

REGRESS RIGHTS AS A FORM OF WARRANTY THE INDONESIAN GOVERNMENT IN FINANCING INFRASTRUCTURE DEVELOPMENT

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ABSTRACT

For the Government of Indonesia, the availability of adequate infrastructure is one of the main prerequisites for achieving sustainable economic growth which has an impact on increasing people's income, as well as equitable national development. Limited government funds in financing infrastructure development prompted the Indonesian government to partner with the private sector through the Private Public Partnership (PPP) scheme by providing a guarantee of certainty due to the risk of infrastructure development through the Right to Regress. This article aims to analyze the legal relationships of the parties involved in guaranteeing the financing of infrastructure development, the location and position of regression rights in the Indonesian national guarantee law, as well as the claim of the Right to Regress. The conclusion in this study is that there are three parties involved in underwriting the financing of infrastructure development, namely the Person in Charge for Cooperation Projects (PJPK), Business Entities and PT. Indonesia Infrastructure Guarantee. Then, the Right to Regress is included in the Personal Guaranty, and gives PT. PII has the right to claim against the PJPK for the payment of the guarantee that has been paid to the Business Entity.

Keywords: Infrastructure, Private Public Partnership (PPP), Regress Rights, Individual Guarantee.

INTRODUCTION

Indonesia is a constitutional state (*rechtsstaat*) which is based on Pancasila and the 1945 Constitution. Pancasila is the manifestation of the crystallization of noble values the life of the Indonesian people, has an important role in the application of the concept of the State Law in Indonesia, so that the Indonesian rule of law is called the Pancasila Law State, not a concept *rechtsstaat* known in Continental European countries and not anyway the concept of the rule of law that developed in countries, Anglo Saxon especially in England (Wijaya, 2015).

The rule of law of Pancasila provides guarantees of legal certainty in administration of all aspects in the field of society, nationality and statehood including a government that must be based on law (Prayogo, 2016). Then, Indonesia also known as a welfare *state where* the Government is in accordance with the mandate The preamble to the 4th paragraph of the 1945 Constitution has a key role as a servant society in order to advance the economic and social welfare of its citizens, as well fulfill public service facilities for the people through national development (Alfitri, 2012).

As an archipelago with an area of 1,990,250 km² and a population amounting to 267 million people, it is necessary to support the availability of adequate infrastructure and facilities

sustainable as a locomotive that has a major role in quality improvement life and social welfare, increasing the value of consumption, increasing productivity labor and access to employment, as well as increasing the competitiveness of investment Indonesia in global economic competition (Jegiftha et al., 2018).

Based on the report, Global Competitiveness Index (GCI) 2019 World Economic Forum (WEF) Indonesia's competitiveness ranks 50th, far behind Singapore's first rank, Malaysia's 27th rank and Thailand's 40th rank (Butar-Butar et al., 2017). This is indicated by several indicators of the competitiveness index and logistics costs in Indonesia that reach 17% of the total costs incurred by entrepreneurs. This figure is considered wasteful compared to logistics costs in Malaysia which are only 8%, the Philippines, 7%, and Singapore 6%. Then, logistics costs in Indonesia reach 24% of the total Gross Domestic Product (GDP) and are the highest logistics costs in the world, thus affecting the attractiveness of the world investment climate in Indonesia.

Realizing this condition, the Government passed Presidential Regulation no. 3 of 2016 as amended by Presidential Regulation No. 58 of 2017, to accelerate the implementation of infrastructure development as a Public Service Obligation, prioritizing three main focuses, namely infrastructure for equitable development, infrastructure for economic development, and infrastructure for urban development supported by energy and electricity development by establishing 245 Strategic Projects National plus 2 programs, namely the electricity program and the aircraft industry program. The total financing needed to carry out the infrastructure development is IDR 4,197 trillion with funding sources from the State/Regional Budget (APBN/APBD) of IDR 525 trillion, State-Owned Enterprises (BUMN) IDR 1,258 trillion, and private IDR 2,414 Trillion. However, based on Presidential Regulation no. 56 of 2018 concerning amendments to Presidential Regulation No. 58 of 2017, it was decided as many as 223 National Strategic Projects (PSN) plus 3 programs, namely electricity programs and aircraft industry programs, as well as economic equality programs with a total investment value of 4,183 trillion, as can be seen from the Figure 1 below. Distribution of 223 Projects and 3 National Strategic Programs, Total Investment of Rp. 4.183 Trillion.



SOURCE <https://kppip.go.id/proyek-strategis-nasional>

FIGURE 1
NATIONAL STRATEGIC PROJECTS

The amount of funding for infrastructure development, amidst limited state finances sourced from the APBN/APBD, is tricked by the government by partnering with the involvement of the private sector to cover the gap in investment needs through the Cooperation scheme Public Private or Public Private Partnership (PPP), which have a positive impact both the government and business entities. The government saves the use of state finances and reduces lending to third parties, realizes the provision of quality, effective, efficient, targeted and timely infrastructure, as well as risk sharing between the government and the private sector, improving service levels which are the responsibility of the government, and multipliers. Effect (broader economic benefits such as job creation and increased income). For the private sector, the concept is PPP an opportunity to enter business fields that were previously monopolized by the government, as well as to obtain certainty on investment returns in infrastructure provision through a regular payment mechanism from the government to business entities (Maramis, 2018). With this collaboration, the advantages possessed by the government and the private sector can be combined.

The risks faced by the private sector in financing infrastructure development are enormously large and complex, such as an unexpected economic or political crisis, risk construction, infrastructure completion risk, operation phase risk, and government negligence risk the project owner in making payments, and others. Therefore, it becomes careful consideration and calculation from the private sector as an investor gets a guarantee of legal certainty that the investment made can be achieved by good.

In order to guarantee certainty of return on investment for business entities in the provision of infrastructure projects in Indonesia, in 2010 the Government through the Minister of Finance inaugurated the establishment of the Indonesia Infrastructure Guarantee Fund (IIGF), or PT. Indonesian Infrastructure Guarantee, and on December 21, 2010, the Presidential Regulation No. 78/2010 concerning Infrastructure Guarantee in Cooperation Projects between the Government and Business Entities carried out through the Infrastructure Guarantee Business Entity as the party that will guarantee (default) of the PJKP's financial obligations due to the risk of implementing infrastructure development with counter-achievement in the form of Regress Rights on business entity claims.

The right of regression as a guarantee for infrastructure development financing under the scheme is Private Public Partnership (PPP) interesting to conduct an assessment through identification of what is the legal relationship of the parties involved in guaranteeing infrastructure development financing; What is the position of regressive rights in the national guarantee law; and What is the mechanism for claiming the Right to Regress in guaranteeing infrastructure development financing.

RESULTS AND DISCUSSION

Legal Relations of the Parties Involved in Guarantee of Financing Infrastructure Development through the PPP Scheme

As the implementation of the Welfare State mandated by the 4th paragraph of the Preamble The 1945 Constitution, the Indonesian government places the procurement of national strategic infrastructure as one of the priorities for national development policies, given the important role of infrastructure can:

1. Increase connectivity and productivity between regions or between countries;
2. Increase efficiency in resource allocation;
3. Accelerate equitable development a region or country;
4. Encouraging new investment so that it becomes a nation that is competitive in facing global economic challenges (Warsilah and Noor, 2015).

The word infrastructure is defined as "*means*" (Berlin & Irwan, 2015), according to Oxford Dictionaries infrastructure is a basic physical and organizational structure (such as buildings, roads, energy supplies) necessary for the operation of society and institutions (Sidarto & Santoso, 2018). Then, Article 1 paragraph (1) Presidential Regulation No. 38 2015 concerning Government Cooperation with Business Entities in Provision Infrastructure, providing the definition of infrastructure is technical facilities, physical, systems, devices hard, and soft needed to perform services to the community and supporting structural networks so that the economic and social growth of the community can run well.

Public infrastructure is broadly the facilities that support smoothness economy and society function, which can be divided into hard infrastructure such as the construction of buildings or other physical facilities, and soft infrastructure that involves providing services such as education, health, and training. Good hard Infrastructure and soft infrastructure can be in the form of economic infrastructure and/or social infrastructure. As for what is meant by economic infrastructure is infrastructure considered important for daily economic activities, such as transportation and network facilities, utilities for water, water disposal, electricity and others. The social infrastructure is infrastructure deemed important to community structures, for example schools, hospitals, libraries and others.

The World Bank Report (World Bank, 1994) divides infrastructure into three categories:

1. Economic Infrastructure is a physical asset that provides services and is used in production and financial consumption, which includes:
 1. Public Utilities, for example telecommunications, drinking water, sanitation and gas;
 2. Public Works, for example dams, irrigation and drainage;
 3. Transportation Sector, for example railroad, port transportation and airport.
2. Social Infrastructure is an asset that supports the expertise and health of the community, including:
 1. Health, for example hospitals and health centers;
 2. Education, for example schools and libraries;
 3. Recreation, for example public playgrounds, museums, etc.
3. Administrative infrastructure, including law enforcement, institutions, administrative control-coordination, as well culture (World Bank, 1994).

In addition, in a broad sense, infrastructure can be divided into three types. First, public infrastructure, namely infrastructure that can be freely enjoyed by all citizens, for example: public roads, bridges, reservoirs or dams, irrigation and public facilities. Second, semi-private infrastructure is paid infrastructure or facilities but not profit oriented which is managed by the government, for example: electricity (PLN), art buildings or facilities, public tourist objects and the like. Third, infrastructure private is a profit-oriented infrastructure or facility, for example: toll roads, ports, sea, airports, industrial areas, Special Economic Zones and the like. Type the first infrastructure is usually built by the government. However for the second and infrastructure the third is usually built by BUMN or BUMD, private or government cooperation with the

private sector (Maramis, 2018).

The character of infrastructure development requires substantial funding large, long-term, and prone to risk. Hence, in increasing power infrastructure competitiveness, the Indonesian government has taken good remedial measures in terms of regulation, fiscal, institutional, as well as developing innovative funding to encourage the private sector plays an active role in infrastructure development through the Cooperation scheme Government and Business Entities (PPP) or also known as the Private Public Partnership (PPP). According to William J. Parente of the USAID Environmental Services Program, PPP are:

"An agreement or contract, between a public entity and a private party, under which: (a) a private party undertakes government function for specified period of time, (b) the private party receives compensation for performing the function, directly or indirectly, (c) the private party is liable for the risks arising from performing the function and, (d) the public facilities, land or other resources may be transferred or made available to the private party (Aziz, 2016)"

PPP according to Article 1 paragraph (6) of Presidential Decree 38 of 2015 is a collaboration between the government and Business Entities in the Provision of Infrastructure for the public interest with reference on the specifications previously determined by the Minister/Head of Institution/Head Region/State Owned Company/Regionally Owned Company, partly or wholly use the resources of the Business Entity by taking into account the risk sharing among the party.

In addition, PPP is defined as a form of cooperation between the government and business entities in the provision of public services (infrastructure) in the long run, to produce products (goods or services by sharing risks, as well as financing between parties parties based on a contractual basis (Knut, 2017; Zhiyong & Yamamoto, 2009).

The World Bank and the *Public Private Infrastructure Advisory Facility* in their *project database divides* several forms of cooperation contracts, including the following: (Farquharson, 2011).

1. Management Contracts, which is a form of cooperation in which the private sector manages its own infrastructure facilities government for a certain period of time with the operational risk remaining with the government. Then, the lease contract is a form of cooperation in which the government rents out infrastructure to the private sector with a certain amount of payment as well as operational risk.
2. Concessions, which is a form of cooperation in which the private sector is given the right to manage government infrastructure facilities for a certain period of time at its own risk. The types of concessions are as follows: (Farquharson, 2011).
 1. Rehabilitate, Operate, and Transfer (ROT), which is a form of cooperation in which the private sector rehabilitates infrastructure facilities, operates, and assumes risks, to then hand over the infrastructure facilities back to the government after the contract period ends.
 2. Rehabilitate, Lease or Rent, and Transfer (RLT), which is a form of cooperation where the private sector rehabilitates infrastructure facilities, leases, operates and maintains the facilities at their own risk during the contract period and then at the end of the contract hand over the infrastructure facilities to the government.
 3. Build, Rehabilitate, Operate, and Transfer (BROT), which is a form of cooperation where the private sector builds additional facilities from existing facilities or completes facilities that are built in stages, rehabilitates assets, operates and maintains facilities at their own risk during the contract period, then later on at the end of the contract handing over the facility to the government.

Greenfield Projects is a form of cooperation between the private sector or a joint venture

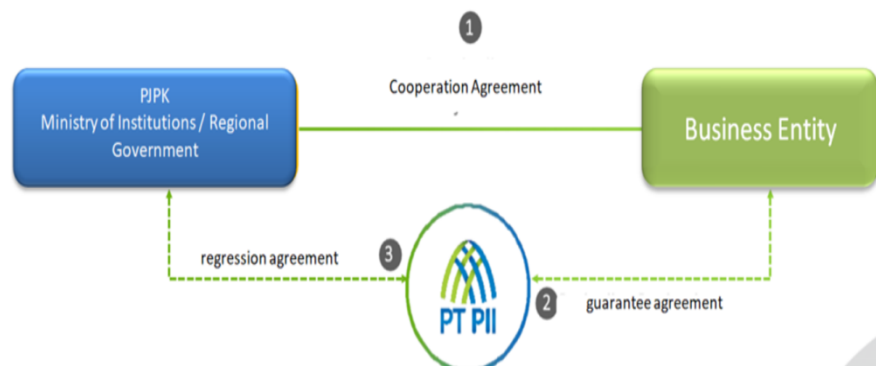
private-government to build and operate new infrastructure facilities. The types of Greenfield Projects are as follows: (Farquharson, 2011):

1. Build, Lease and Transfer (BLT), which is a form of cooperation, in which the private sector builds new infrastructure facilities at their own risk, then transfers ownership to the government. Furthermore, the private sector leases the facility from the government to operate it at its own risk up to a certain time. As a contradiction, the government provides a guarantee of minimum income through a long contract period.
2. Build, Operate, and Transfer (BOT), which is a form of cooperation in which the private sector builds, operates infrastructure facilities at their own risk, then after the operation period ends the infrastructure facilities are handed back to the government.
3. Build, Own, and Operate (BOO), which is a form of cooperation agreement where the private sector gets the right to build infrastructure facilities, then own and operate the facilities at their own risk.
4. Build-Own-Operate-Transfer (BOOT), which is a form of cooperation in which the government grants franchises to the private sector to finance, design, build and operate infrastructure facilities for a certain period of time. After the operating period ends, the infrastructure facilities are handed back to the government. For example: Airport.
5. Design-Build-Operate (DBO) is a single contract given by the government to the private sector to design, build and operate public facilities, but ownership remains with the government.
6. Build-Develop-Operate (BDO), namely the private sector buys public facilities, then develops them with their own resources, then operates them through contracts with the government.

Given the importance of private investment in accelerating infrastructure development, the Government issued Presidential Regulation No. 78/2010 as a form of infrastructure underwriting in cooperation projects between the government and business entities, the implementation of which is carried out by the Infrastructure Guarantee Agency/PT. PII for the occurrence of infrastructure risks which are the responsibility of the Cooperation Project Officer (PJK). For the payment of this guarantee, the Infrastructure Guarantee Agency/PT. The Indonesian Infrastructure Guarantee (PT.PII) has the Right to regress to collect the PJK for what it has paid to the Business Entity as the Guarantee Recipient.

In order to accelerate infrastructure development, until September 2020 PT. Infrastructure Guarantee Indonesia has provided guarantees for 26 joint venture projects between the government and business entities with a fund of Rp. 223 trillion. The 26 projects consist of 6 sectors, namely the Road Sector Project of 13 toll roads and 1 Non-Toll Road Sector Project, 4 Sector Projects Telecommunications (West, Central and East Palapa Ring Packages and Multifunctional Satellite), 1 Electricity Sector Project, 5 Drinking Water Sector Projects, and 2 Transportation Sector Project.

The implementation of this infrastructure development financing guarantee involves the Government as the Responsible Agency for Cooperation Projects (PJK), Business Entities as investors, and Infrastructure Guarantee Business Entities (BUPI)/PT. Indonesia Infrastructure Guarantee (Persero, 2011), which creates the following legal relationships: First, the legal relationship between the PJK and the Business Entity is the legal relationship between the agreement *PPP*. Second, the legal relationship between PT. Indonesia Infrastructure Guarantee with Business Entities is a legal relationship with a guarantee or guarantee agreement; and third, the legal relationship between the PJK and PT. Indonesia Infrastructure Guarantee is a regressive agreement, as can be seen from the Figure 2 below:



Source: PT. Indonesia Infrastructure Guarantee (Persero, 2011).

FIGURE 2 GUARANTEE OF INFRASTRUCTURE DEVELOPMENT FINANCING

Position of Regress Rights in the National Guarantee Law

Generally, infrastructure development guarantees are related to the law guarantee. The term guarantee law comes from security of law, which is a set of provisions governing guarantees receivables of a person or entity that are contained in various laws and regulations by placing an asset as collateral for payment or ability an obligation (Riyanto, 2015; Marbun, 2012).

In Indonesian guarantee law, basically the types of guarantees can be divided into two kinds, namely:

General Guarantee

Guarantee in general is regulated in Article 1131 of the Civil Code which stipulates that all rights debtor objects, both movable and immovable, both existing and non-movable there will be a responsibility for all the engagement (Bahsan, 2012).

Special guarantees, which can be divided into 2, namely: Immaterial guarantee (individual).

The term personal guarantee comes from the words borgtocht (Dutch) and Personal Guarantee or Suretyship (English) (Roeroe, 2017), regulated in book III, chapter XVII starting Article 1820 to Article 1850 of the Civil Code concerning Debt Assurance (Indriyani, 2006). Insurance coverage is divided into 2, namely: First, Personal Guarantee and Corporate Guarantee (Bahsan, 2002).

Guarantee is generally defined as:

"A promise or undertaking given by one person (the guarantor or surety) to another (the principal debtor) whereby the guarantor agrees to secondarily answerable for the debt, default, miscarriage of the principal debtor (Lindgren, 1990)"

Personal Guarantee

Neither they nor the Corporate Guarantee provides such position precedence over creditors. The creditor position is only as a concurrent creditor i.e. has the right to collect from

the guarantor/guarantor of the debt competitively with creditors other concurrently. Because there is no obligation to designate certain assets/objects, then the legal protection provided is the need for information to creditors about property debt guarantors.

Material Guarantee

According to Sri Soedewi Masjchoen Sofwan, material guarantees are:

"Guarantee in the form of absolute rights over an object, which has the characteristics of having direct connection to a particular object, can be maintained against anyone, always follow the object and can be transferred (Sofwan, 1980; Mopeng, 2017)"

Material collateral can be charged through the following institutions:

1. Regulated in Chapter 20 Book II of the Civil Code;
2. Mortgages as regulated in Chapter 21 Book II of the Criminal Code Civil Code as repealed by Law No. 4 of 1996 concerning Rights Dependence on Land and other objects related to Land; and
3. Fiduciary security as stipulated in Law No. 42 of 1999 (Mopeng, 2017).

From the types of guarantees above, then in the national guarantee law lies and the position of the Right to regress as a guarantee for infrastructure development is included in Personal Guaranty. According to the provisions of Article 1820 of the Civil Code Personal Guaranty is a third party agreement, namely Infrastructure Guarantee Business Entities (BUPI)/PT. Indonesia Infrastructure Guarantee for the purpose of cyber debt (PJPK) binds himself to the Business Entity as a creditor, to fulfill the obligations of the PJPK as debtors or debtors who are unable to fulfill their obligations to the business entity.

Infrastructure Guarantee Business Entities (BUPI)/PT. Indonesia Infrastructure Guarantee as guarantor who has completed the PJPK obligations as the debtor to the Business Entity as the creditor is given the Right to Regress. According to Article 1839 the Civil Code. The Right to regress is the right to "*reclaim*" the entire amount that has been paid to creditors, in the form of principal debt, interest, fines, and other costs incurred is demanded by the creditor based on the principal agreement.

As with a guarantee agreement in general, the nature of the guarantee agreement infrastructure development as a Personal Guaranty ISIS accessory, that, an agreement provided that if the principal agreement is written off, then the guarantee agreement is terminated (Panjaitan, 2018).

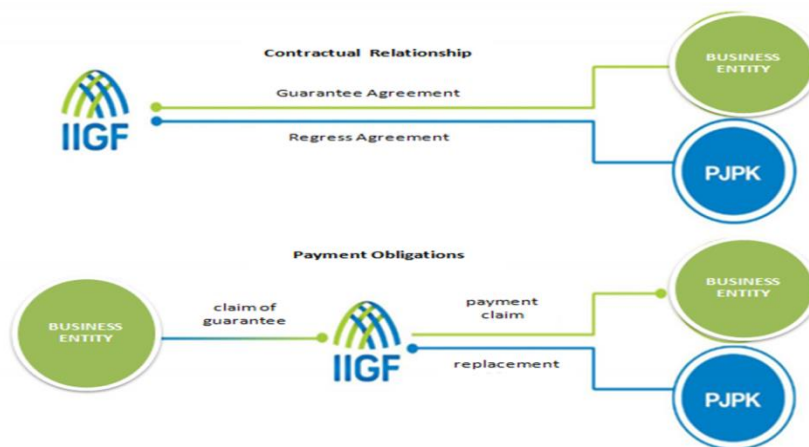
Recruitment Rights Claim Mechanism in Development Financing Guarantee Infrastructure

Apart from being regulated in Article 1839 of the Civil Code, the right to regress is also regulated in Article 1 number 20 Presidential Regulation No. 78 of 2010, namely the rights granted to business entities Infrastructure Guarantee (BUPI)/PT.PII as guarantor to collect the Government as The person in charge for the Cooperation Project (PJPK) for the payment that has been given to Business Entities as Guarantee Recipients in order to fulfill Financial Obligations The person in charge for the Cooperation Project (PJPK) takes into account the time value of money is paid (time value of money).

In accordance with Presidential Regulation No. 78 of 2010, the claim mechanism for filing the Right to regress is as follows:

1. The business entity submits a claim to the PJKP to fulfill its obligations under the agreement *PPP*;
2. PJKP is unable to carry out its obligations according to the *PPP* agreement;
3. Infrastructure Guarantee Business Entities (BUPI)/PT. Indonesia Infrastructure Guarantee (PT.PII) makes payments against claims submitted by business entities as investors against the failure of the PJKP to fulfill its obligations in accordance with the Agreement *PPP*;
4. After BUPI/PT.PII carries out its obligations to the Business Entity as a Guarantee Recipient, then BUPI/PT.PII submits a notification letter of the implementation of the Right to Regress to Minister of Finance as PJKP;
5. In the event that the Person in Charge of Cooperation Projects is the Minister of Finance, the fulfillment of Regress Rights carried out by the State Revenue and Expenditure Budget (APBN) mechanism;
6. In the event that the person in charge of the cooperation project is the Regional Head, the fulfillment of Regress Rights carried out by the mechanism of the Regional Budget (APBD);
7. In the event that the Person in Charge of the Cooperation Project is a BUMN/BUMD, the fulfillment of Regress Rights carried out by a corporate mechanism based on the prevailing laws and regulations;
8. BUPI/PT.PII can charge a guarantee fee for the infrastructure guarantee that has been given, with due observance of: (1) the value of financial compensation for the type of Infrastructure Risk will be guaranteed; (2) costs incurred in providing security; (3) the profit margin naturally.

Based on the stages of the claim for the Right to Regress as described above, it can be described as shown below in Figure 3.



Source: PT. Indonesia Infrastructure Guarantee (Persero, 2011)

FIGURE 3 GUARANTEE AGREEMENT AND REGRESSIVE CLAIM

CONCLUSION

Based on the research results, it can be concluded that there are three parties involved in underwriting infrastructure development financing, namely the Project Responsible Officer Cooperation (PJKP), Business Entities, and Infrastructure Guarantee Business Entities (BUPI)/PT. PII, which is based on a legal relationship between the government and business

entity cooperation agreement, the legal relationship of the guarantee agreement, and the legal relationship with the regressive agreement. Location and the position of regressive rights in the Indonesian national guarantee law is included in Personal Guaranty, which gives rights to BUPI/PT. PII as a guarantee to collect the PJKK against the payment that has been given to the Business Entity as the Beneficiary Guarantee.

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