovates the building; (3) a third party manages and operates the building by leasing it from the local government for rent to another party or to use it alone; (4) the third party contributes from the rental proceeds to the regional government, with an agreed amount stated in the agreement; (5) the third party bears the cost of

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52 Zainal Asikin, *Op.Cit*, p. 60.

53 Ana I. Irimia-Diéguez, Dolores Oliver-Alfonso, *Loc. Cit*.

54 Zainal Asikin, *Loc.Cit*.

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55 *Ibid*

56 Ana I. Irimia-Diéguez, Dolores Oliver-Alfonso, *Loc. Cit*.

57 Zainal Asikin, *Op. Cit*, p. 60.

- maintenance and insurance; (6) cooperation risk according to the agreement.<sup>58</sup>
- j. BTL (*Build, Transfer, Leasehold*), a cooperation model between the government and the third party with the following conditions: (1) the government owns the assets (land); (2) the third party builds on government land; (3) the third party hands over the building to the government after completion; (4) the third party manages, operates the building by renting it out to other parties; (5) the third party contributes to the local government from the proceeds of the lease in the amount according to the agreement; (6) the third party bears the cost of maintenance; (7) the risk during the cooperation period is borne by the third party.<sup>59</sup>
  - k. WAA Model (*Wraparound Addition*), a model where the private sector extends public ownership and operationalizes the infrastructure. Management is carried out on the main infrastructure or its auxiliary parts and when operation is complete, ownership is shared between the government and the private sector.<sup>60</sup>
  - l. Design-Build-Finance-Operate (DBFO), the most common form of public-private partnership agreement for the service sector which involves four (4) main activities: designing, building, financing and operating carried out by one party.<sup>61</sup>
  - m. The Design-Build-Operate (DBO), a service sector agreement model where the public or government sector provides funds to design and build a facility, and then private tenants will rent to operate the facility.<sup>62</sup>
- According to PT Sarana Multi Infrastruktur (SMI), there are several models of cooperation between the government and the private sector in Indonesia:
- a. Management Contract, a public-private partnership scheme in which the private sector carries out the function of managing the procurement of goods/services using infrastructure assets and/or facilities built by the government. In a Management Contract, there is no transfer of ownership by the private sector.<sup>63</sup>
  - b. Service Contract, a form of public-private partnership contract in which the private sector is not involved in the management aspect but is only limited to services provision. In general, the private sector is not required to expand and/or revitalize assets built by the government because the private sector only provides services. In this contract, there is no transfer of ownership from the government. Income for the private sector is a fixed fee according to the contract in the context of providing services to the public.<sup>64</sup>
  - c. Leasing, a public-private partnership scheme in which the government as asset owner, both infrastructure and facilities, leases them out to the private sector for business. Depending on the regulations and contracts agreed upon, the private sector may be obliged to only maintain until it adds value and/or the amount of government assets. In relation to public services, the government only issues business permits for the use of assets leased by the government to provide services to the public. In this regard, the private sector does not receive a fix reward.
  - d. Build-Operate-Transfer (BOT), a public-private partnership scheme that requires the private sector to build assets, operate them within a certain period, and provide

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58 *Ibid.*

59 *Ibid.*

60 Ana I. Irimia-Diéguez, Dolores Oliver-Alfonso, *Loc. Cit.*

61 Singapore Ministry of Finance, *Public-private partnership Handbook*, Version 2, 2012, p. 5-6.

62 *Ibid.*

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63 PT Sarana Multi Infrastruktur (Pesero), *Op.Cit.*, p.20.

64 *Ibid.*

services at an agreed level to the public. When the management period expires, ownership is transferred to the government. The government can decide whether to continue to cooperate with the same party, manage these assets alone, or award concession contracts to other parties. The private sector may receive guaranteed minimum income and/or additional income if the service performance exceeds the agreement. Government investment can be in the form of land provision, injection of equity, subsidies, incentives, and/or guarantees.

- e. Concession Contract, a public-private partnership scheme similar to BOT but business enterprises or private parties can impose tariffs directly on customers. Whereas in BOT, it is the public sector that collects fees.
- f. Build-Operate-Own (BOO) Contract, a public-private partnership model similar to BOT but does not have an element of transfer of ownership at the end of the concession period unless purchased, either by the government or by other interested private parties. The contract also regulates the quality of service required, the role/portion of the government, and others.
- g. Divestiture, a model incorporating transfer of ownership of part and/or all of the government's assets to the private sector for business. Government control over the private sector is only in the licensing of business or service type.

In a public-private partnership, the form of contract chosen by the government must be tailored to its needs, the type of port infrastructure provision required, the status of its assets, and other considerations. In choosing the most appropriate form of contract, it is most important to note that public-private partnership requires more than just commitment from the funders. Leadership, technical, legal,

institutional and commercial aspects must present in the structure of project provision. The following are several elements that must be considered in a public-private partnership:

1. A strong commitment from the PJKs.
2. Adequates capacity and capability of the PJK in managing PPPs (including their ability to understand commercial and legal aspects of the partnership).
3. Quality project preparation (feasibility study).
4. Effective coordination between relevant institutions.
5. Synchronization of regulations (if needed).
6. Funds to finance project preparation.
7. Adequate assessment and good project preparation that underly the PPP project determination process.

## CONCLUSION

The principles that must be applied in a public-private partnership scheme for infrastructure development include the principle of partnership, namely cooperation between the government and the private sector carried out based on the provisions of laws and regulations and requirements that take into account the needs of both parties. In addition, the principle of benefit would contribute to the provision of infrastructure by the government and the private sector in providing social and economic benefits to the public. Another principle that underlies the public-private partnership is the competitive principle where the set up of private partnerships is carried out through transparent and transparent selection stages, and takes into account the principles of fair and opencompetition, as well as healthy business conduct. In addition, there are also risk control and risk management principles, where cooperation on infrastructure provision considers risk assessment, development of management strategies, and mitigation of risks. Furthermore, it is also necessary to implement the effective principle, where cooperation on infrastructure

provision is capable of accelerating development while at the same time increasing the quality of infrastructure management and maintenance services. Apart from that, the efficient principle, where cooperation on infrastructure provision is to meet sustainable funding needs through the support of private funds. All the principles must also be considered when establishing public-private partnerships on infrastructure projects in the port sector.

The scheme of public-private partnership is generally set out in an agreement or the granting of license. the partnership form is determined based on the agreement between the government and the private sector as long as it does not conflict with the prevailing laws and regulations. In practice, the government—in this case represented by the Ministers/Heads of Institutions/Regional Heads or state-owned enterprises—acts as the Person in Charge of the

Cooperation Project. There are various forms of Public-private partnership Contracts, ranging from Build and Operate (BO), BOT (Build, Operate and Transfer), BTO (Build, Transfer and Operate), BBO (Buy, Build and Operate), BT (Build and Transfer), BOLT (Build, Operate, Leasehold, and Transfer), LDO (Lease, Develop and Operate), ROT (Renovate, Operate, and Transfer)—renovate, operate, and transfer, ROLT (Renovate, Operate, Leasehold , and Transfer), BTL (Build, Transfer, Leasehold), WAA Model (Wraparound Addition), Design-Build-Finance-Operate (DBFO), the Design-Build-Operate (DBO). In Indonesia, the form of contracts that are often performed are: Management Contracts, Service Contracts, Leasing or Leases, Build-Operate-Transfer (BOT) Contracts, Concession Contracts or Concessions, Build-Own-Ownership Contracts or Build-Operate-Own (BOO) and Divestment or Divestiture.



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