

The Concept of Land Management by State-Owned Enterprises (SOE's)

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Abstract

This study analyzes the concept of land management by State-Owned Enterprises (SOE's) based on the state's control and ownership rights over land. Based on the Constitution and Law No. 5 of 1960 concerning Basic Agrarian Principles (UUPA), land belongs to the Indonesian people, and the state only has the right to control it, except for land that is factually owned by the state, which gives it the right to own it. It is necessary to study more in depth regarding the state capital participation in SOE's in the form of land, whether it arises from the right to control the state's land or the right to own said land. The analysis was carried out using UUPA and regulations on state asset management. The novelty of this research lies in the distinction between state-controlled land and state-owned land in the context of capital participation in SOEs, which has not been clearly emphasized in previous studies. This study finds that only state-owned land, not merely state-controlled land, can be used for capital participation in SOEs due to the legal consequences of ownership transfer.

Keywords: *State-Owned Enterprises; State Capital Participation in the Form of Land; The Right to Control The State*

1. INTRODUCTION

Article 2 paragraph (1) of Law no. 5 of 1960 concerning Basic Agrarian Basics (UUPA) regulates that "On the basis of the provisions in Article 33 paragraph (3) of the Constitution and the matters as intended in Article 1, Earth, water and space, including the natural wealth contained therein, are controlled at the highest level by the state, as a power organization."¹ The phrase "controlled by the state as an organization of power". places the physical areas of earth, water, and space within the realm of public legal authority (*rechtsgebiet*). Such an arrangement gives the State a position as a ruler who gives birth to the right to control, with the task of regulating the management and use of land. The state's right to control land was born from the Indonesian people's understanding that earth, water, and space are gifts from God to the Indonesian nation. Thus, the state's right to land arises from the rights of the Indonesian people to land. To achieve benefits for all Indonesian people, the state, as the highest public authority, has the task from the Indonesian people to regulate the management and use of land, which is the right of the Indonesian people.

In practice, it has been found that state land granted with the right to cultivate (HGU) to state-owned enterprises (BUMN) is misused by the BUMN. An example of this is the case of PT Perkebunan Nusantara, which is suspected of transferring parts of the land to third parties for commercial activities without governmental permission. Another case is PT Jasa Marga, which is suspected of also using state land for commercial purposes outside of toll road projects. In fact, based on legal regulations, HGU has the right to cultivate state-controlled land for a certain period. Thus, BUMN only has the right to utilize state land and

¹ Law No. 5 of 1960 of Dasar--Dasar Pokok Agraria, Article 2.

does not possess full ownership over the land, because legally, HGU does not transfer land ownership. Furthermore, HGU is not a separation of wealth, as the land granted in these rights is not state land and cannot be transferred. Due to its status as non-state land, its utilization is also limited by laws and regulations. The UUPA stipulates that HGU is granted for a maximum period of 35 years and can be extended for 25 years. The restriction on land utilization for a certain period indicates the public nature of the land, which is intended to further benefit the community.²

Based on the explanation of the state's right to control land as stated in Article 2, paragraph (1) of the UUPA, the state's authority includes:³ (a) "regulate and organize, allocation, use, supply and maintenance; (b) determine and regulate the rights that can be had over (part of) the earth, water and space; (c) determine and regulate legal relationships between people and legal actions concerning earth, water and space."

The state authority that arises from the right to control shows the state's position as ruler, and the actions taken to implement this authority are within the realm of public law. According to Oloan Sitorus,⁴ this happens because the State's authority in the land sector, as regulated in the UUPA is a delegation of the nation's duty to regulate the control and use of common land, which is national wealth. In principle, the delegation of authority from the Indonesian people to the state is a delegation of public authority. This opinion is in line with Santoso's opinion, which states that because of the right to control the state in the UUPA, it gives rise to authority that is only public in nature.⁵

As the highest public authority institution, which is also a public legal entity, the state can carry out actions within the realm of public law as well as actions within the realm of civil law. Likewise, with actions related to land, the state can carry out actions within both. The state's actions regarding land are based on the state's rights and powers over the land. In addition, state actions regarding land in each legal domain have different sources of authority and legal implications. When the state acts in the context of implementing its authority in the realm of public law, the land referred to here is the land it controls. Meanwhile, when the state acts in the realm of civil law, the land referred to here is land owned by the state, meaning land purchased using funds originating from the State Budget (APBN) or other legitimate acquisitions.⁶ Land rights are attached to the land purchased or acquired.

² Laporan Hasil Pemeriksaan BPK RI Nomor 49/AUDITAMAVII/PDPT/12/2015 dan Hasil Pemeriksaan Kepatuhan atas Pengelolaan Pendapatan, Beban, dan Kegiatan Investasi Tahun 2021 sampai dengan Tahun 2023 Nomor 26/LHP/XX/8/2024.

³ Law No. 5 of 1960 of Dasar--Dasar Pokok Agraria., Explanation Article 2.

⁴ Rachmat Trijono, dkk, "Hak Menguasai Negara Di Bidang Pertanahan" (Jakarta, 2015), p. 32.

⁵ *Ibid.*

⁶ This legal concept follows the norm of inner state property Law no. 1 of 2004 concerning State Treasury, because the mentioned land belongs to the state property.

In legal relations, the position as a legal subject is differentiated between humans and legal entities. The position of this legal subject needs to be considered in the use of land, especially in relation to the rights that can be granted by the state, because the rights to land that are granted differ between people and legal entities. One of the legal entities in society is SOE's. SOE's is a legal entities established by the state to increase national economic activities. Most or all SOE's capital comes from the state, which is a separate state asset.⁷ One of them is in the form of land.

Referring to the state's two authorities over land, namely in the realm of public law and the realm of civil law, it is necessary to examine whether the land managed by SOE's is granted within the framework of the authority to control the state or within the framework of state action in private law. This is important considering the implications of the two-state actions are different. From the perspective of the legal entity itself, the land it manages can come from the state or be purchased by the legal entity itself with funds obtained from the profits of the legal entity. Regarding land originating from the state, it's related to two types of actions carried out by the state; it is necessary to further examine the origin of the land because each has different implications. With this research, it's hoped that clarity will be obtained on land managed by SOE's, whether it is based on the state's authority and actions in accordance with its legal domain to avoid misuse of land management.

Research on the right to control the state was conducted by Sasmitha, et al.⁸ This research explores the Constitutional Court's understanding of the right to control the state by studying the Constitutional Court (MK) Decision no. 35/PUU-X/2012, MK Decision no. 58/PUU-X/2012, MK Decision no. 3/PUU-VIII/2010. The research revealed that the Constitutional Court's opinion in the 3 decisions was consistent in that the right to control the state is a public right which is different from the character of the right to own (civil law). The state is not the owner but the regulator and manager. Another research written by Zakie⁹ also produced similar results, where the right to control the state gives rise to the right to regulate, which is used to achieve prosperity. Research conducted by Kusumadara¹⁰ showed that state control rights are increasingly being reduced in Indonesia, replaced by individual private rights to land as reflected in several sectoral regulations related to land. There is also research on BUMN land acquisition conducted by Muntaqo et al,¹¹ which resulted in the fact that BUMN Persero has the right to acquire land by applying the principles of Good

⁷“Law No. 19 of 2003 of Badan Usaha Milik Negara” (n.d.), Article 4.

⁸ Sukayadi Tody Sasmitha, Haryo Budhiawan, “Pemaknaan Hak Menguasai Negara Oleh Mahkamah Konstitusi (Kajian Terhadap Putusan MK No. 35/PUU-X/2012; Putusan MK No. 30/PUU-X/2012; Dan Putusan MK No. 3/PUU-VIII/2010,” 2014.

⁹ Mukmin Zakie, “Konsepsi Hak Menguasai Oleh Negara Atas Sumberdaya Agraria,” *Jurnal Hukum* 12, no. 29 (2005): 111–27.

¹⁰ Afifah Kusumadara, “Perkembangan Hak Negara Atas Tanah: Hak Menguasai Atau Hak Memiliki,” *Jurnal Media Hukum* 20, no. 2 (2013): 262–76. <https://doi.org/10.18196/jmh.v20i2.267>

¹¹ Firman Muntaqo, Bagoes Mahendra Jaya, Machdum Satria, “Perolehan Tanah BUMN Berbadan Hukum PT (Persero) Tbk.,” *Simbur Cahaya Fakultas Hukum Universitas Sriwijaya*, n.d., 97–118.

Corporate Governance and other principles of civil land acquisition. Research on Persero regarding the transfer of land rights originating from state capital participation was carried out by Zileni S. and Suparjo,¹² which resulted in the fact that state capital participation in the form of land, with the concept of separation of wealth, gave Persero the right to carry out the transfer. The research conducted by Muntaqo and Zileni used the perspective of Persero SOE's, while the research conducted by the author used the State perspective related to state control rights and state ownership rights to land managed by SOE's. SOE's manages land that originates from state capital participation, land that it has purchased itself, and land that is managed with certain permits. As a private legal entity, SOE's has the right to acquire their own land, apart from the land they obtain based on state capital participation. One form of land management by SOE's is the form of transfer itself. However, the transfer has legal consequences, namely the transfer of land rights, which is why it is necessary to investigate further regarding land managed by SOE's, whether it comes from state control rights or state ownership rights to land, so that it does not injure the rights of the Indonesian people as landowners. Based on the background above, this research analyzes the concept of land management by State-Owned Enterprises (SOE's) based on the state's control and ownership rights over land that does not injure the Indonesian people as landowners.

2. METHOD

To answer the research problem, this research uses a doctrinal research method with a historical approach. "Legal research with a normative doctrinal approach, or normative juridical legal research or normative legal research, is an activity that will examine the internal aspects (to resolve problems that exist within) positive law."¹³ A historical approach is needed to explore the concept of land law in Indonesia. Next, the understanding of legal rules is carried out by combining the concept of land law and the concept of state treasury law to be able to understand the concept of control rights and state ownership rights over land in Indonesia, which is managed by SOE's. It is hoped that the results of the research carried out will be holistic and in-depth regarding the concept of land management by SOE's which does not injure the Indonesian people as landowners.

3. RESULTS AND DISCUSSION

Juridical land management has two aspects, namely the public aspect and the private aspect. For each aspect, respective laws apply. Management with a public aspect is regulated by public law, while for management with a private aspect, civil law applies. Indonesian land law is based on the concept of land in customary law. In customary law

¹² Ingrid Josephine S Zileni, Suparjo, "Kewenangan Peralihan Hak Atas Tanah Yang Berasal Dari Penyertaan Modal Negara Pada Persero," *Jurnal Ilmu Sosial Dan Pendidikan (JISIP)* 6, no. 2 (2022): 3683–95. <http://dx.doi.org/10.58258/jisip.v6i2.2929>.

¹³ Kornelius Benuf, Muhamad Azhar, "Metodologi Penelitian Hukum Sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer," *Jurnal Gema Keadilan* 7, no. 1 (2020): 20–33. <https://doi.org/10.14710/gk.2020.7504>.

communities, land management is handed over from the indigenous community to traditional elders with the aim of using it for the welfare of the indigenous community. Apart from that, Indonesian land law also recognizes the existence of private management where land management is aimed at personal interests.

Examining further, these two models of land management both prioritize the interests of the owner. In the public domain, for example, in managing customary land, the interests of the owner, namely the interests of indigenous communities, are the main goal of management. Likewise, in private management, the aim of the management is for the benefit of the landowner. Differences arise in the objectives of the actions of the parties carrying out the management. In the public domain, land managers take actions not on their own behalf but on the authority of the owner, and management actions are not aimed at the interests of the manager but for the interests of the owner. This is different from land management in the private realm, where the land manager acts on behalf of himself as the owner and his management actions are aimed at his own interests - in this case, the manager is also the owner.

Apart from that, the authority to carry out management in the realm of public law is based on the delegation of authority from the owner to act in the interests of the owner. Meanwhile, in the realm of private law, management authority is part of ownership, so management is aimed at its own interests. This difference in power and objectives of land management actions gives rise to state rights in carrying out land management actions, which have certain implications in the realm of treasury law. A description of this will be presented in the first part and will be the basis for analyzing the management concept of land originating from the state by SOE's.

3.1 The Concept of Land Management by the State from the Perspective of Agrarian Law and State Treasury Law

The law in a country, which lives and develops in society, is a combination of various legal aspects. The law itself is the result of various aspects of society that develop in such a way as to suit the needs of society. Specifically in Indonesia, the applicable laws are influenced by customary law and colonial law (public and private). In relation to land, these two laws underline differences in the power to manage and the actions that can be taken on the land, namely the right to control the state and the right to own the land.

3.1.1 The State's Right to Control Land

“The state's right to control over agrarian resources is the granting of authority to the state as the personification of all the Indonesian people.”¹⁴ The Preamble to the 1945 Constitution provided the basis for the formation of law in Indonesia. Simultaneously with the declaration of independence, the Indonesian people formed the Government of the

¹⁴ Andi Bustamin Daeng Kunu, “Kedudukan Hak Menguasai Negara Atas Tanah,” *Fiat Justitia Jurnal Ilmu Hukum* 6, no. 1 (2012).<https://doi.org/10.25041/fiatjustisia.v6no1.343>.

Republic of Indonesia to provide for the welfare of the people, which was the aim of establishing the state. The formation of this state was accompanied by the handover of power from the Indonesian people to the Government of the Republic of Indonesia. This handover of power gives the state government the authority to act on behalf of the Indonesian nation to achieve the goals of the state. The actions taken by the state are not intended for its interests but for the interests of the Indonesian nation.

To achieve these state goals, the body of the Constitution regulates the welfare of the people, which is achieved through the economy. For this reason, it is clearly regulated how the economy is run. As a society that promotes kinship, the economic system is also based on the principle of kinship, which produces economic democracy. To be able to maintain the administration of the economy in accordance with economic democracy, the presence of the state as the highest public authority is required. The state is given the authority to control, among other things, the earth, water, and natural resources contained in the earth so that they can be used for the prosperity of the people.¹⁵

Thus, the Constitution provides a strong constitutional foundation regarding the transfer of power from the Indonesian people to the state to achieve state goals. For this reason, the state is given the power to act over the earth, water, and natural resources contained in the earth. In this case, the state acts under the authority of its owner, namely the Indonesian people. Actions taken by the state are carried out in the public interest (the Indonesian nation) - not for itself. In other words, the authority to control is the authority to act in the interests of the owner, not in the interests of the manager.

This concept is derived in Article 2 paragraph (1) of the UUPA which regulates that "On the basis of the provisions in Article 33 paragraph (3) of the Constitution and matters as intended in Article 1, earth, water and outer space, including the natural wealth contained therein it is at the highest level controlled by the state, as a power organization."¹⁶ Furthermore, Article 2 UUPA¹⁷ regulates that the earth, water, and outer space, including the natural wealth contained therein, are at the highest level controlled by the state, as an organization of power for all the people. Therefore, the State's right to control is giving the authority to a) regulate and administer the allocation, use, supply and maintenance of the earth, water and space; b) determine and regulate legal relationships between people and earth, water and space; and c) determine and regulate legal relationships between people and legal actions concerning earth, water and space. The authority that originates from the State's right to control is used to achieve the greatest prosperity of the people in the sense of nationality, prosperity, and independence in an independent, sovereign, just, and prosperous Indonesian society and legal state. As for the implementation of the State's right to control

¹⁵ Undang-Undang Dasar 1945, Article 33 paragraph (3).

¹⁶ Law No. 5 of 1960 of Dasar--Dasar Pokok Agraria, Article 2.

¹⁷ Law No. 5 of 1960 of Dasar--Dasar Pokok Agraria., Article 2.

can be delegated to remote areas and customary law communities, if necessary and not in conflict with national interests. The norm of this article gives birth to the state's right to control land, which is based on the rights of the Indonesian people to land. The rights of the Indonesian people to land include all land within the territory of the state, which is common land, is eternal, and is the parent for other control rights over land.¹⁸

Based on these norms, the state's right to control over agrarian resources is the granting of authority to the state as the personification of all the Indonesian people,¹⁹ with the power to regulate the use of land rights to provide the greatest welfare for the people. The position of the state in the concept of control here is as an organ for implementing the will of the people in utilizing land. For this reason, policy direction must be targeted at optimizing long-term and sustainable use that provides benefits for all Indonesian people. Therefore, land management within the scope of the right to control is only aimed at achieving state goals, namely the welfare of all Indonesian people.

In particular, the implementation of the state's right to control land provides an obligation for the state to regulate: a) all forms of utilization of earth, water, space and the natural resources contained therein, must be able to significantly increase the prosperity and welfare of society; b) protect and guarantee all the people's rights in and on the earth, water, space and natural resources contained therein, which can be produced directly or enjoyed directly by the people; and c) prevent all actions from any party that will result in the people not having the opportunity or losing access to the earth, water, space and the natural riches contained therein.²⁰

Specifically, the Constitutional Court has formulated actions that can be taken in order to exercise the right to control, namely, including State actions to formulate policies (*beleid*), carry out regulations (*regelen daad*), carry out administration (*bestuurdaad*), carry out management (*beheer daad*), and carry out supervision (*toezicht houden daad*) for the purpose of maximizing the prosperity of the people.²¹ Therefore, the right to control the state does not give authority to the state as the owner, such as using land as land rights, but rather as the holder of the highest public authority to use the land for the benefit of the owner, namely the Indonesian nation.²²

The right to control the state gives rise to state land. State land is land that is controlled directly by the state. This land is land in Indonesian territory that is not attached to any land rights and is also not waqf land or customary land. This state land includes land stipulated by Law or Government Regulation, reclaimed land, emerging land, land

¹⁸ Badan Pembinaan Hukum Nasional, *Hak Menguasai Negara di Bidang Pertanahan*, (Jakarta: BPHN, 2015), p. 29-30.

¹⁹ Andi Bustamin Daeng Kunu, "Kedudukan Hak Menguasai Negara Atas Tanah," *Fiat Jurnal Ilmu Hukum* Volume 6 No. 1 (Januari-April 2012). <https://doi.org/10.25041/fiatjustisia.v6no1.343>

²⁰ *Ibid.*

²¹ Constitution Court Decision No. 3/PUU-VIII/2010.

²² Constitution Court Decision No. 35/PUU-X/2012.

originating from the release/surrender of rights, land originating from the release of forest areas, abandoned land, land rights whose term has expired and no extension/renewal has been requested or cannot be extended based on central government policy, and land that has originally had state land status.²³ State land does not give rise to ownership rights for the state, and therefore is not a state asset. This is also confirmed in Article 1 of Government Regulation No. 18 of 2021 concerning Management Rights, Land Rights, Flats and Land Registration, which contains the following norms: "State land is....., not an asset belonging to the state/regional property."²⁴

The state's right to control land gives rise to state actions, including granting permits, licenses, or concessions. The issuance of permits, licenses, or concessions does not result in a transfer of land ownership, because the issuance is only in the form of land use carried out by the state in the context of optimizing the use of land under control. Thus, the land is still owned by the Indonesian people – there is no reduction in ownership. For the issuance of permits, licenses, or concessions, the state receives income in the form of Non-Tax State Revenue (PNBP), which is recorded as state revenue in the APBN. Henceforth, these revenues will be used for the greatest prosperity of the people. You can see here the implementation of the state's public functions.

The most important element in the implementation of the state's public functions over the land it controls is that the actions taken by the state must not result in land transfer, reduction of the nation's rights, or reduction of the nation's ownership of the land. In government management, land controlled by the state is not recorded as state wealth or state assets, because only land owned by the state can be recorded as state assets.

3.1.2 The State's right to own Land

In general, in object law, legal subjects can have the right to own an object. The concept itself is a civil concept that creates a legal relationship between the owner and the object owned to obtain benefits for the owner's interests. The civil law on property that applies in Indonesia comes from Dutch colonial law contained in the *Burgerlijk Wetboek* (BW). BW itself was influenced by the concept of ownership in the *corpus ius civilis* teachings that applied in Roman times regarding civil property rights.²⁵

In object law, according to BW, goods are every object and every right that can become the object of property rights (Article 499 BW). Over an item, a person may have possession rights or ownership rights or inheritance rights or the right to enjoy the proceeds or land servitude rights or lien rights, or mortgage rights (Article 528). This material concept also applies to objects in the form of land, where land is categorized as immovable

²³ "Government Regulation No. 18 of 2021 of Hak Pengelolaan, Hak Atas Tanah, Satuan Rumah Susun, Dan Pendaftaran Tanah" (n.d.), Article 2 paragraph (1) dan (3).

²⁴ *Ibid.*, Article 1.

²⁵ Rika Aryati, Hamzah Vensuri, M. Febrianto, "Sejarah Berlakunya BW Dan KUHPerdara Di Indonesia," *Journal of Criminology and Justice* 2, no. 1 (2022): 11–16.

property (Article 506 BW). In the civil concept, the right to own creates a legal relationship between the owner and the item he owns to use the item forever (Article 507 BW).

Regarding ownership of goods, it is regulated in BW that goods can be owned by the state, association, or individual (Article 519). Article 520 BW stipulates that yards and other immovable property that are not maintained and have no owner are state property. Apart from that, Article 521 BW also regulates the roads and passages whose maintenance is funded by the state, river and river beaches, large and small islands, shoals that appear above rivers or rivers, including harbors and landing places, are also declared as state property. The norms in these three articles imply that BW does not differentiate between goods born from the right to control the state and goods born from the right to own, because all these goods are called state property. This creates confusion because there are differences in power, authority to act, and legal implications for goods that arise from the right to control the state and those that arise from the right to own the state.

Referring to the concept of agrarian law, for land that arises from the right to control, the state is not the owner, and the state acts on behalf of the owner, namely the Indonesian people, to manage the land. This right was born because the state received the delegation of power from the people to manage land belonging to the Indonesian people. This right arises from the public power of the state. Land that arises from the right to control is called state land. Meanwhile, regarding land that arises from the state's right to own, the state is the owner and acts on its own behalf regarding the land it owns and for its interests. This right arises from state actions in the form of purchases or other legitimate acquisitions. Land that arises from the state's right to own is called state-owned land.

In the context of state treasury law, land that arises from state ownership rights is state property (BMN), because the land was purchased by the state or obtained by the state legally.²⁶ This BMN land is recorded in the state assets inventory. On BMN land, the State can carry out alienation actions, including actions that result in the reduction of state-owned land. Meanwhile, land that arises from the right to control the state is not BMN and therefore is not recorded in the state assets inventory, and over it cannot be transferred or carried out by actions that could intentionally result in a reduction in land area.

The state's right to own goods is necessary for the provision of facilities and means for administering government and public services. With this right to own, the state has a legal basis to use the goods in accordance with the purpose of procuring the goods, namely, the interests of the state itself. This right creates a direct legal relationship between the state as the owner and the land it owns.

BMN land as state property is specifically regulated in Law No. 1 of 2004 concerning the State Treasury and its derivative regulations governing BMN. Efforts must be made for

²⁶ Law no. 1 of 2004 concerning State Treasury, Article 1 number 10: "State Property are properties that are purchased by APBN or gained through other legal means."

the optimal use of BMN. BMN must be managed and administered as well as possible (Article 44) in accordance with BMN management. For land that arises from state ownership rights, the land must be certified in the name of the Government (Article 49, paragraph (1)) as legal evidence for state ownership of the land. Furthermore, the land is recorded in the state inventory as BMN.

The use of BMN is targeted at the Government's interest in carrying out the state's duties and responsibilities, namely, providing government and public services. BMN must be managed optimally to provide benefits to the country. The government acts on behalf of the State and manages it to improve the quality of government administration and public services. In managing BMN land, the Government can take legal action in order to increase added value through exchange or investment, or sale if maintenance costs exceed the benefits achieved. The state's actions in this case are in accordance with its capacity as an owner in protecting its interests. This concept *mutatis mutandis* also applies to Regional Property (BMD) (Article 1, number 11 of Law No. 1 of 2004 concerning State Treasury).

Basically, BMN must be managed optimally to provide benefits to the state; however, in the event that BMN is no longer needed, then BMN in the form of land can be transferred with the approval of the people's representatives, namely the DPR/DPRD (Articles 45 and 46 of Law 1/2004). What is meant by the transfer of BMN land includes acts of sale, exchange, grant, or inclusion as government capital (Article 45 1/2004). Transfers result in a reduction in state wealth. This concept can only be applied to state-owned land.

3.2 Concept of Land Management by SOE's

Land status in SOE's can be in the form of capital originating from separate state assets, in the form of SOE's wealth originating from purchases of the BUMN itself, or in the form of land cultivated with certain permits. These three statuses have certain legal implications; therefore, they are important, especially in relation to the rights of the state.

3.2.1 Land Derived from Separated State Assets

"Land is one form of BMN."²⁷ Referring to Law No. 1 of 2004 concerning the State Treasury, BMN refers to goods purchased using funds originating from the APBN or other legitimate acquisitions. As explained in the previous subchapter, BMN was born with a civil concept, namely the right to own the state. Therefore, the state has the authority and right to carry out management in the interests of the state, including carrying out transfers as regulated in Article 45 of Law No. 1 of 2004 concerning the State Treasury.

Transfer is an act of transferring ownership.²⁸ Thus, the first element is that transfer is an action that results in a change in ownership. Therefore, transfers can only be carried out on property (as the second element), in this case, state property. In connection with the

²⁷ M Nazir Salim Tsaurah ZA, Fokky Fuad, "Penyelesaian Sertipikasi Barang Milik Negara Pada Bidang Tanah Bersertipikat Lainnya," *Tunas Agraria* 6, no. 3 (2023): 220–36, <https://doi.org/https://doi.org/10.31292/jta.v6i3.243>.

²⁸ Government Regulation No. 27 of 2014 of Pengelolaan Barang Milik Negara/Daerah., Article 1 number 17.

transfer of land, you must pay attention to the rights of the land. Referring to the two elements of transfer, the only land that can be transferred is land in the form of BMN based on state ownership rights to the land.

One of the actions categorized as transfer is the Government's capital participation in SOE's. With the act of inclusion, from a treasury law perspective, a change occurs, namely (a) from unseparated assets to segregated assets;²⁹ (b) changes in ownership of the assets;³⁰ (c) changes in wealth status in the recording of the assets of the party carrying out the transfer, namely, the elimination of assets as a result of the transfer of ownership;³¹ (d) the write-off changes the form of wealth from one form of wealth to another form, which is usually in the form of capital, shares, net assets, or other net assets of the party receiving the transfer of the assets.³² (e) the party making the investment generally gets shares in the assets included as capital.³³ When the Government invests capital in the form of land in an SOE's, the land is no longer registered and is removed from the BMN property list. For this participation, the Government received shares. Ownership of shares in SOE's is then recorded as a long-term investment.³⁴

With the transfer of ownership, the land no longer belongs to the state and is no longer managed by the state, but instead belongs to SOE's and is managed by SOE's. In this case, land owned by the state is reduced to shares. Therefore, the land included by the state in BUMN is only land owned by the state or BMN based on the state's right to own land.

3.2.2 Land Purchased by SOE's

In supporting/developing their business, SOEs can use a portion of their profits to purchase land. The land they acquire based on the purchase proceeds is recorded as the SOE's property (fixed asset of SOEs). Thus, the management procedures are subject to the regulations applicable to the management of fixed assets of the SOE. The land management is subject to SOE's management rules, which are subject to the principles of good corporate governance.

The management of land as fixed assets of SOEs is used in SOE activities. Regarding the management of fixed assets, in this case, land, there are several regulations that are specifically intended to protect and obtain optimal benefits. Although SOE assets belong to the SOEs, due to the state's capital participation in SOEs, the management of SOE assets is

²⁹ Government Regulation No. 27 of 2014 of *Pengelolaan Barang Milik Negara/Daerah*, as it was last change with Government Regulation No. 28 of 2020, Article 1 number 21.

³⁰ Government Regulation No. 72 of 2016 Concerning *Perubahan Atas PP No. 44 Tahun 2005 Tentang Tata Cara Penyertaan Dan Penatausahaan Modal Negara Pada BUMN Dan PT*, Article 2A paragraph (3) and (4).

³¹ Ministry of Finance Regulation No. 181/PMK.06/2016 of *Penatausahaan Barang Milik Negara*, Attachment II.

³² Government Regulation No. 72 of 2016 concerning *Government Regulation on Amendments to PP No. 44 of 2005 on Procedures for State Capital Participation and Administration in BUMN and PT*, Article 2A paragraph (3) and (4).

³³ Government Regulation No. 72 of 2016 concerning *Government Regulation on Amendments to PP No. 44 of 2005 on Procedures for State Capital Participation and Administration in BUMN and PT*, Article 2A paragraph (3).

³⁴ Government Regulation No. 72 of 2016 concerning *Government Regulation on Amendments to PP No. 44 of 2005 on Procedures for State Capital Participation and Administration in BUMN and PT*, Article 2A paragraph (3) and (5).

regulated by the Minister of SOEs Regulation, and only certain matters are regulated in the articles of association of the SOEs. Essentially, SOE assets are prohibited from being transferred except for certain matters and are prohibited from being pledged (Article 143 paragraph (5) of the Minister of State-Owned Enterprises Regulation Number PER-2/MBU/03/2023 concerning the Governance and Significant Corporate Activities of State-Owned Enterprises).

Although in principle the transfer of assets (in this case land) belonging to SOEs is prohibited, it's possible for lands owned by SOEs to be transferred as long as it provides a better impact or benefit for the concerned SOE. This can be done through sales, exchanges, compensation, capital participation, or other means (Article 164 of the Minister of State-Owned Enterprises Regulation Number PER-2/MBU/03/2023 concerning the Governance and Significant Corporate Activities of State-Owned Enterprises). The conditions are that (Articles 165-174 of the Minister of State-Owned Enterprises Regulation Number PER-2/MBU/03/2023 concerning the Governance and Significant Corporate Activities of State-Owned Enterprises): (a) it is technically and/or economically no longer beneficial or providing advantages for the concerned SOE if it is maintained; (b) there are other technical and/or economic alternatives or substitutes that are more beneficial or advantageous for the concerned SOE; (c) it is intended for public interest in accordance with statutory regulations and the general plan of spatial or area planning that has been approved in accordance with statutory regulations; (d) required by the Ministry or State/Government Institutions in the context of carrying out state or government duties and functions; (e) part of the restructuring and recovery program of the relevant State-Owned Enterprises (SOEs); (f) required directly or indirectly by the Investment Management Institution (LPI) from the joint venture company formed by LPI; or (g) the only alternative source of funding for the relevant SOE for very urgent needs.

Following the transfer of assets, they are immediately written off. In addition to the transfer, there are certain conditions that also cannot be avoided for a write-off, namely for fixed assets that: (a) are lost; (b) are destroyed; (c) are damaged beyond repair total loss; (d) the cost of transferring them is greater than the economic value obtained from the transfer; (e) are dismantled to be rebuilt or built into other fixed assets, which the budget of which has been set by the GMS/Minister through the approval of the RKAP; (f) are dismantled to not be rebuilt in relation to other programs that have been planned in the RKAP; (g) are dismantled to be rebuilt in relation to government programs; and/or (h) based on laws and regulations and/or court decisions that have permanent legal force, the fixed assets are no longer owned or controlled by SOEs.

Considering the limited nature of the transfer or write-off of fixed assets of state-owned enterprises, including land, the Board of Directors must obtain prior approval from the Board of Commissioners/Board of Supervisors, or the General Meeting of

Shareholders/Minister to carry out the transfer or write-off in accordance with the authority established in Articles 175 and 176 and the articles of association of the state-owned enterprise.

3.3 Land Cultivated with Certain Permits

In accordance with its field of business, a company can be given certain permits to manage land. This permit is granted for state land based on the state's right to control it. A management permit legally gives authority to the permit recipient to carry out management or utilization within a certain period only. In this case, there is no transfer of ownership, only use. When the agreed-upon time expires, management or utilization of the land also stops, and the managed land is returned to the state as the landowner's agent. Permits are given by the state because on land controlled by the state, the state is not the owner but only represents the owner to obtain benefits from managing the owner's land. Therefore, there is no transfer of ownership, because permission is given for land that is not owned. In this case, the state is the highest authority given the authority by the people to manage land belonging to the Indonesian people.

If a SOE's obtains permission to manage land, the land managed is state land and the land is not transferred and is not recorded as SOE's property, because the SOE's is only the manager for a certain period and must return it to the state when the management period has ended. The permit is issued by the state only in the form of land use to optimize the use of land controlled by the state.

4. CONCLUSION

Based on the results of the analysis, it can be concluded that the state's right to control land is a public law concept that gives rise to the authority that regulates the management and utilization of land for the benefit of the people as the owner. Meanwhile, ownership rights are a civil law concept that gives rise to the right to utilize something that is the owner's right. Therefore, the state's actions in implementing the state's right to control are not allowed to reduce the land it controls, because the state is not the owner. Meanwhile, the state is allowed to take actions that result in a reduction in its landownership rights as long as it brings greater benefits. The act of state capital participation in the form of land in BUMN causes a transfer of rights. Therefore, the act of participation can only be carried out on state-owned land, not land controlled by the state. Land controlled by the state can only be managed by BUMN with the concept of granting a permit that does not result in a transfer of ownership or a change in the area. The suggestion that can be given is not to harm the rights of the Indonesian people; the land used for state capital participation is only state-owned land.

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