PURSE PROJECT

Private Participation in Urban Services

ANALYSIS OF LEGAL AND REGULATORY CONSTRAINTS, DEFICIENCIES AND OMISSIONS IN INDONESIA REGARDING PPP & PSP PROJECTS IN WATER SUPPLY, WASTE WATER AND SOLID WASTE URBAN INFRASTRUCTURE

Prepared by
Soewito, Suhardiman, Eddymurthy & Kardono

PURSE Report No.: I.C.1.02.1.2/95/032

Submitted by
Chemonics International
Jakarta, Indonesia

In association with
Resource Management International
Sheladia Associates

P.T. Resource Development Consultants
December 1995
Under Contract No. AID 497-0373-C-00-3030-00
United States Agency for International Development

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DEPARTEMEN DALAM NEGERI

DEPARTEMEN KEUANGAN
DEP. PEKERJAAN UMUM

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LIST OF DEFINITIONS AND ABBREVIATIONS

AOA	:	Articles of Association
APIT	:	Angka Pengenal Importir Terbatas (Limited Import License Number)
B3 Waste	:	Limbah Bahan Beracun dan Berbahaya (hazardous and toxic waste)
BAPEDAL	:	Badan Pengendalian Dampak Lingkungan (the Environmental Impact Management Agency)
BAPEPAM	:	Badan Pengawas Pasar Modal (the Capital Market Supervisory Board)
BAPPENAS	:	Badan Perencanaan Pembangunan Nasional (the National Development Planning Board)
BKPM	:	Badan Koordinasi Penanaman Modal (Capital Investment Coordinating Board)
BKPM Decree 15/94:		BKPM Decree No.15/SK/1994 regarding Implementation Provisions on Share Ownership/ Shareholding in Companies Established in the Framework of Foreign Capital Investment (July 29, 1994)
BOO Project	:	Build Own and Operate Project; BOO refers to a specific type of "public private partnership" or PPP in which a private sector organization will "own" the project and will be responsible for construction, financing and operation of the infrastructure project which provides a public domain infrastructure service.
BOT Project	:	Build, Operate and Transfer Project; BOT refers to a specific type of "public private partnership" or PPP in which a private sector organization will be responsible for construction and operation of an infrastructure project which provides a public domain infrastructure service. The project will be owned for a pre-determined period of time (the lease period) by the private sector organization that has developed the Project and will be transferred to the GOI immediately at the end of the pre-negotiated lease period.

BPAL	:	Badan Pengelola Air Limbah (Waste Water Management Agency)
BPAM	:	Badan Pengelola Air Minum (Managing Board of Drinking Water)
BUMD	:	Badan Usaha Milik Daerah (Regional Government Owned Company)
BUMN	:	Badan Usaha Milik Negara (Central Government / State-owned Company)
Cipta Karya	:	The Director General of Housing Construction Planning and Urban Development
Dewan Perwakilan Rakyat Daerah Tingkat I	:	Legislative Body at the Regional (Provincial) Level (Level I)
Dewan Perwakilan Rakyat Daerah Tingkat II	:	Legislative Body at the Municipal Level (Level II)
DKI Decree 313/84	:	DKI Governor Decree No.313 of 1984 regarding Procedures for Obtaining License in Sanitation Sector in the Special Territory of the Capital City of Jakarta (February 25, 1984)
DKI Jakarta	:	Daerah Khusus Ibukota Jakarta (the Special District of the Capital City of Jakarta)
DKI Reg. 15/81	:	DKI Regional Regulation No.15 of 1981 regarding the Organizational Structure and Procedures of the Sanitation and Procedures of the Sanitation Authority of the Special Territory of the Capital City of Jakarta (December 7, 1981)
DKI Reg. 10/91	:	DKI Regional Regulation No.10 of 1991 regarding Regional Corporation of Waste Water Management for DKI Jakarta (September 20, 1991)
DNI	:	Daftar Negatif Investasi (Negative Investment List)
DOF	:	Department of Finance

Domestic Investment Law	:	Law No. 6 of 1968 regarding Domestic Investment (July 3, 1968) as amended by Law No. 12 of 1970 regarding Amendment and Supplement to Law No. 6 of 1968 regarding Domestic Investment (August 7, 1970)
DOPW	:	Department of Public Works
DPR	:	Dewan Perwakilan Rakyat (Parliament)
DRM	:	Daftar Rekanan Mampu (List of Capable Contractors)
DRT	:	Daftar Rekanan Terpilih (List of Selected Contractors)
DSP	:	Daftar Skala Prioritas (Priority List)
EKKU	:	Ekonomi dan Keuangan (Economic and Finance Department)
ELIPS Project	:	Economic Law and Improved Procurement System Project
Foreign Investment Law	:	Law No. 1 of 1967 regarding Foreign Investment (January 10, 1967) as amended by Law No. 11 of 1970 regarding the Amendment of and Supplement to Law No. 1 of 1967 regarding Foreign Investment (August 7, 1970)
Garbage	:	All kinds of refuse generated by households, public buildings, factories and industrial sites, including waste building material, scrap automobiles and the like.
GBHN	:	Garis-garis Besar Haluan Negara (the Broad Outlines of State Policy)
GOI	:	Government of Indonesia
HGB	:	Hak Guna Bangunan (Right to Build)
HIR	:	Herziene Indonesische Reglement (Basic Code of Civil Procedure in Indonesia); see also RV.
HPL	:	Hak Pengelolaan Lingkungan (Right of Environmental Management)

IGGI	:	Inter-Governmental Group on Indonesia
Indonesia Jurisprudence	:	Publication in which the Indonesian Supreme Court publishes selected decisions on an annual basis (Yurisprudensi Indonesia)
Inmen	:	Ministerial Instructions or Instruksi Menteri
Instruksi Gubernur	:	Instructions from the Governor
IPU	:	Informasi Peluang Usaha (Information on Business Opportunities) published by BKPM
IUT	:	Izin Usaha Tetap (Permanent Operating License)
JD	:	Joint Decree
JD 1978	:	Joint Decree of the Minister of Public Works, Minister of Home Affairs and Minister of Finance, Number 281/KPTS/1978, 160/1978 and 350/KMK.011/1978 regarding the Undertaking and Control of the Construction of Drinking Water Projects and the Aid from the Central Government (September 19, 1978)
JD 1984	:	Joint Decree of the Minister of Home Affairs and Minister of Public Works No.3 of 1984 and No.26/KPTS/1984 regarding Procedures of Proposal and Procurement of Clean Water Projects and Temporary Operations and Transfer of Operations (January 23, 1984)
JD 4-27/84	:	Joint Decree of the Minister of Home Affairs No. 4 of 1984 and Minister of Public Works No.27/KPTS/1984 regarding the Guidelines for Drinking Water Regional Enterprises (January 23, 1984)
JUKNIS	:	Joint Decree of the Minister of Finance and the State Minister for National Development Planning/Chairman of the National Development Planning Agency No. Kep-27/MK.3/8/1994 and Kep-166/KET/8/1994 regarding the Technical Directives for the Implementation of Presidential Decree No. 16 of 1994 on the Realization of the State Budget of Income and Expenditure (August 4, 1994)
Keppres	:	Keputusan Presiden (Presidential Decree)

Keppres 59/72	:	Presidential Decree No.59 of 1972 regarding Receiving Foreign Credit (October 12, 1972), as amended
Keppres 15/84	:	Presidential Decree No.15 of 1984 regarding Organization of Departments (March 6, 1984)
Keppres 15/91	:	Presidential Decree No. 15 of 1991 regarding the Receipt of Offshore Loans and the Issuance of Bank Guarantees for the Receipt of Offshore Loans by State Banks and Regional Development Banks already Appointed as Foreign Exchange Banks (March 18, 1991)
Keppres 39/91	:	Presidential Decree No.39 of 1991 regarding the Coordination of Management of Offshore Commercial Loans (September 4, 1991)
Keppres 55/93	:	Presidential Decree No. 55 of 1993 regarding Land Appropriation for the Implementation of Construction in the Interest of the Public (June 17, 1993)
Keppres 16/94	:	Presidential Decree No.16 of 1994 regarding the Implementation of the State Revenue and Expenditures Budget (March 22, 1994)
Keppres 6/95	:	Presidential Decree No. 6 of 1995 regarding Procurement Evaluation Team (February 2, 1995).
Keppres 6/95 Team	:	The Procurement Evaluation Team established under Keppres 6/95.
Law No.5/60	:	Law No.5 of 1960 regarding the Basic Agrarian Law (September 24, 1960)
Law No.19/60	:	Law No.19 of 1960 regarding State Enterprises (April 30, 1960)
Law No.5/62	:	Law No.5 of 1962 regarding Regional Enterprises (February 14, 1962)
Law No.1/67	:	Law No.1 of 1967 regarding Foreign Investment (January 10, 1967)
Law No. 6/68	:	Law No.6 of 1968 regarding Domestic Investment (July 3, 1968)

Law No.6/69	:	Law No.6 of 1969 regarding Declaration to Invalidate Various Laws and Government Regulation in Lieu of Law (July 5, 1969)
Law No.11/74	:	Law No.11 of 1974 regarding Water Resources (December 26, 1974)
Level I Government	:	Regional or Provincial Government, or Daerah Tingkat I
Level II Government	:	Municipal Government or Daerah Tingkat II
Management Operating Contracts	:	As defined in the PURSE/SSEK Subcontract, refers to contracts whereby a private organization has entered into a contractual agreement with an agency of government to operate a facility such as a water treatment station. Under an operating contract, the private sector organization will be given management responsibility for the total operation of a capital intensive facility.
Management Services Contract	:	As defined in the PURSE/SSEK Subcontract, refers to contracts whereby a private organization has entered into a contractual agreement to provide a specific service to an agency of government that is in charge of the operation of a capital intensive facility. Management service contracts could involve providing engineering testing services to an operator of a water treatment plant, providing billing collection services or providing vehicular transportation services to an operator of a solid waste transfer station.
Model I/PMA	:	Form of Foreign Investment Application submitted to BKPM as prerequisite to forming a PMA Company
MOE	:	The Minister of the Environment
MOF	:	The Minister of Finance
MOF Decree 261/73	:	Minister of Finance Decree No.261 of 1973 regarding Implementing Provisions on Receiving Foreign Credits (May 3, 1973), as amended

MOF Decree 417/89:		Minister of Finance Decree No. 417 of 1989 regarding the Amendment of Article 2 of the Minister of Finance Decree No. 261 of 1973 regarding Implementing Provisions on Receiving Foreign Credits (May 1, 1989)
MOF Decree 248/95:		Minister of Finance Decree No. 248 of 1995 regarding Income Tax Treatment of Parties Engaged in Cooperation under Build, Operate and Transfer Agreements (June 2, 1995)
MOF Letter S-1603/90:		Minister of Finance Letter No. S-1603/MK.013/1990 regarding Stoppage of Investment Credits to Foreign Companies and Joint Ventures (December 7, 1990).
MOHA	:	The Minister of Home Affairs
MOHA Instruction 9/95	:	Minister of Home Affairs Instruction No. 9 of 1995 regarding Guidelines for Cooperation between Regional Enterprises and Third Parties (March 28, 1995)
MOHA Reg. 1/84	:	Minister of Home Affairs Regulation No.1 of 1984, regarding Procedures of Guidelines and Supervision of Regional Enterprises within the Regional Governments (January 31, 1984)
MOHA Reg. 3/86	:	Minister of Home Affairs Regulation No.3 of 1986 regarding Regional Government Capital Participation in Third Parties (October 1, 1986)
MOHA Reg. 4/90	:	Minister of Home Affairs Regulation No.4 of 1990, regarding Procedure on the Cooperation Between Regional Enterprises and Third Parties (March 16, 1990)
MOPW	:	The Minister of Public Works
MOPW Decree 269/84:		Minister of Public Works Decree No.269/KPTS/1984 regarding the Establishment of the Management Board of Drinking Water (August 8, 1984)
MOPW Decree 510/87:		Minister of Public Works Decree No.510/KPTS/1987 regarding Establishment of the Waste Water Management Agency in the Special Territory of the Capital City of Jakarta (October 26, 1987)

MOPW Decree 249/95:		Minister of Public Works Decree No. 249/KPTS/1995 regarding Establishment of Coordinating Team for Preparing Water Supply Projects in Jakarta and its Surrounding Areas with the Involvement of the Private Sector (July 6, 1995)
MOPW Reg. 49/90	:	Minister of Public Works Regulation No. 49/PRT/1990 regarding Procedures and Requirements on the License to Use Water and/or Water Source (December 5, 1990)
MPR	:	Majelis Permusyawaratan Rakyat (The People's Consultative Assembly)
Narrative Description:		The Narrative Description of Indonesian Laws and Regulations on Public Private Partnerships and Private Sector Participation in the Sectors of Water Supply, Waste Water and Solid Waste prepared by SSEK and submitted in November 1994 pursuant to the PURSE/SSEK Subcontract
NPWP	:	Nomor Pokok Wajib Pajak (Tax Identification Number)
PAM Jaya	:	Perusahaan Air Minum Jakarta Raya (the PDAM for DKI Jakarta)
PBH	:	Perjanjian Bagi Hasil (revenue sharing patterns)
PDAM	:	Perusahaan Daerah Air Minum (Drinking Water Regional Enterprise)
PDK	:	Perusahaan Daerah Kebersihan (Regional Sanitation Enterprise)
PD PAL Jaya	:	Regional Corporation for Waste Water Management for DKI Jakarta
Peraturan Pemerintah	:	Government Regulations (PP)
Peraturan Pemerintah Pengganti Undang-Undang	:	Government Regulations in Lieu of Laws which are statutes promulgated by the President

PERDA	:	Peraturan Daerah (Regional Regulation)
Perda DKI 11/93	:	DKI Jakarta Regional Regulation No.11 of 1993 on the Provision of Drinking Water Services (December 13, 1993)
Permen	:	Peraturan Menteri (Ministerial Regulation)
Persero	:	A type of state-owned enterprise in the form of a limited liability company
Perusahaan Negara:		A type of state-owned enterprise not in the form of a limited liability company
PKLN Decree 5/91	:	Decision of the Chairman of the Commercial Offshore Loans Management Coordinating Team No.KEP-05/K.TIM.PKLN/1991
PKLN Team	:	Commercial Offshore Loan Management Team established under Keppres 39/91
PMA Company	:	Penanaman Modal Asing (Foreign Capital Investment) Company formed under the Foreign Investment Law
PMDN Company	:	Penanaman Modal Dalam Negeri (Domestic Capital Investment) Company formed under the Domestic Investment Law
PP	:	Peraturan Pemerintah (Government Regulation)
PP 18/53	:	Government Regulation No.18 of 1953 regarding the Implementation of Transfer of Part of the Central Government's Affairs in the field of Public Works to the Provinces and Confirmation of Public Works Affairs of the Municipalities, Big Cities and Small Towns in Java (April 16, 1953)
PP 14/87	:	Government Regulation No.14 of 1987 regarding Transfer of Part of Governmental Affairs in the Field of Public Works to the Regions (June 27, 1987)
PP 20/90	:	Government Regulation No.20 of 1990 regarding Water Pollution Control (June 5, 1990)

PP 22/90	:	Government Regulation No.22 of 1990 regarding Procedures of Water Arrangements (June 14, 1990)
PP 19/94	:	Government Regulation No.19 of 1994 regarding the Management of the Waste of Hazardous and Toxic Materials (April 30, 1994)
PP 20/94	:	Government Regulation No.20 of 1994 regarding Share Ownership in Companies Established Within the Framework of Foreign Capital Investment (May 19, 1994)
PPP	:	Public Private Partnership (Capital-Intensive Projects); a generic term, referring to any capital-intensive infrastructure project which is developed, financed and constructed by a private sector organization with the authorization and support of an agency of government to provide a public infrastructure service
Project Company	:	A generic term for any corporate entity having principal operating and management authority over a PPP project. Its shareholders may be any one or a mix of private or public entities and may refer to a privately held or publicly listed company.
PSP	:	Private Sector Participation (Non-Capital-Intensive Projects); a generic term, referring to any non-capital-intensive infrastructure project which does not involve large capital expenditures, but which will provide a service under a contractual agreement with the GOI or its designated representative to provide a public domain infrastructure service
PT	:	Perseroan Terbatas (Limited Liability Company)
PUOD	:	Pemerintahan Umum Otonomi Daerah (Directorate of Public Administration and Regional Autonomy) under MOHA
PURSE Project	:	USAID funded project on Private Participation in Urban Services
Regional Enterprises	:	See BUMD

Regional Government	:	Provincial or Special Regional Governments (such as DKI Jakarta and Yogyakarta), also called Daerah Tingkat I
RV	:	Reglement op de Rechtsvordering (a procedural code that exists in addition to the HIR)
SMAA Reg.2/93	:	State Minister of Agrarian Affairs/Head of the National Land Bureau Regulation No.2 of 1993 regarding Procedure for acquiring Location License and Right on Land for Companies in the Framework of Capital Investment (October 23, 1993)
Sekneg	:	Sekretariat Negara (State Secretariate)
SP	:	Surat Persetujuan (Letter of Approval) issued by BKPM to the applicants of approved projects under the Domestic Investment Law
SPPP	:	Surat Pemberitahuan Persetujuan Presiden (Notification of Presidential Approval) delivered by BKPM to the applicants of approved projects under the Foreign Investment Law.
SSEK	:	Soewito, Suhardiman, Eddymurthy & Kardono, Indonesian Legal Consultants
State Gazette of the Republic of Indonesia	:	The official governmental publication of the Republic of Indonesia (Lembaran Negara Republik Indonesia)
Surat Edaran	:	Circular Letters issued from Government Departments and their Agencies
Target Sectors	:	Water Supply, Waste Water and Solid Waste Management
Tingkat I	:	Regional or Provincial Government or Level I
Tingkat II	:	Municipal Government or Level II
WURS	:	Water Use Rights System
WURS Draft Report	:	Draft Report, Water Use Rights System, Java Irrigation Improvement and Water Resources Management Project (October 1994)

SCOPE AND PERSPECTIVE OF ANALYSIS

This paper builds and expands upon the work contained in the Narrative Description of Indonesian Laws and Regulations on Public - Private Partnerships and Private Sector Participation in the Sectors of Water Supply, Waste Water and Solid Waste (PURSE Report No.101.01/94/016, November 1994). Whereas the purpose of the Narrative Summary was to identify the relevant existing laws and regulations and provide a synopsis of their content, the purpose of this paper is to analyze those laws and regulations to determine their adequacy in respect of PPP and PSP projects in the Target Sectors.

In structuring the analysis, we have first tried to identify the basic concerns of private sector participants in entering into the types of projects under consideration. By doing so, we provide a focus for the analysis, i.e., to what extent do existing laws and regulations meet these basic concerns. We are mindful, of course, that the concerns of the private sector must be balanced against public policy goals and constraints. Although we have attempted to take into account public policy realities, the objective of this paper is to identify existing legal and regulatory impediments faced by the private sector and offer recommendations as to how existing laws and regulations could be changed, or new ones adopted, in order to remove those impediments.

The analysis and recommendations contained in this paper must be viewed within a broader contextual framework. Issues relating to uniform engineering standards, environmental and public health safeguards, public access to services as well as uniform accounting and auditing standards must all be considered in creating a framework for urban infrastructure development that will provide sufficient incentives for the private sector while assuring that the needs and concerns of the Indonesian people are adequately addressed. It is hoped that this paper, focusing on legal and regulatory issues, will make a useful contribution toward the building of that overall framework.

In preparing this paper, it was necessary to recognize a fundamental difference between PPP projects and PSP projects. PPP projects, by definition, are "capital-intensive" and normally look to private sources of capital (whether equity or debt) for financing. PSP projects, on the other hand, are non-capital-intensive, normally taking the form of an operating or service contract. Given the greater risk assumed by private participants (whether developers, lenders or investors) in PPP projects, it is natural that the scope of their legal and regulatory concerns would be broader.

Accordingly, we have identified ten (10) basic legal and regulatory areas of concern, the first five (5) of which are relevant to private participants in either PSP or PPP projects, and the second five (5) of which are typically of greater concern to PPP participants.

The ten (10) critical areas of concern are briefly identified as follows:

1. Clear legal basis for private sector participation;
2. Clear legal basis for public sector participation;
3. Clear procedures and protocols of project approval and implementation;
4. Timely access to all relevant legal information;
5. Reasonable confidence in overall legal and regulatory system;
6. Legal validity of investment structure;
7. Clear and definite land titles and water rights;
8. Access to sufficient funding;
9. Sufficient and certain project revenues; and
10. Adequate and enforceable security interests and/or credit support.

The preparation of this paper has not been a mere exercise in abstract analysis. As practising legal consultants providing services in numerous urban infrastructure projects in Indonesia, we have been able to draw upon our real-world experience to better understand and express the concerns of private sector companies contemplating PSP or PPP projects in the Target Sectors and, we believe, arrive at conclusions and concrete recommendations that are both practical and meaningful.

EXECUTIVE SUMMARY

This paper is a broad survey and analysis of the constraints, deficiencies and omissions in the legal and regulatory framework affecting private sector involvement in PPP and PSP projects in the Target Sectors. It concludes that real and substantial improvement can be achieved by initially focusing the attention of specified Government departments on certain key areas of the greatest practical concern to the private sector. In short, it is recommended that the following matters be given attention on a priority basis:

1. An interdepartmental approach toward establishing clear procedures of project approval and implementation is required. MOHA and MOPW are the key departments and each has independently addressed the issue of appropriate and applicable procedures, but the coordination of these efforts is needed to prevent confusion and conflict. Detailed guidance relating to licensing, assignments, terminations and post-approval reporting and permitting requirements should be provided in the form of a Joint Ministerial Decree, Government Regulation or, perhaps, integrated into an overall PPP Project Law or Regulation.

2. Further guidance regarding the application of Indonesian tax law to PPP projects is essential, particularly in respect of VAT, import duties and related charges, construction taxes and withholding taxes on offshore payments. MOF has taken the first steps in this regard by issuing MOF Decree 248/95, and further clarification along these lines would permit meaningful tax planning and the development of reliable financial models, both of which are prerequisites to large-scale investment.

3. The experience of Indonesia with PPP projects, particularly in the Target Sectors, is relatively limited but will grow rapidly over the next decade. A Law or Government Regulation addressing many if not all of the issues raised in this paper would establish ground rules that would remove much of the uncertainty currently surrounding PPP projects. BAPPENAS would perhaps be the most suitable Government entity to take the lead in the formulation of such a law or regulation.

4. Private sector investors in water supply and waste water projects will insist that allocation of available water resources be done in such a way that their project-needs are dealt with in a fair and rational manner. As demands on the limited water resources of Indonesia continue to grow, increased sophistication in water management systems and methods will be required. In order to provide the basis for the necessary management, this paper recommends that a formal Water Use Rights System (WURS) be established along the lines of the system

recommended in the WURS Draft Report sponsored by MOPW. As a first step, implementing guidelines under MOPW Reg. 49/90 should be issued.

5. Access to adequate sources of financing is a sine qua non of private participation in PPP projects. Especially in light of the vital nature of Target Sector infrastructure development, the MOF should reconsider the necessity of certain restrictions affecting the financing of PPP projects, e.g., the prohibition of State Bank funding of foreign invested projects and the requirement of PKLN approval of offshore financings of projects "linked" with the GOI.

Following is a synopsis of the analysis and recommendations contained in this paper.

1. Legal Basis for Private Participation

The legal basis for PSP projects (i.e., service contracts) differs fundamentally from the legal basis for PPP projects (i.e., capital-intensive equity arrangements) and each must be separately considered. Moreover, in the case of PPP projects particular regulations relating to each of the Target Sectors must also be taken into account.

a. PSP Projects

The government procurement regulations set out in Keppres 16/94 generally provide the legal basis for the private sector to sell goods and services to the GOI. By its terms, however, Keppres 16/94 excludes from its coverage (i) BUMD procurement of goods and services for "operational/exploitational purposes" and (ii) "clean water installation projects" undertaken by PDAMs. The exclusion of these types of procurement from the scope of Keppres 16/94 creates some uncertainty regarding whether a particular PSP project would be considered within the scope of Keppres 16/94 and also regarding the procedures that a private participant must follow in connection with non-Keppres 16/94 contracts.

Recommendations: Clarification regarding the exact scope of Keppres 16/94 would be welcome, as would a model set of BUMD procurement regulations for adaptation by BUMDs. Either EKKU or the newly established Keppres 6/95 Team should take a leading role in this regard.

b. PPP Projects

PPP projects are not covered by Keppres 16/94. Instead, the legal basis for private participation in capital-intensive infrastructure projects in the Target Sectors can only be found by referring to a variety of laws and regulations

including general investment laws and regulations as well as sector-specific government promulgations in each of the Target Sectors.

The legal basis for private participation in **PPP water supply projects** is generally well-founded as can be seen from a review of Government Regulation No.20 of 1994, Law No.11 of 1974 and other relevant laws and regulations. Nevertheless, the most current IPU issued by BKPM appears to place certain constraints on the types of projects open to private sector participation as well as the acceptable geographic locations of such projects.

Recommendations: The legal status of the IPU itself should be clarified. Moreover, all unnecessary restrictions related to project types and geographic locations should be eliminated.

The legal basis for private participation in **PPP waste water projects** appears to be established in Government Regulation No.20 of 1990, but there is little guidance given regarding the permitted nature and scope of such participation. The investment laws and regulations, including the DNI and IPU, are silent regarding private participation in waste water projects thereby raising a presumption that such participation is acceptable.

Recommendations: Further governmental guidance in the form of Ministerial Decree would be helpful to confirm the legal basis of private sector involvement in PPP waste water projects.

The only positive legal basis for private participation in **PPP solid waste projects** is found in the current IPU which permits certain types of solid waste projects, itemizes certain types of acceptable cooperative arrangements with the public sector and identifies certain geographic locations in which such projects may be carried out. Given the ever-increasing importance of solid waste management in Indonesia, the legal and regulatory framework of this sector deserves greater attention.

Recommendations: As with our comments to PPP water supply projects, we recommend that the legal status of the IPU be clarified and that unnecessary restrictions regarding types and locations of projects be eliminated. Similarly, unnecessary restrictions on the acceptable cooperative structures should also be removed. Lastly, given the importance of this sector, a separate law or regulation establishing a firm basis for private participation be promulgated.

2. Legal Basis for Governmental Participation

Any private participant in a PPP or PSP project will need assurance that a valid legal basis exists for the actions and commitments of its governmental counterpart. In general, virtually all public works responsibility for the Target Sectors has been transferred to the regional (Level I) and municipal (Level II) governments. Accordingly, subject to overall supervisory powers retained by the Central Governmental authorities (including MOPW and MOHA), Regional Governments (and in many cases BUMDs) have primary responsibility for developing, operating and maintaining infrastructural projects within the Target Sectors.

a. Regional Governments

The legal basis for Regional Governments to cooperate with "third parties" (including private entities) is set out in MOHA Reg. 3/86 and its Official Elucidation. The Official Elucidation imposes serious constraints on the flexibility of Regional Governments to cooperate with the private sector by mandating the forms and terms of contractual arrangements into which Regional Governments can enter. Regional Governments are thereby restricted from exploring different commercially feasible structures of cooperation with the private sector.

Recommendations: MOHA Reg.3/86, or at least its Official Elucidation, should be rescinded in favor of the more flexible approach contained in MOHA Reg. 4/90 dealing with cooperation between BUMDs and third parties.

b. BUMDs

The legal basis for BUMDs to cooperate with third parties is theoretically cloudy due to the "lame duck" status of Law No.5 of 1962, and the fundamental constraints it appears to create in the legal ability of BUMDs to cooperate with the private sector in water supply and, perhaps, other infrastructural projects in the Target Sectors. Law No.6 of 1969 anticipated the revocation and replacement of Law No.5/62, but to date Law No.5/62 remains on the books. Although subsequent legislation (e.g., Law No.11 of 1974), regulations (e.g., PP 20/94) and practice (e.g., existing PPP water supply projects) all support the de facto repeal of the constraints imposed by Article 5(4) of Law No.5/62, its technical validity continues to create questions regarding its force and effect.

Additionally, the scope of Keppres 16/94 needs clarification in the context of PSP and PPP projects within the Target Sectors.

Recommendations: Law No.5/62 should be repealed and replaced with a new law on BUMDs that takes into account the changes in governmental structure, needs and plans that have occurred over the last 30 years as well as the future developmental needs of Indonesia. As to Keppres 16/94, EKKU or the Keppres 6/95 Team should provide necessary clarifications.

3. Procedures and Protocols of Project Approval and Implementation

Implementing regulations relating to cooperative arrangements between BUMDs and third parties under MOHA Decree 4/90 are contained in the recently issued MOHA Instruction 9/95, but they omit to describe the roles of other interested Governmental agencies including BAPPENAS, MOPW, MOF and the involved Regional Government. An even greater omission in the regulatory framework is the complete absence of implementing regulations relating to private sector cooperation with BUMNs and Regional Governments, although such omission is not material in the context of the Target Sectors.

Coordination of the roles and authorities of these various agencies is essential to prevent private sector participants and their public sector counterparts from being subjected to duplicative and/or conflicting demands from Governmental authorities. In at least one recent instance, such shortcoming has been addressed on an ad hoc basis by the establishment of a special coordinating team under the leadership of MOPW, but this facet of the regulatory scheme is simply too important to be addressed on a case-by-case basis.

Recommendations: A fundamental responsibility of the GOI is to establish coordinated, interdepartmental procedures for the approval and implementation of such projects. An internal consensus on applicable procedures and protocols must be reached and this should be reflected in an appropriate Governmental promulgation such as a Joint Ministerial Decree, Presidential Decree, Government Regulation or a PPP Project Law.

4. Timely Access to Legal Information

The lack of easy access to up-to-date legal information is a major impediment to promoting private participation in the Target Sectors and elsewhere in the economy. The State Gazette and its various supplements are neither complete nor timely, and their circulation is limited. This results in a lack of certainty which undercuts the confidence of private participants. Additionally, the research efforts required merely to identify relevant laws and regulations are excessive, resulting in increased costs and unnecessary delays.

Recommendations: Several specific recommendations are offered:

a. Require mandatory publication in an official daily gazette of all laws, regulations and decrees prior to their effective date;

b. Improve and expand the existing government publication distribution system;

c. Continue both private and public sector efforts to expand computer data bases of legal information;

d. Arrange for regular and systematic publication of court decisions; and

e. Consider private sector subcontractors to assist in items b, c and d.

5. Overall Legal and Regulatory Concerns

Although the focus of the paper is on those legal and regulatory constraints, deficiencies and omissions pertaining most directly to PSP and PPP projects in the Target Sectors, there exists a broad spectrum of general issues that continue to be of serious concern to investors in Indonesia. These include substantive and procedural tax issues, tariff and non-tariff import barriers, an over-burdened and ill-equipped judicial system, practical difficulties in enforcing remedies and outdated Civil and Commercial Codes.

Several of these issues are the subject of various law reform projects already underway in Indonesia. The limited discussion in this paper of these areas of concern is not intended to minimize their importance; reform in each is essential to the development of a fair, open, reliable and predictable legal environment for private investors. A comprehensive analysis of each of these concerns, however, exceeds the scope and purpose of this paper.

a. Tax Law and Administration

Particularly in the case of complicated financing structures typically used in BOT and BOO Projects, issues that are new and unfamiliar to the tax authorities may arise. MOF Decree 248/95 addresses certain tax concerns of BOT Projects (but leaves many issues open: it has no applicability to BOO or other financing structures and, it does not address VAT, construction tax, import duties or offshore withholding taxes). The administration of the tax laws continues to be perceived as weak and inconsistent.

Recommendations: Additional clarifications of the tax areas identified above would be welcomed. The overall improvement of tax administration in Indonesia is a long-term project requiring (i) training and education programs for tax officials, (ii) improved administrative procedures, (iii) increased transparency in interactions between tax officials and the private sector and (iv) enhanced administrative resources.

b. Import Control and Administration

In some PPP or PSP projects, the ability to import equipment, machinery and/or materials on a cost-efficient basis may be critical to the success or failure of such project. Relevant issues relate to (i) import tariff levels, (ii) non-tariff import barriers including importer licensing and countertrade requirements and (iii) customs clearance administration. In accordance with its commitments under the Uruguay Round of GATT, both tariff and non-tariff barriers in Indonesia are being gradually removed.

Recommendations: Reform efforts in these areas should continue as required under GATT. Continuing efforts to improve customs clearance procedures and port operations are required.

c. Judicial Dispute Resolution

A nearly universal concern within the Indonesian business community is the inability of the Indonesian judiciary to hear and resolve commercial disputes in a fair, impartial and independent manner. The subject of judicial reform is complex and sensitive, and the magnitude of effort required to effect real progress is substantial.

Recommendations: Various reform proposals include (i) establishment of a separate Commercial Court with specially trained judges, (ii) specialized judicial training programs in commercial, corporate and financial legal matters, (iii) official publication of judicial decisions, (iv) establishment of effective alternative dispute resolution mechanisms.

d. Enforcement of Remedies

A lengthy appellate process lacking an adequate bonding system, archaic and complex enforcement procedures, and the apparently limitless creativity of judgment debtors in thwarting enforcement of judicial orders all combine to frustrate the realization of remedies by "successful" litigants in Indonesia. In practice, the enforcement of foreign arbitral awards has also proven to be difficult despite Indonesia's ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Indonesia's relatively poor record

in ensuring that solvent judgment debtors satisfy their obligations cannot help but undercut the ultimate confidence of private investors in any type of venture.

Recommendations: Several possible avenues of improvement may be identified: (i) adoption of a revised and unified Code of Civil Procedure, (ii) adoption of pre-judgment and post-judgment bonding systems to facilitate practical enforcement of judgments and (iii) upgrading the state auction office and streamlining its procedures.

e. Revision of Civil and Commercial Codes

Both the Indonesian Civil Code and Commercial Code date from the mid-1800s and are largely ill-suited for their purpose in light of modern commercial realities.

Recommendations: Nothing short of a comprehensive revision of the Civil and Commercial Codes is required to bring Indonesian law up-to-date as the nation prepares to enter the 21st century.

6. Legal Validity of PPP Investment Structures

An overriding concern of a private participant in a PPP project is the legal validity of the overall investment structure in the host jurisdiction. Depending on the details of a particular project, some of the contractual forms and financing structures (e.g., escrows and revenue bonds) may be unfamiliar to local counterparts and authorities alike. Indonesia's experience with PPP projects (e.g., BOT projects) is rapidly growing but is still limited, particularly in the context of the Target Sectors. Given the complex of legal, commercial, and financial relationships created by a BOT structure, in a nascent market like Indonesia further comfort and encouragement would be provided to all participants by a basic law or regulation (i.e., a PPP Project Law) dealing with the overall legal framework of PPP projects in the Target Sectors.

Recommendations: An appropriate law or government regulation should be adopted to establish the overall legal framework of PPP projects in Indonesia. Such a regulation could recognize and define a range of acceptable types of PPP projects, set out approval procedures and protocols, clarify applicability of necessary legal mechanisms (e.g., use of escrow accounts and other security arrangements), recognize legal capacity of Project Companies and/or BUMDs to issue revenue bonds, identify any special investment incentives and establish binding dispute resolution mechanisms. Promulgation of a PPP Project Law could allay many of the concerns of the private sector, and reduce the current start-up time and expense of PPP project approval and implementation.

7. Land Titles and Water Rights

a. Land Titles

Land law in Indonesia is complex and sensitive for historical as well as socio-political reasons. Within the context of private sector involvement in PPP projects, concerns arise regarding (i) land acquisition and the applicability of eminent domain powers, (ii) limited use land rights akin to easements, and (iii) the duration of land titles. Although private sector land acquisition continues to be a time-consuming and expensive undertaking, that concern will be alleviated to the extent that PPP projects rely on the Governmental counterpart to exercise its powers of eminent domain to acquire necessary land. Limited use rights similar to easements, however, are not recognized under the Basic Agrarian Law of 1960. Additionally, investors can be expected to require absolute assurance that the duration of the validity of relevant land titles will correspond to the lifetime of the project.

Recommendations: Given the substantial capital investments typically required in PPP projects, an absolute assurance of continuing land title validity must be obtained by the developers and their creditors. Ideally, the conditional right to "extend" and "renew" HGB land titles should be replaced by a system of long-term absolute land rights. Moreover, the specialized land needs of some PPP projects should be reflected in new laws or regulations recognizing land interests in the nature of easements.

b. Water Rights

Due to pressures created by population growth and economic development, water resource management will become increasingly important to ensure that the competing demands for this limited resource are fully recognized, priorities of water use are established and implemented and that the rights and obligations of both the private and public sectors are clearly delineated. Especially in the water supply and waste water sectors, clear and certain rights relating to the use of bulk water supplies are of paramount importance to private participants in PPP projects.

Recommendations: Existing laws and regulations provide a solid basis upon which to build an improved and integrated water rights system. Extensive research and analysis in this area has already been conducted, and the resulting recommendations are essentially sound and sensible. As a first step, implementing guidelines under MOPW Reg. 49/90 should be issued providing specific guidance regarding the overall rights and obligations of the holders of water rights as well as the Government, including the nature of rights granted, the forms of granting instruments, the duration of the grant, rights and

procedures regarding modification, renewal and termination of the grant and the circumstances under which the grant may be transferred.

8. Access to Sufficient Funding Sources

The capital requirements for major infrastructural projects are huge. A key concern, therefore, is to ensure that the sponsors and investors in such projects have sufficient access to capital sources, both onshore and offshore.

Access to offshore funding sources by Governmental entities and apparently all PPP projects (due to the broad interpretation of "linkage") is severely restricted by the requirement of PKLN Team approval and queueing procedure. Moreover, State Banks, which represent a major pool of domestic capital, are prohibited from providing loans to foreign-invested PPP projects. In addition to reconsidering these restrictions, creative financing alternatives should be explored.

Revenue bonds, if structured properly, will attract capital investors, particularly those with existing capital reserves matched by long-term liabilities (such as pension funds and insurance reserves). The Indonesian commercial paper market is only just developing and issues relating to revenue bonds include tariff covenants, the legal status of bondholder liens and the nature and source of credit enhancements.

Recommendations: Infrastructure projects directly related to the public welfare should be given priority by the PKLN Team. MOF Letter S-1603/90 should be amended to allow foreign-invested infrastructure projects in the Target Sectors to borrow from State Banks. Also, specific legal and regulatory steps should be taken to allow Regional Governments and BUMDs to issue revenue bonds and employ other appropriate financing tools. Empowering legislation and implementing decrees, as appropriate, should be developed in coordination with the MOF, BAPEPAM, MOHA, and representatives of Regional Governments and BUMDs with input from interested private entities such as securities advisors and underwriters.

9. Sufficient and Certain Project Revenues

From an investor's point of view, project financing is feasible only if (a) the forecast stream of revenues is both sufficient for all financing and operational purposes and (b) the forecasts are perceived as reasonably certain to be met. In the water supply sector, difficulties in meeting these two criteria stem from current regulations and policies related to the term of tariff rates (i.e., maximum

term of three (3) years) and tariff rate levels (rates not reflective of true costs). In the other two Target Sectors, similar concerns exist.

Recommendations: Current MOHA decrees that establish guidelines relating to water tariffs should be amended to permit longer maximum tariff rate terms and/or to allow rates to be established that will reflect commercial and economic realities. Similar tariff mechanisms should be established for the other Target Sectors.

10. Security Interests and Credit Support

Given the long-term nature of the credit risks involved, together with the amounts of capital at risk and the limited track record of Regional Governments and BUMDs in PPP projects in the Target Sectors, investors will be keenly interested in the security interests obtained over the project and the availability of third-party credit support.

As indicated in Section 5.d. above, the practical enforcement of remedies in Indonesia is difficult and uncertain, and same types of security interests frequently required by creditors (e.g., fiduciary assignments of operating licenses) may not be permitted under Indonesian law and practice.

Moreover, normal types of third-party credit support such as bond insurance or governmental guarantees may not be available, at least as a practical matter, in Indonesia. Bank guarantees or standby letters of credit, however, may be one means of providing creditors and investors sufficient comfort to place their capital at risk in such PPP projects.

Recommendations: The legal basis of fiduciary assignments needs to be established and/or clarified. More specifically, fiduciary assignments relating to revenue encumbrances and operating license transfers within the context of PPP projects must be addressed. The establishment of a registration system for fiduciary transfers of proprietary rights is long overdue.

Existing restrictions on Governmental and State Banks guarantees should be reconsidered within the context of PPP projects and, perhaps, relaxed. Express authorization for the issuance of long-term guarantees or standby letters of credit by potential guarantor banks, including State Banks, should be adopted. Government should consider taking steps to foster the creation of bond insurance companies.

RINGKASAN

Kertas kerja ini berisi penelitian serta analisa yang luas dari kejanggalan-kejanggalan, kekurangan-kekurangan dan kekosongan hukum dalam kerangka hukum dan peraturan mengenai keterlibatan pihak swasta dalam proyek-proyek PSP dan PPP pada Sektor-sektor Sasaran. Kertas kerja ini menyimpulkan bahwa kemajuan yang nyata dan substansial dapat dicapai dengan mula-mula departemen-departemen Pemerintah tertentu memusatkan perhatian pada kepentingan-kepentingan praktis utama dari pihak swasta mengenai sektor-sektor pokok/kunci. Singkatnya, diusulkan bahwa hal-hal berikut (di bawah ini) selayaknya diberikan prioritas perhatian:

1. Diperlukan pendekatan inter-departemen menuju pembentukan prosedur yang jelas dari persetujuan dan pelaksanaan proyek. Departemen Dalam Negeri dan Departemen Pekerjaan Umum adalah departemen-departemen kunci dan masing-masing secara berdikari telah menerbitkan prosedur yang dapat diterapkan dan sudah sepantasnya dilakukan, tetapi koordinasi dari usaha-usaha ini sangat dibutuhkan untuk mencegah konflik dan ketidakjelasan. Ketentuan-ketentuan yang berhubungan dengan perijinan dan pemindahan, pengakhiran dan pelaporan lebih lanjut serta persyaratan-persyaratan setelah persetujuan harus diatur di dalam bentuk Keputusan Menteri Bersama, Peraturan Pemerintah atau mungkin terintegrasi ke dalam keseluruhan Peraturan atau Undang-undang Proyek PPP.

2. Petunjuk lebih lanjut mengenai penerapan hukum pajak Indonesia untuk proyek PPP merupakan hal yang mendasar, khususnya yang berkenaan dengan PPN, pajak-pajak impor dan biaya-biaya yang berhubungan dengan hal itu, pajak-pajak jasa konstruksi dan pajak yang dipotongkan dari pembayaran luar negeri. Menteri Keuangan telah mengambil langkah-langkah pertama sehubungan dengan hal ini dengan mengeluarkan Keputusan Menteri Keuangan No. 248/95 dan penjelasan lebih lanjut dalam hal ini akan memungkinkan perencanaan pajak dan pengembangan model-model pembiayaan yang terpercaya, di mana keduanya merupakan prasyarat bagi investasi skala besar.

3. Pengalaman Indonesia dengan proyek PPP khususnya dalam Sektor-Sektor Sasaran relatif terbatas tetapi akan berkembang secara cepat dalam dekade mendatang. Undang-undang atau Peraturan Pemerintah yang membahas sebagian atau semua permasalahan yang berkembang dalam kertas kerja ini akan merupakan peraturan-peraturan dasar yang akan menghapus banyak hal yang tidak jelas yang hingga saat ini meliputi proyek PPP. BAPPENAS mungkin merupakan unit pemerintah yang paling tepat untuk mengambil langkah dalam pembentukan undang-undang atau peraturan tersebut.

4. Investor-investor swasta di bidang penyediaan air dan proyek pengolahan air limbah akan menuntut bahwa alokasi sumber-sumber air yang tersedia dilaksanakan dengan suatu cara di mana kebutuhan proyek mereka dilaksanakan dengan cara-cara yang adil dan rasional. Seiring dengan meningkatnya permintaan terhadap sumber-sumber air Indonesia yang terbatas, maka diperlukan pula peningkatan metode-metode dan sistem pengelolaan air yang lebih canggih. Dalam rangka mengatur dasar-dasar pengelolaan yang diperlukan, kertas kerja ini menyarankan Sistem Hak Penggunaan Air yang dibentuk sejalan dengan sistem yang direkomendasikan dalam Draft Report, Water Use Rights System yang disponsori Menteri Pekerjaan Umum. Sebagai langkah pertama, pelaksanaan petunjuk di bawah Peraturan Menteri Pekerjaan Umum No. 49/90 harus segera ditetapkan.

5. Akses terhadap sumber pembiayaan yang memadai adalah merupakan suatu kondisi "sine qua non" dari partisipasi swasta di dalam proyek PPP. Khususnya sehubungan dengan sifat dasar dari pembangunan infrastruktur Sektor-sektor Sasaran, Menteri Keuangan harus mempertimbangkan pembatasan-pembatasan tertentu yang mempengaruhi pembiayaan proyek-proyek PPP, sebagai contoh adalah larangan dari Bank Pemerintah untuk membiayai proyek penanaman modal asing dan persyaratan persetujuan dari Tim PKLN terhadap pembiayaan luar negeri atas proyek-proyek yang berhubungan dengan Pemerintah Indonesia.

Di bawah ini merupakan ringkasan analisa dan saran-saran yang termuat di dalam kertas kerja ini:

1. Dasar Hukum bagi Partisipasi Swasta

Dasar hukum untuk proyek-proyek PSP (contoh: kontrak-kontrak jasa) pada dasarnya berbeda dengan dasar hukum untuk proyek-proyek PPP (contoh: perjanjian penyertaan modal yang besar), dan harus dipertimbangkan secara terpisah. Dalam hal proyek-proyek PPP, peraturan-peraturan khusus yang berhubungan dengan Sektor-sektor Sasaran harus diperhitungkan.

a. Proyek-proyek PSP

Peraturan-peraturan pengadaan yang diatur dalam Keppres 16/94 pada umumnya menetapkan dasar hukum bagi sektor swasta untuk menjual barang-barang dan jasa untuk Pemerintah Indonesia. Berdasarkan ketentuan-ketentuannya, Keppres 16/94 tidak mencakup (i) usaha pengadaan barang-barang dan jasa-jasa bagi BUMD untuk tujuan-tujuan "operasi/eksploitasi" dan (ii) "proyek-proyek instalasi air bersih" yang dijalankan oleh PDAM-PDAM. Pengecualian tipe-tipe usaha pengadaan barang ini dari ruang lingkup Keppres 16/94 menciptakan ketidakpastian sehubungan dengan apakah proyek-proyek

khusus PSP akan dipertimbangkan dalam ruang lingkup Keppres 16/94 dan juga mengenai prosedur-prosedur yang harus diikuti oleh pihak swasta sehubungan dengan kontrak-kontrak yang tidak tercakup dalam Keppres 16/94.

Saran-saran : Penjelasan sehubungan dengan ruang lingkup yang tepat dari Keppres 16/94 sangat diperlukan, sebagaimana halnya kumpulan contoh dari peraturan-peraturan pengadaan barang BUMD yang diterapkan oleh BUMD. Baik Tim EKKU maupun Tim Keppres 6/95 yang baru dibentuk harus mengambil peran utama sehubungan dengan hal ini.

b. **Proyek-proyek PPP**

Proyek-proyek PPP tidak termasuk dalam Keppres 16/94. Dasar hukum partisipasi swasta dalam proyek-proyek infrastruktur dengan modal besar dalam Sektor-sektor Sasaran hanya dapat ditemukan dengan cara merujuk pada bermacam-macam undang-undang dan peraturan-peraturan termasuk undang-undang dan peraturan-peraturan umum tentang penanaman modal serta pengaturan-pengaturan sektor khusus oleh pemerintah di tiap Sektor-sektor Sasaran.

Dasar hukum partisipasi swasta di proyek-proyek PPP penyediaan air pada umumnya diatur dengan baik, seperti dapat ditemukan dan dilihat di dalam Peraturan Pemerintah No. 20 tahun 1994, Undang-undang No. 11 tahun 1974 dan undang-undang serta peraturan-peraturan lainnya yang bersangkutan. Namun demikian, IPU terbaru yang diterbitkan oleh BKPM nampaknya menetapkan beberapa kejanggalan pada tipe-tipe proyek-proyek yang terbuka untuk sektor-sektor swasta serta ditentukan pula lokasi-lokasi geografis dimana proyek-proyek ini dapat dilaksanakan.

Saran-saran : Status hukum dari IPU harus diperjelas. Selanjutnya, pembatasan-pembatasan yang tidak penting sehubungan dengan tipe-tipe proyek dan lokasi-lokasi geografis harus dihapuskan.

Dasar hukum partisipasi swasta di proyek-proyek PPP air limbah ditetapkan oleh Peraturan Pemerintah No. 20 tahun 1990, tetapi hanya sedikit pedoman/petunjuk yang diberikan mengenai perizinan dan sifat dasar dan bidang dari partisipasi tersebut. Undang-undang dan peraturan-peraturan mengenai penanaman modal, termasuk DNI dan IPU, tidak menyebutkan apapun mengenai partisipasi swasta dalam proyek-proyek air limbah sehingga timbul anggapan bahwa partisipasi tersebut terbuka.

Saran-saran: Pedoman pemerintah lebih lanjut dalam bentuk Keputusan Menteri akan membantu dalam memperkuat dasar hukum keterlibatan pihak swasta dalam proyek-proyek PPP pengelolaan air limbah.

Satu-satunya dasar hukum positif untuk partisipasi swasta dalam Proyek-proyek PPP sampah ditemukan di IPU yang terbaru yang mengijinkan tipe-tipe tertentu proyek-proyek sampah, merinci tipe-tipe tertentu dari pengaturan-pengaturan kerjasama dengan pemerintah dan menentukan lokasi-lokasi tertentu di mana proyek-proyek itu dapat dilaksanakan. Dengan bertambah pentingnya pengelolaan sampah di Indonesia, sangatlah penting adanya perhatian terhadap hukum dan peraturan-peraturan dalam sektor ini.

Saran-saran: Selaras dengan komentar-komentar kami terhadap proyek-proyek PPP penyediaan air, kami menyarankan agar status hukum IPU harus diperjelas dan pembatasan-pembatasan yang tidak penting berdasarkan tipe-tipe dan lokasi-lokasi proyek agar dihilangkan. Begitu juga halnya, pembatasan-pembatasan yang tidak penting pada struktur-struktur kerjasama yang dapat dilakukan juga harus dihilangkan. Terakhir, dengan pentingnya sektor ini, undang-undang dan peraturan yang terpisah harus ditetapkan dalam membentuk dasar yang kokoh bagi partisipasi swasta.

2. Dasar hukum untuk partisipasi Pemerintah

Partisipasi swasta di proyek-proyek PPP atau PSP memerlukan kepastian, bahwa terdapat dasar hukum yang sah dan berlaku untuk tindakan-tindakan dan komitmen-komitmen dari pihak pemerintah. Pada umumnya, sebenarnya semua tanggung jawab atas pekerjaan-pekerjaan dibidang pekerjaan umum untuk Sektor-sektor Sasaran telah diserahkan kepada Pemerintah Daerah (Daerah Tingkat I) dan Kabupaten/Kotamadya (Daerah Tingkat II). Dengan memperhatikan seluruh wewenang pengawasan yang dimiliki oleh Pemerintah Pusat (termasuk Menteri Pekerjaan Umum dan Menteri Dalam Negeri), Pemerintah Daerah (dan dalam banyak hal BUMD-BUMD) memiliki tanggung jawab utama dalam pengembangan, pelaksanaan dan perawatan proyek-proyek infrastruktur dalam Sektor-sektor Sasaran.

a. Pemerintah Daerah

Dasar hukum Pemerintah Daerah untuk bekerjasama dengan "pihak ketiga" (termasuk badan-badan swasta) diatur dalam Peraturan Menteri Dalam Negeri 3/86 dan Penjelasan Resminya. Penjelasan Resmi berisi kejanggalan-kejanggalan yang serius terhadap fleksibilitas dari Pemerintah Daerah untuk bekerjasama dengan pihak swasta dengan mengatur bentuk-bentuk dan syarat-syarat kontrak di mana Pemerintah Daerah dapat berpartisipasi. Pemerintah Daerah oleh karena itu dibatasi untuk dapat melakukan bentuk kerjasama komersial yang feasible lainnya dengan pihak swasta.

Saran-saran : Peraturan Menteri Dalam Negeri 3/86, atau paling sedikit Penjelasan Resminya, harus ditarik kembali dengan tujuan agar pendekatan yang tertuang dalam Peraturan Menteri Dalam Negeri 4/90 dalam mengatur

kerjasama antara BUMD-BUMD dan pihak ketiga yang lebih fleksibel dapat tercapai.

b. **BUMD-BUMD**

Dasar hukum BUMD-BUMD untuk bekerjasama dengan pihak ketiga secara teoritis tidak jelas mengingat status "lame duck/peraturan yang sudah dicabut tetapi masih berlaku" dari UU No. 5/tahun 1962, dan pembatasan-pembatasan yang mendasar yang tampaknya bertujuan untuk menciptakan kemampuan hukum bagi BUMD-BUMD untuk bekerjasama dengan sektor swasta di bidang penyediaan air, dan kemungkinan proyek-proyek infrastruktur lainnya di Sektor-sektor Sasaran. Undang-undang No. 6 tahun 1969 mengantisipasi pencabutan dan penggantian Undang-undang No. 5 tahun 1962, tetapi sampai saat ini Undang-Undang No. 5 tahun 1962 tetap dijadikan acuan. Meskipun undang-undang selanjutnya (contoh : Undang-undang No. 11 tahun 1974), peraturan-peraturan (contoh: PP 20/1994) dan dalam praktek (contoh: keberadaan proyek-proyek PPP penyediaan air) semuanya mendukung secara faktual pencabutan pembatasan-pembatasan yang ditekankan pada Pasal 5 ayat 4 dari Undang-undang No. 5 tahun 1962, keberadaannya terus menciptakan permasalahan-permasalahan mengenai berlakunya Undang-undang No. 5/1962.

Sebagai tambahan, ruang-lingkup Keppres 16/94 membutuhkan penjelasan dalam konteks proyek-proyek PSP dan PPP dalam Sektor-sektor Sasaran.

Saran-saran : Undang-undang No. 5 tahun 1962 harus dicabut dan diganti dengan undang-undang yang baru mengenai BUMD-BUMD di mana harus diperhitungkan perubahan-perubahan dari struktur pemerintahan, kebutuhan dan rencana-rencana yang telah tercapai selama 30 tahun terakhir serta kebutuhan-kebutuhan pembangunan Indonesia di masa yang akan datang. Demikian pula terhadap Keppres 16 tahun 1994, Tim EKKU atau Tim Keppres 6/1995 harus mengeluarkan penjelasan-penjelasan yang dibutuhkan.

3. **Prosedur-prosedur dan Protokol-protokol dari Perijinan dan Pelaksanaan Proyek**

Peraturan-peraturan pelaksanaan mengenai pengaturan kerjasama antara BUMD-BUMD dan pihak ketiga menurut Keputusan Menteri Dalam Negeri No. 4 tahun 1990 tercantum dalam Instruksi Menteri Dalam Negeri No. 9 tahun 1995 yang baru diterbitkan, tetapi kedua peraturan tersebut tidak menjelaskan peranan instansi pemerintah tertentu termasuk BAPPENAS, Menteri Pekerjaan Umum, Menteri Keuangan dan Pemerintah Daerah yang bersangkutan. Satu hal yang lebih penting yang tidak dicantumkan dalam kerangka peraturan ialah kekurangan yang menyeluruh dari peraturan-peraturan

pelaksanaan sehubungan dengan kerjasama pihak swasta dengan BUMN-BUMN dan Pemerintah Daerah, meskipun tidak dicantumkannya tidak merupakan hal yang utama dalam konteks Sektor-sektor Sasaran.

Koordinasi peranan dan wewenang berbagai badan pemerintah sangat penting untuk menghindarkan pihak swasta dari kewajiban untuk memenuhi permintaan-permintaan ganda atau yang saling bertentangan dari badan-badan Pemerintah.

Dalam suatu contoh yang baru-baru ini terjadi, kekurangan tersebut telah diatasi, dengan pendekatan ad hoc, dengan pembentukan suatu tim koordinasi khusus yang dipimpin oleh Menteri Pekerjaan Umum, tetapi peraturan ini terlalu penting jika hanya diatasi dengan dasar kasuistis.

Saran-saran : Suatu tanggung jawab yang mendasar untuk Pemerintah Indonesia adalah menetapkan suatu prosedur antar departemen untuk persetujuan dan pelaksanaan proyek-proyek tersebut yang terkoordinasi. Suatu kesepakatan internal atas prosedur-prosedur dan protokol-protokol harus dapat dicapai dan hal ini harus tercermin dalam suatu peraturan Pemerintah yang sesuai, misalnya Keputusan Bersama Menteri, Keputusan Presiden, Peraturan Pemerintah atau Undang-undang tentang Proyek PPP.

4. **Akses yang tepat waktu terhadap Informasi Hukum**

Kurangnya kemudahan akses untuk mendapatkan informasi yang up-to-date adalah suatu hambatan yang cukup besar dalam meningkatkan partisipasi swasta dalam Sektor-sektor Sasaran dan bidang ekonomi lainnya. Lembaran Negara dan bermacam-macam tambahannya tidak lengkap dan juga tidak keluar tepat pada waktunya, dan sirkulasinya terbatas. Masalah-masalah ini menimbulkan ketidakpastian dan menurunkan kepercayaan pihak swasta. Sebagai tambahan, penelitian-penelitian yang dilakukan semata-mata untuk mengidentifikasikan undang-undang dan peraturan-peraturan yang relevan adalah berlebih-lebihan, hal ini mengakibatkan peningkatan biaya dan keterlambatan yang tidak perlu terjadi.

Saran-saran : Beberapa saran-saran khusus yang ditawarkan :

a. Mensyaratkan publikasi yang bersifat wajib dalam pengumuman harian resmi tentang semua undang-undang, peraturan-peraturan dan keputusan-keputusan sebelum hari berlakunya;

b. Memperbaiki dan memperluas sistem distribusi dari publikasi-publikasi pemerintah yang ada;

c. Melanjutkan usaha-usaha pihak swasta dan umum untuk meningkatkan komputerisasi data base informasi hukum;

d. Mengatur publikasi keputusan-keputusan pengadilan secara berkala dan sistimatis; dan

e. Mempertimbangkan subkontraktor swasta untuk membantu aktifitas tercantum pada b, c dan d diatas.

5. Persoalan-persoalan hukum dan peraturan-peraturan secara keseluruhan

Meskipun fokus dari kertas kerja ini terbatas pada penelitian terhadap kejanggalan-kejanggalan, kekurangan-kekurangan dan kekosongan-kekosongan yang terdapat pada undang-undang dan peraturan-peraturan yang berhubungan dengan proyek-proyek PSP dan PPP dalam Sektor-sektor Sasaran, masih ada suatu spektrum yang luas dari permasalahan-permasalahan umum yang terus berlanjut menjadi permasalahan serius yang dihadapi para investor di Indonesia. Hal ini mencakup permasalahan-permasalahan pajak, pembatasan-pembatasan tarif dan non-tarif impor secara substantif dan prosedural, sistem peradilan yang menanggung beban berlebihan dan dengan perangkat-perangkat yang tidak sehat, kesulitan-kesulitan praktis dalam pelaksanaan upaya hukum dan masalah Kitab Undang-undang Hukum Perdata dan Kitab Undang-undang Hukum Dagang yang sudah tidak sesuai dengan jaman.

Beberapa permasalahan tersebut telah merupakan subyek dari berbagai proyek-proyek reformasi hukum yang sudah berlangsung di Indonesia. Pembahasan tambahan dalam kertas kerja ini mengenai hal-hal yang perlu dipikirkan tersebut tidaklah bermaksud untuk mengurangi betapa pentingnya usaha-usaha tersebut; perbaikan undang-undang adalah penting untuk pengembangan kondisi hukum yang adil, terbuka, dapat dipercaya dan dapat dipastikan oleh investor-investor swasta. Analisa secara keseluruhan dari masing-masing persoalan ini diluar ruang lingkup dan tujuan makalah ini.

a. Undang-undang dan Administrasi Pajak

Dalam hal khususnya struktur-struktur pembiayaan yang rumit dalam proyek-proyek BOT dan BOO, permasalahan-permasalahan yang baru dan tidak lazim bagi badan-badan perpajakan yang berwenang mungkin timbul. Keputusan Menteri Keuangan No. 248 tahun 1995 membahas persoalan-persoalan pajak tertentu dari proyek-proyek BOT (tetapi masih membuka banyak persoalan-persoalan: dimana tidak dapat diterapkan pada BOO atau struktur pembiayaan yang lain, dan keputusan tersebut tidak mengatur PPN, Pajak Konstruksi, Pajak Impor atau pajak pendapatan atas pembayaran ke luar negeri). Administrasi undang-undang pajak tetap berlanjut lemah dan tidak konsisten.

Saran-saran : Tambahan penjelasan-penjelasan terhadap permasalahan pajak yang diidentifikasikan di atas sangat diharapkan. Perbaikan bagi administrasi pajak merupakan proyek jangka panjang yang memerlukan (i) program-program latihan dan pendidikan untuk pegawai-pegawai pajak (ii) prosedur-prosedur administrasi yang lebih baik (iii) keterbukaan dari interaksi-interaksi antara pegawai-pegawai pajak dan pihak swasta dan (iv) peningkatan sumber-sumber administrasi.

b. **Pengawasan impor dan administrasi**

Dalam beberapa proyek PPP atau PSP, kemampuan untuk mengimpor perlengkapan, mesin-mesin atau bahan-bahan material berdasarkan pembiayaan yang efisien dapat menjadi sangat penting untuk keberhasilan atau kegagalan proyek tersebut. Persoalan-persoalan ini berhubungan dengan (i) tingkat-tingkat tarif impor, (ii) pembatasan non-tarif impor termasuk lisensi impor dan persyaratan-persyaratan barter (counter-trade) dan (iii) penyelesaian administrasi pabean. Sehubungan dengan komitmen dalam Putaran Uruguay dari GATT, hambatan-hambatan tarif dan non-tarif di Indonesia secara bertahap dikurangi.

Saran-saran : Usaha-usaha reformasi dalam bidang ini harus dilanjutkan sejalan dengan GATT. Dibutuhkan usaha-usaha yang berkesinambungan untuk memperbaiki penyelesaian prosedur pabean dan operasi-operasi pelabuhan.

c. **Penyelesaian sengketa peradilan**

Sudah merupakan suatu persoalan yang diketahui umum dalam masyarakat bisnis di Indonesia di mana peradilan di Indonesia kurang mampu untuk memeriksa dan menyelesaikan perselisihan perdagangan yang adil, tidak memihak dan bebas. Subyek dari perbaikan peradilan adalah kompleks dan sensitif dan dibutuhkan usaha yang besar untuk menciptakan kemajuannya.

Saran-saran : Usulan-usulan perbaikan yang bermacam-macam meliputi: (i) mengadakan peradilan komersial yang terpisah dengan hakim-hakim yang telah dilatih, (ii) program-program pelatihan hukum yang khusus dalam permasalahan-permasalahan hukum komersial, perusahaan dan keuangan, (iii) publikasi resmi dari putusan-putusan peradilan, (iv) membentuk mekanisme-mekanisme pilihan penyelesaian sengketa.

d. **Pelaksanaan upaya hukum**

Proses banding yang lama dan tidak memilikinya sistem jaminan yang memadai, prosedur pelaksanaan keputusan yang sudah tidak sesuai lagi dan lemahnya itikad debitor dalam menghindari pelaksanaan putusan-putusan

pengadilan, kesemua hal tersebut secara bersama-sama menyulitkan pelaksanaan upaya hukum oleh para yuris "terkemuka" di Indonesia. Dalam prakteknya, pelaksanaan keputusan arbitrasi asing telah terbukti sulit meskipun Indonesia telah meratifikasi Konvensi New York, tentang Pengakuan dan Pelaksanaan Keputusan Arbitrasi Asing. Prestasi Indonesia yang minim dalam menjamin agar para debitur yang mampu memenuhi kewajiban mereka, sulit untuk memberi kepastian kepada para investor di segala bidang usaha.

Saran-saran : Beberapa kemungkinan cara-cara untuk memperbaiki yang dapat dikemukakan (i) penetapan Kitab Undang-undang Hukum Acara Perdata yang telah diperbaiki dan yang berlaku secara manunggal (ii) penetapan sistem jaminan pra-peradilan dan pasca-peradilan untuk memudahkan pelaksanaan praktis putusan-putusan peradilan dan (iii) perbaikan di dalam tubuh badan lelang negara dan penyederhanaan prosedur-prosedurnya.

e. **Perbaikan dari Kitab Undang-undang Hukum Perdata dan Dagang**

Kitab Undang-undang Hukum Perdata Indonesia dan Hukum Dagang yang diundangkan sejak pertengahan tahun 1800-an secara realita sudah tidak cocok di perdagangan modern.

Saran-saran : Perubahan keseluruhan Kitab Undang-undang Hukum Perdata dan Hukum Dagang sangat diperlukan untuk memajukan hukum Indonesia seiring dengan persiapan bangsa Indonesia memasuki abad ke 21.

6. **Keabsahan hukum tentang struktur-struktur investasi PPP**

Kekhawatiran pihak swasta dalam proyek-proyek PPP ialah keabsahan hukum dari struktur investasi di wilayah jurisdiksi tempat di mana proyek dilaksanakan. Bergantung pada perincian-perincian suatu proyek, beberapa bentuk kontrak dan struktur pembiayaan (misalnya, escrows dan obligasi) mungkin tidak lazim bagi pihak-pihak lokal dan badan-badan yang berwenang. Pengalaman Indonesia dengan proyek-proyek PPP (misalnya: proyek-proyek BOT) yang berkembang pesat tetapi masih terbatas, khususnya dalam konteks Sektor-sektor Sasaran. Mengingat kompleksitas pembiayaan, komersiality dan hukum yang timbul dari struktur BOT dalam pasar yang berkembang seperti Indonesia dorongan dan kemudahan-kemudahan akan diberikan bagi semua pihak dengan adanya suatu undang-undang pokok atau peraturan pokok (misalnya suatu undang-undang proyek PPP) yang berkaitan dengan keseluruhan kerangka kerja dari proyek-proyek PPP dalam Sektor-sektor Sasaran.

Saran-saran: Suatu Undang-undang atau peraturan pemerintah yang sesuai harus ditetapkan untuk membentuk keseluruhan kerangka hukum proyek-proyek PPP di Indonesia. Peraturan semacam itu harus mengakui dan menetapkan suatu batasan dari jenis proyek PPP yang dapat diterima, menentukan prosedur dan protokol persetujuan, memperjelas daya berlaku mekanisme hukum yang diperlukan (misalnya, penggunaan rekening escrow dan bentuk jaminan lainnya), mengakui kapasitas hukum dari Perusahaan-perusahaan Proyek dan/atau BUMD-BUMD untuk menerbitkan obligasi, menetapkan insentif-insentif khusus dalam penanaman modal dan membentuk mekanisme penyelesaian sengketa yang mengikat. Penetapan suatu undang-undang Proyek PPP dapat meredam keragu-raguan pihak swasta, dan mengurangi waktu dan biaya untuk memperoleh persetujuan dan pelaksanaan proyek PPP.

7. Hak-hak atas Tanah dan Hak-hak atas Air

a. Hak-hak atas Tanah

Hukum mengenai tanah di Indonesia bersifat kompleks dan sensitif baik mengenai latar belakangnya maupun alasan-alasan sosial politiknya.

Dalam konteks keterlibatan pihak swasta dalam proyek-proyek PPP, permasalahan-permasalahan timbul mengenai (i) perolehan tanah dan daya berlaku dari wewenang pemerintah untuk membebaskan tanah bagi keperluan umum (ii) hak-hak penggunaan tanah yang terbatas seperti easement dan (iii) masa berlaku dari hak-hak atas tanah.

Meskipun perolehan tanah oleh sektor swasta tetap memakan waktu lama dan mahal, kekhawatiran tersebut akan diatasi sepanjang proyek-proyek PPP mempercayakan pihak pemerintah untuk melaksanakan haknya untuk memperoleh tanah bagi kepentingan umum dalam rangka memperoleh tanah yang diperlukan. Namun begitu, hak-hak penggunaan yang terbatas seperti easements tidak dikenal dalam Undang-undang Pokok Agraria tahun 1960. Sebagai tambahan, para investor dapat diharapkan untuk mensyaratkan kepastian yang absolut di mana tenggang waktu keabsahan hak-hak atas tanah yang berhubungan akan selaras dengan masa pelaksanaan proyek tersebut.

Saran-saran: Mengingat jumlah investasi yang khususnya disyaratkan dalam proyek-proyek PPP, suatu jaminan mutlak atas keabsahan hak atas tanah yang berkesinambungan harus didapatkan oleh para pengembang dan kreditornya. Idealnya, hak bersyarat untuk "memperpanjang" atau "memperbaharui" HGB harus diganti dengan suatu sistem hak-hak absolut atas tanah untuk jangka panjang. Lebih jauh, kebutuhan-kebutuhan khusus atas tanah dari beberapa proyek PPP harus tercermin dalam undang-undang atau

peraturan baru yang memberikan sifat-sifat kemudahan dalam penggunaan tanah.

b. Hak-hak atas Air

Diakibatkan oleh tekanan yang diciptakan oleh perkembangan populasi dan ekonomi, pengelolaan sumber daya air menjadi bertambah penting untuk menjamin pemenuhan segala permintaan yang juga terus meningkat terhadap sumber daya yang terbatas ini, maka skala prioritas dalam penggunaan air dibentuk dan dilaksanakan dan hak-hak dan kewajiban-kewajiban kedua belah pihak swasta dan publik dipaparkan secara jelas. Khususnya pada sektor-sektor penyediaan air dan pembuangan air limbah, hak-hak yang jelas dan pasti yang berhubungan dengan penggunaan air dalam jumlah besar adalah sangat penting bagi pihak-pihak swasta dalam proyek-proyek PPP.

Saran-saran : Undang-undang dan peraturan-peraturan yang ada memberikan dasar yang kuat guna membentuk suatu sistem hak-hak atas air yang berkembang dan terintegrasi. Penelitian dan analisis yang intensif di lingkungan telah dijalankan, dan hasil rekomendasi-rekomendasi adalah penting dan dapat diterima. Sebagai langkah pertama, peraturan pelaksanaan Peraturan Menteri Pekerjaan Umum No. 49 tahun 1990 harus ditetapkan yang mengatur petunjuk khusus mengenai keseluruhan hak-hak dan kewajiban-kewajiban bagi pemegang hak-hak air, demikian halnya bagi Pemerintah termasuk sifat dari hak-hak yang diberikan, bentuk dari hak yang diberikan, masa berlaku hak yang diberikan. Hak-hak dan prosedur-prosedur mengenai perubahan, pembaharuan dan penghapusan hak tersebut dan kondisi-kondisi di mana hak tersebut dapat dialihkan.

8. Akses pada Pembiayaan Sumber-sumber yang Cukup

Persyaratan permodalan bagi proyek-proyek infrastruktur adalah sangat besar. Maka kunci kekhawatirannya, oleh karena itu, adalah untuk menjamin bahwa para pemberi sponsor dan para investor dalam proyek-proyek tersebut memiliki akses yang memadai terhadap sumber-sumber modal, baik dalam negeri maupun luar negeri.

Akses pada sumber-sumber pembiayaan luar negeri bagi badan-badan pemerintahan dan nampaknya bagi seluruh proyek-proyek PPP (mengingat interpretasi yang luas terhadap kata "terkait"), tertutup atau terbatas karena adanya persyaratan persetujuan oleh Tim PKLN dan prosedur antrian. Lebih lanjut, Bank-bank Pemerintah, yang merupakan pusat-pusat modal dalam negeri, dilarang untuk memberikan pinjaman kepada proyek-proyek PPP yang melibatkan modal asing. Alternatif-alternatif pembiayaan yang lain harus dicari sebagai tambahan untuk mempertimbangkan kembali pembatasan-pembatasan tersebut.

Obligasi, apabila diatur secara benar, akan menarik para penanam modal, khususnya bagi mereka yang memiliki cadangan modal jangka panjang (seperti halnya, dana-dana pensiun dan cadangan-cadangan asuransi). Perdagangan surat berharga di Indonesia baru saja berkembang dan permasalahan yang berhubungan dengan obligasi termasuk perjanjian-perjanjian tarif, status hukum pemegang obligasi dan sifat dan sumber dari peningkatan kredit.

Saran-saran: Proyek-proyek infrastruktur yang berhubungan langsung dengan kesejahteraan umum harus diutamakan oleh tim PKLN. Surat Menteri Keuangan No. S-1603/90 harus dirubah untuk memungkinan proyek-proyek infrastruktur yang melibatkan modal asing dalam Sektor-sektor Sasaran memperoleh dana dari Bank-bank Pemerintah. Juga langkah-langkah hukum khusus harus diambil untuk memungkinkan Pemerintah Daerah dan BUMD-BUMD untuk menerbitkan obligasi-obligasi dan mencari alat pembiayaan yang lain yang sesuai. Peraturan-peraturan dan Keputusan-keputusan pelaksanaan, sesuai dengan keperluan, harus ditetapkan secara terkoordinir dengan Menteri Keuangan, BAPEPAM, Menteri Dalam Negeri dan perwakilan-perwakilan Pemerintah Daerah dan BUMD-BUMD, juga dengan masukan-masukan dari badan-badan swasta yang terkait seperti konsultan-konsultan surat berharga dan para penjamin emisi.

9. Pendapatan Proyek Yang Cukup dan Pasti.

Dari sudut pandang seorang investor, pembiayaan proyek dapat dikatakan laik hanya apabila (a) perkiraan terhadap sumber pendapatan mencukupi tujuan pembiayaan dan operasional dan (b) perkiraan-perkiraan tersebut cukup meyakinkan untuk dapat dicapai. Dalam bidang penyediaan air, kesulitan-kesulitan untuk mencapai kedua kriteria tersebut bertumpu pada peraturan-peraturan dan kebijaksanaan yang ada yang berhubungan dengan jangka waktu penentuan tarif (misalnya maksimal jangka waktu untuk 3 (tiga) tahun) dan tingkatan tarif (tarif tidak mencerminkan biaya yang sebenarnya). Di dalam dua Sektor Sasaran lainnya, terdapat juga permasalahan yang sama.

Saran-saran: Keputusan-keputusan Menteri Dalam Negeri yang ada yang berhubungan dengan pedoman tarif air harus diubah untuk memberikan ijin yang lebih lama untuk jangka waktu penentuan tarif dan/atau memberikan keleluasaan untuk menentukan tarif yang mencerminkan kenyataan keadaan perniagaan dan ekonomi. Mekanisme tarif yang sama juga harus dilakukan untuk Sektor-sektor Sasaran lainnya.

10. Jaminan dan Dukungan Kredit

Memperhatikan resiko-resiko kredit jangka panjang yang ada, bersama dengan jumlah modal yang dipertaruhkan dan sedikitnya pengalaman

Pemerintah Daerah dan BUMD-BUMD dalam proyek-proyek PPP pada Sektor-sektor Sasaran, para investor akan sangat mengharapkan jaminan yang didapatkan dari proyek dan tersedianya dukungan kredit dari pihak ketiga.

Sebagaimana tercantum dalam Bagian 5.d diatas, dalam praktek pelaksanaan upaya hukum di Indonesia adalah sulit dan tidak jelas, dan pelaksanaan jaminan yang sering dibutuhkan oleh para kreditur (misalnya peralihan ijin operasi secara fidusia) mungkin tidak diperbolehkan oleh hukum Indonesia dan secara praktek.

Lebih dari itu, bentuk-bentuk umum dari dukungan kredit pihak ketiga seperti asuransi obligasi atau garansi pemerintah mungkin tidak tersedia, setidaknya dalam praktek di Indonesia. Garansi bank atau standby L/C, bagaimanapun, mungkin dapat merupakan salah satu alat yang dapat menenangkan para kreditor dan investor untuk mempertaruhkan modal mereka di proyek-proyek PPP.

Saran-saran: Dasar hukum penyerahan gadai perlu untuk dibentuk dan/atau diperjelas. Lebih khususnya, penyerahan secara fidusia yang berhubungan dengan pengikatan-pengikatan penghasilan dan pemindahan ijin operasi dalam konteks proyek-proyek PPP harus ditetapkan. Pembentukan sistem pendaftaran hak-hak pemilikan dari pemindahan secara fidusia sudah seharusnya telah dilaksanakan sebelumnya.

Pembatasan-pembatasan yang ada mengenai jaminan-jaminan Pemerintah dan bank-bank pemerintah harus dipertimbangkan kembali dalam konteks, atau bahkan dihapuskan, untuk kepentingan proyek-proyek PPP. Pernyataan pemberian kekuasaan untuk mengeluarkan garansi-garansi jangka panjang atau standby letter of credit oleh bank-bank pemberi garansi yang potential, termasuk bank-bank pemerintah, harus ditetapkan. Pemerintah harus mempertimbangkan langkah-langkah untuk membantu perkembangan pembentukan perusahaan asuransi obligasi.

MOPW Decree 249/95:		Minister of Public Works Decree No. 249/KPTS/1995 regarding Establishment of Coordinating Team for Preparing Water Supply Projects in Jakarta and its Surrounding Areas with the Involvement of the Private Sector (July 6, 1995)
MOPW Reg. 49/90	:	Minister of Public Works Regulation No. 49/PRT/1990 regarding Procedures and Requirements on the License to Use Water and/or Water Source (December 5, 1990)
MPR	:	Majelis Permusyawaratan Rakyat (The People's Consultative Assembly)
Narrative Description:		The Narrative Description of Indonesian Laws and Regulations on Public Private Partnerships and Private Sector Participation in the Sectors of Water Supply, Waste Water and Solid Waste prepared by SSEK and submitted in November 1994 pursuant to the PURSE/SSEK Subcontract
NPWP	:	Nomor Pokok Wajib Pajak (Tax Identification Number)
PAM Jaya	:	Perusahaan Air Minum Jakarta Raya (the PDAM for DKI Jakarta)
PBH	:	Perjanjian Bagi Hasil (revenue sharing patterns)
PDAM	:	Perusahaan Daerah Air Minum (Drinking Water Regional Enterprise)
PDK	:	Perusahaan Daerah Kebersihan (Regional Sanitation Enterprise)
PD PAL Jaya	:	Regional Corporation for Waste Water Management for DKI Jakarta
Peraturan Pemerintah	:	Government Regulations (PP)
Peraturan Pemerintah Pengganti Undang-Undang	:	Government Regulations in Lieu of Laws which are statutes promulgated by the President

PERDA	:	Peraturan Daerah (Regional Regulation)
Perda DKI 11/93	:	DKI Jakarta Regional Regulation No.11 of 1993 on the Provision of Drinking Water Services (December 13, 1993)
Permen	:	Peraturan Menteri (Ministerial Regulation)
Persero	:	A type of state-owned enterprise in the form of a limited liability company
Perusahaan Negara:		A type of state-owned enterprise not in the form of a limited liability company
PKLN Decree 5/91	:	Decision of the Chairman of the Commercial Offshore Loans Management Coordinating Team No.KEP-05/K.TIM.PKLN/1991
PKLN Team	:	Commercial Offshore Loan Management Team established under Keppres 39/91
PMA Company	:	Penanaman Modal Asing (Foreign Capital Investment) Company formed under the Foreign Investment Law
PMDN Company	:	Penanaman Modal Dalam Negeri (Domestic Capital Investment) Company formed under the Domestic Investment Law
PP	:	Peraturan Pemerintah (Government Regulation)
PP 18/53	:	Government Regulation No.18 of 1953 regarding the Implementation of Transfer of Part of the Central Government's Affairs in the field of Public Works to the Provinces and Confirmation of Public Works Affairs of the Municipalities, Big Cities and Small Towns in Java (April 16, 1953)
PP 14/87	:	Government Regulation No.14 of 1987 regarding Transfer of Part of Governmental Affairs in the Field of Public Works to the Regions (June 27, 1987)
PP 20/90	:	Government Regulation No.20 of 1990 regarding Water Pollution Control (June 5, 1990)

PP 22/90	:	Government Regulation No.22 of 1990 regarding Procedures of Water Arrangements (June 14, 1990)
PP 19/94	:	Government Regulation No.19 of 1994 regarding the Management of the Waste of Hazardous and Toxic Materials (April 30, 1994)
PP 20/94	:	Government Regulation No.20 of 1994 regarding Share Ownership in Companies Established Within the Framework of Foreign Capital Investment (May 19, 1994)
PPP	:	Public Private Partnership (Capital-Intensive Projects); a generic term, referring to any capital-intensive infrastructure project which is developed, financed and constructed by a private sector organization with the authorization and support of an agency of government to provide a public infrastructure service
Project Company	:	A generic term for any corporate entity having principal operating and management authority over a PPP project. Its shareholders may be any one or a mix of private or public entities and may refer to a privately held or publicly listed company.
PSP	:	Private Sector Participation (Non-Capital-Intensive Projects); a generic term, referring to any non-capital-intensive infrastructure project which does not involve large capital expenditures, but which will provide a service under a contractual agreement with the GOI or its designated representative to provide a public domain infrastructure service
PT	:	Perseroan Terbatas (Limited Liability Company)
PUOD	:	Pemerintahan Umum Otonomi Daerah (Directorate of Public Administration and Regional Autonomy) under MOHA
PURSE Project	:	USAID funded project on Private Participation in Urban Services
Regional Enterprises	:	See BUMD

Regional Government	:	Provincial or Special Regional Governments (such as DKI Jakarta and Yogyakarta), also called Daerah Tingkat I
RV	:	Reglement op de Rechtsvordering (a procedural code that exists in addition to the HIR)
SMAA Reg.2/93	:	State Minister of Agrarian Affairs/Head of the National Land Bureau Regulation No.2 of 1993 regarding Procedure for acquiring Location License and Right on Land for Companies in the Framework of Capital Investment (October 23, 1993)
Sekneg	:	Sekretariat Negara (State Secretariate)
SP	:	Surat Persetujuan (Letter of Approval) issued by BKPM to the applicants of approved projects under the Domestic Investment Law
SPPP	:	Surat Pemberitahuan Persetujuan Presiden (Notification of Presidential Approval) delivered by BKPM to the applicants of approved projects under the Foreign Investment Law.
SSEK	:	Soewito, Suhardiman, Eddymurthy & Kardono, Indonesian Legal Consultants
State Gazette of the Republic of Indonesia	:	The official governmental publication of the Republic of Indonesia (Lembaran Negara Republik Indonesia)
Surat Edaran	:	Circular Letters issued from Government Departments and their Agencies
Target Sectors	:	Water Supply, Waste Water and Solid Waste Management
Tingkat I	:	Regional or Provincial Government or Level I
Tingkat II	:	Municipal Government or Level II
WURS	:	Water Use Rights System
WURS Draft Report	:	Draft Report, Water Use Rights System, Java Irrigation Improvement and Water Resources Management Project (October 1994)

SCOPE AND PERSPECTIVE OF ANALYSIS

This paper builds and expands upon the work contained in the Narrative Description of Indonesian Laws and Regulations on Public - Private Partnerships and Private Sector Participation in the Sectors of Water Supply, Waste Water and Solid Waste (PURSE Report No.101.01/94/016, November 1994). Whereas the purpose of the Narrative Summary was to identify the relevant existing laws and regulations and provide a synopsis of their content, the purpose of this paper is to analyze those laws and regulations to determine their adequacy in respect of PPP and PSP projects in the Target Sectors.

In structuring the analysis, we have first tried to identify the basic concerns of private sector participants in entering into the types of projects under consideration. By doing so, we provide a focus for the analysis, i.e., to what extent do existing laws and regulations meet these basic concerns. We are mindful, of course, that the concerns of the private sector must be balanced against public policy goals and constraints. Although we have attempted to take into account public policy realities, the objective of this paper is to identify existing legal and regulatory impediments faced by the private sector and offer recommendations as to how existing laws and regulations could be changed, or new ones adopted, in order to remove those impediments.

The analysis and recommendations contained in this paper must be viewed within a broader contextual framework. Issues relating to uniform engineering standards, environmental and public health safeguards, public access to services as well as uniform accounting and auditing standards must all be considered in creating a framework for urban infrastructure development that will provide sufficient incentives for the private sector while assuring that the needs and concerns of the Indonesian people are adequately addressed. It is hoped that this paper, focusing on legal and regulatory issues, will make a useful contribution toward the building of that overall framework.

In preparing this paper, it was necessary to recognize a fundamental difference between PPP projects and PSP projects. PPP projects, by definition, are "capital-intensive" and normally look to private sources of capital (whether equity or debt) for financing. PSP projects, on the other hand, are non-capital-intensive, normally taking the form of an operating or service contract. Given the greater risk assumed by private participants (whether developers, lenders or investors) in PPP projects, it is natural that the scope of their legal and regulatory concerns would be broader.

Accordingly, we have identified ten (10) basic legal and regulatory areas of concern, the first five (5) of which are relevant to private participants in either PSP or PPP projects, and the second five (5) of which are typically of greater concern to PPP participants.

The ten (10) critical areas of concern are briefly identified as follows:

1. Clear legal basis for private sector participation;
2. Clear legal basis for public sector participation;
3. Clear procedures and protocols of project approval and implementation;
4. Timely access to all relevant legal information;
5. Reasonable confidence in overall legal and regulatory system;
6. Legal validity of investment structure;
7. Clear and definite land titles and water rights;
8. Access to sufficient funding;
9. Sufficient and certain project revenues; and
10. Adequate and enforceable security interests and/or credit support.

The preparation of this paper has not been a mere exercise in abstract analysis. As practising legal consultants providing services in numerous urban infrastructure projects in Indonesia, we have been able to draw upon our real-world experience to better understand and express the concerns of private sector companies contemplating PSP or PPP projects in the Target Sectors and, we believe, arrive at conclusions and concrete recommendations that are both practical and meaningful.

EXECUTIVE SUMMARY

This paper is a broad survey and analysis of the constraints, deficiencies and omissions in the legal and regulatory framework affecting private sector involvement in PPP and PSP projects in the Target Sectors. It concludes that real and substantial improvement can be achieved by initially focusing the attention of specified Government departments on certain key areas of the greatest practical concern to the private sector. In short, it is recommended that the following matters be given attention on a priority basis:

1. An interdepartmental approach toward establishing clear procedures of project approval and implementation is required. MOHA and MOPW are the key departments and each has independently addressed the issue of appropriate and applicable procedures, but the coordination of these efforts is needed to prevent confusion and conflict. Detailed guidance relating to licensing, assignments, terminations and post-approval reporting and permitting requirements should be provided in the form of a Joint Ministerial Decree, Government Regulation or, perhaps, integrated into an overall PPP Project Law or Regulation.

2. Further guidance regarding the application of Indonesian tax law to PPP projects is essential, particularly in respect of VAT, import duties and related charges, construction taxes and withholding taxes on offshore payments. MOF has taken the first steps in this regard by issuing MOF Decree 248/95, and further clarification along these lines would permit meaningful tax planning and the development of reliable financial models, both of which are prerequisites to large-scale investment.

3. The experience of Indonesia with PPP projects, particularly in the Target Sectors, is relatively limited but will grow rapidly over the next decade. A Law or Government Regulation addressing many if not all of the issues raised in this paper would establish ground rules that would remove much of the uncertainty currently surrounding PPP projects. BAPPENAS would perhaps be the most suitable Government entity to take the lead in the formulation of such a law or regulation.

4. Private sector investors in water supply and waste water projects will insist that allocation of available water resources be done in such a way that their project-needs are dealt with in a fair and rational manner. As demands on the limited water resources of Indonesia continue to grow, increased sophistication in water management systems and methods will be required. In order to provide the basis for the necessary management, this paper recommends that a formal Water Use Rights System (WURS) be established along the lines of the system

recommended in the WURS Draft Report sponsored by MOPW. As a first step, implementing guidelines under MOPW Reg. 49/90 should be issued.

5. Access to adequate sources of financing is a sine qua non of private participation in PPP projects. Especially in light of the vital nature of Target Sector infrastructure development, the MOF should reconsider the necessity of certain restrictions affecting the financing of PPP projects, e.g., the prohibition of State Bank funding of foreign invested projects and the requirement of PKLN approval of offshore financings of projects "linked" with the GOI.

Following is a synopsis of the analysis and recommendations contained in this paper.

1. Legal Basis for Private Participation

The legal basis for PSP projects (i.e., service contracts) differs fundamentally from the legal basis for PPP projects (i.e., capital-intensive equity arrangements) and each must be separately considered. Moreover, in the case of PPP projects particular regulations relating to each of the Target Sectors must also be taken into account.

a. PSP Projects

The government procurement regulations set out in Keppres 16/94 generally provide the legal basis for the private sector to sell goods and services to the GOI. By its terms, however, Keppres 16/94 excludes from its coverage (i) BUMD procurement of goods and services for "operational/exploitational purposes" and (ii) "clean water installation projects" undertaken by PDAMs. The exclusion of these types of procurement from the scope of Keppres 16/94 creates some uncertainty regarding whether a particular PSP project would be considered within the scope of Keppres 16/94 and also regarding the procedures that a private participant must follow in connection with non-Keppres 16/94 contracts.

Recommendations: Clarification regarding the exact scope of Keppres 16/94 would be welcome, as would a model set of BUMD procurement regulations for adaptation by BUMDs. Either EKKU or the newly established Keppres 6/95 Team should take a leading role in this regard.

b. PPP Projects

PPP projects are not covered by Keppres 16/94. Instead, the legal basis for private participation in capital-intensive infrastructure projects in the Target Sectors can only be found by referring to a variety of laws and regulations

including general investment laws and regulations as well as sector-specific government promulgations in each of the Target Sectors.

The legal basis for private participation in **PPP water supply projects** is generally well-founded as can be seen from a review of Government Regulation No.20 of 1994, Law No.11 of 1974 and other relevant laws and regulations. Nevertheless, the most current IPU issued by BKPM appears to place certain constraints on the types of projects open to private sector participation as well as the acceptable geographic locations of such projects.

Recommendations: The legal status of the IPU itself should be clarified. Moreover, all unnecessary restrictions related to project types and geographic locations should be eliminated.

The legal basis for private participation in **PPP waste water projects** appears to be established in Government Regulation No.20 of 1990, but there is little guidance given regarding the permitted nature and scope of such participation. The investment laws and regulations, including the DNI and IPU, are silent regarding private participation in waste water projects thereby raising a presumption that such participation is acceptable.

Recommendations: Further governmental guidance in the form of Ministerial Decree would be helpful to confirm the legal basis of private sector involvement in PPP waste water projects.

The only positive legal basis for private participation in **PPP solid waste projects** is found in the current IPU which permits certain types of solid waste projects, itemizes certain types of acceptable cooperative arrangements with the public sector and identifies certain geographic locations in which such projects may be carried out. Given the ever-increasing importance of solid waste management in Indonesia, the legal and regulatory framework of this sector deserves greater attention.

Recommendations: As with our comments to PPP water supply projects, we recommend that the legal status of the IPU be clarified and that unnecessary restrictions regarding types and locations of projects be eliminated. Similarly, unnecessary restrictions on the acceptable cooperative structures should also be removed. Lastly, given the importance of this sector, a separate law or regulation establishing a firm basis for private participation be promulgated.

2. Legal Basis for Governmental Participation

Any private participant in a PPP or PSP project will need assurance that a valid legal basis exists for the actions and commitments of its governmental counterpart. In general, virtually all public works responsibility for the Target Sectors has been transferred to the regional (Level I) and municipal (Level II) governments. Accordingly, subject to overall supervisory powers retained by the Central Governmental authorities (including MOPW and MOHA), Regional Governments (and in many cases BUMDs) have primary responsibility for developing, operating and maintaining infrastructural projects within the Target Sectors.

a. Regional Governments

The legal basis for Regional Governments to cooperate with "third parties" (including private entities) is set out in MOHA Reg. 3/86 and its Official Elucidation. The Official Elucidation imposes serious constraints on the flexibility of Regional Governments to cooperate with the private sector by mandating the forms and terms of contractual arrangements into which Regional Governments can enter. Regional Governments are thereby restricted from exploring different commercially feasible structures of cooperation with the private sector.

Recommendations: MOHA Reg.3/86, or at least its Official Elucidation, should be rescinded in favor of the more flexible approach contained in MOHA Reg. 4/90 dealing with cooperation between BUMDs and third parties.

b. BUMDs

The legal basis for BUMDs to cooperate with third parties is theoretically cloudy due to the "lame duck" status of Law No.5 of 1962, and the fundamental constraints it appears to create in the legal ability of BUMDs to cooperate with the private sector in water supply and, perhaps, other infrastructural projects in the Target Sectors. Law No.6 of 1969 anticipated the revocation and replacement of Law No.5/62, but to date Law No.5/62 remains on the books. Although subsequent legislation (e.g., Law No.11 of 1974), regulations (e.g., PP 20/94) and practice (e.g., existing PPP water supply projects) all support the de facto repeal of the constraints imposed by Article 5(4) of Law No.5/62, its technical validity continues to create questions regarding its force and effect.

Additionally, the scope of Keppres 16/94 needs clarification in the context of PSP and PPP projects within the Target Sectors.

Recommendations: Law No.5/62 should be repealed and replaced with a new law on BUMDs that takes into account the changes in governmental structure, needs and plans that have occurred over the last 30 years as well as the future developmental needs of Indonesia. As to Keppres 16/94, EKKU or the Keppres 6/95 Team should provide necessary clarifications.

3. Procedures and Protocols of Project Approval and Implementation

Implementing regulations relating to cooperative arrangements between BUMDs and third parties under MOHA Decree 4/90 are contained in the recently issued MOHA Instruction 9/95, but they omit to describe the roles of other interested Governmental agencies including BAPPENAS, MOPW, MOF and the involved Regional Government. An even greater omission in the regulatory framework is the complete absence of implementing regulations relating to private sector cooperation with BUMNs and Regional Governments, although such omission is not material in the context of the Target Sectors.

Coordination of the roles and authorities of these various agencies is essential to prevent private sector participants and their public sector counterparts from being subjected to duplicative and/or conflicting demands from Governmental authorities. In at least one recent instance, such shortcoming has been addressed on an ad hoc basis by the establishment of a special coordinating team under the leadership of MOPW, but this facet of the regulatory scheme is simply too important to be addressed on a case-by-case basis.

Recommendations: A fundamental responsibility of the GOI is to establish coordinated, interdepartmental procedures for the approval and implementation of such projects. An internal consensus on applicable procedures and protocols must be reached and this should be reflected in an appropriate Governmental promulgation such as a Joint Ministerial Decree, Presidential Decree, Government Regulation or a PPP Project Law.

4. Timely Access to Legal Information

The lack of easy access to up-to-date legal information is a major impediment to promoting private participation in the Target Sectors and elsewhere in the economy. The State Gazette and its various supplements are neither complete nor timely, and their circulation is limited. This results in a lack of certainty which undercuts the confidence of private participants. Additionally, the research efforts required merely to identify relevant laws and regulations are excessive, resulting in increased costs and unnecessary delays.

Recommendations: Several specific recommendations are offered:

a. Require mandatory publication in an official daily gazette of all laws, regulations and decrees prior to their effective date;

b. Improve and expand the existing government publication distribution system;

c. Continue both private and public sector efforts to expand computer data bases of legal information;

d. Arrange for regular and systematic publication of court decisions; and

e. Consider private sector subcontractors to assist in items b, c and d.

5. Overall Legal and Regulatory Concerns

Although the focus of the paper is on those legal and regulatory constraints, deficiencies and omissions pertaining most directly to PSP and PPP projects in the Target Sectors, there exists a broad spectrum of general issues that continue to be of serious concern to investors in Indonesia. These include substantive and procedural tax issues, tariff and non-tariff import barriers, an over-burdened and ill-equipped judicial system, practical difficulties in enforcing remedies and outdated Civil and Commercial Codes.

Several of these issues are the subject of various law reform projects already underway in Indonesia. The limited discussion in this paper of these areas of concern is not intended to minimize their importance; reform in each is essential to the development of a fair, open, reliable and predictable legal environment for private investors. A comprehensive analysis of each of these concerns, however, exceeds the scope and purpose of this paper.

a. Tax Law and Administration

Particularly in the case of complicated financing structures typically used in BOT and BOO Projects, issues that are new and unfamiliar to the tax authorities may arise. MOF Decree 248/95 addresses certain tax concerns of BOT Projects (but leaves many issues open: it has no applicability to BOO or other financing structures and, it does not address VAT, construction tax, import duties or offshore withholding taxes). The administration of the tax laws continues to be perceived as weak and inconsistent.

Recommendations: Additional clarifications of the tax areas identified above would be welcomed. The overall improvement of tax administration in Indonesia is a long-term project requiring (i) training and education programs for tax officials, (ii) improved administrative procedures, (iii) increased transparency in interactions between tax officials and the private sector and (iv) enhanced administrative resources.

b. Import Control and Administration

In some PPP or PSP projects, the ability to import equipment, machinery and/or materials on a cost-efficient basis may be critical to the success or failure of such project. Relevant issues relate to (i) import tariff levels, (ii) non-tariff import barriers including importer licensing and countertrade requirements and (iii) customs clearance administration. In accordance with its commitments under the Uruguay Round of GATT, both tariff and non-tariff barriers in Indonesia are being gradually removed.

Recommendations: Reform efforts in these areas should continue as required under GATT. Continuing efforts to improve customs clearance procedures and port operations are required.

c. Judicial Dispute Resolution

A nearly universal concern within the Indonesian business community is the inability of the Indonesian judiciary to hear and resolve commercial disputes in a fair, impartial and independent manner. The subject of judicial reform is complex and sensitive, and the magnitude of effort required to effect real progress is substantial.

Recommendations: Various reform proposals include (i) establishment of a separate Commercial Court with specially trained judges, (ii) specialized judicial training programs in commercial, corporate and financial legal matters, (iii) official publication of judicial decisions, (iv) establishment of effective alternative dispute resolution mechanisms.

d. Enforcement of Remedies

A lengthy appellate process lacking an adequate bonding system, archaic and complex enforcement procedures, and the apparently limitless creativity of judgment debtors in thwarting enforcement of judicial orders all combine to frustrate the realization of remedies by "successful" litigants in Indonesia. In practice, the enforcement of foreign arbitral awards has also proven to be difficult despite Indonesia's ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Indonesia's relatively poor record

in ensuring that solvent judgment debtors satisfy their obligations cannot help but undercut the ultimate confidence of private investors in any type of venture.

Recommendations: Several possible avenues of improvement may be identified: (i) adoption of a revised and unified Code of Civil Procedure, (ii) adoption of pre-judgment and post-judgment bonding systems to facilitate practical enforcement of judgments and (iii) upgrading the state auction office and streamlining its procedures.

e. Revision of Civil and Commercial Codes

Both the Indonesian Civil Code and Commercial Code date from the mid-1800s and are largely ill-suited for their purpose in light of modern commercial realities.

Recommendations: Nothing short of a comprehensive revision of the Civil and Commercial Codes is required to bring Indonesian law up-to-date as the nation prepares to enter the 21st century.

6. Legal Validity of PPP Investment Structures

An overriding concern of a private participant in a PPP project is the legal validity of the overall investment structure in the host jurisdiction. Depending on the details of a particular project, some of the contractual forms and financing structures (e.g., escrows and revenue bonds) may be unfamiliar to local counterparts and authorities alike. Indonesia's experience with PPP projects (e.g., BOT projects) is rapidly growing but is still limited, particularly in the context of the Target Sectors. Given the complex of legal, commercial, and financial relationships created by a BOT structure, in a nascent market like Indonesia further comfort and encouragement would be provided to all participants by a basic law or regulation (i.e., a PPP Project Law) dealing with the overall legal framework of PPP projects in the Target Sectors.

Recommendations: An appropriate law or government regulation should be adopted to establish the overall legal framework of PPP projects in Indonesia. Such a regulation could recognize and define a range of acceptable types of PPP projects, set out approval procedures and protocols, clarify applicability of necessary legal mechanisms (e.g., use of escrow accounts and other security arrangements), recognize legal capacity of Project Companies and/or BUMDs to issue revenue bonds, identify any special investment incentives and establish binding dispute resolution mechanisms. Promulgation of a PPP Project Law could allay many of the concerns of the private sector, and reduce the current start-up time and expense of PPP project approval and implementation.

7. Land Titles and Water Rights

a. Land Titles

Land law in Indonesia is complex and sensitive for historical as well as socio-political reasons. Within the context of private sector involvement in PPP projects, concerns arise regarding (i) land acquisition and the applicability of eminent domain powers, (ii) limited use land rights akin to easements, and (iii) the duration of land titles. Although private sector land acquisition continues to be a time-consuming and expensive undertaking, that concern will be alleviated to the extent that PPP projects rely on the Governmental counterpart to exercise its powers of eminent domain to acquire necessary land. Limited use rights similar to easements, however, are not recognized under the Basic Agrarian Law of 1960. Additionally, investors can be expected to require absolute assurance that the duration of the validity of relevant land titles will correspond to the lifetime of the project.

Recommendations: Given the substantial capital investments typically required in PPP projects, an absolute assurance of continuing land title validity must be obtained by the developers and their creditors. Ideally, the conditional right to "extend" and "renew" HGB land titles should be replaced by a system of long-term absolute land rights. Moreover, the specialized land needs of some PPP projects should be reflected in new laws or regulations recognizing land interests in the nature of easements.

b. Water Rights

Due to pressures created by population growth and economic development, water resource management will become increasingly important to ensure that the competing demands for this limited resource are fully recognized, priorities of water use are established and implemented and that the rights and obligations of both the private and public sectors are clearly delineated. Especially in the water supply and waste water sectors, clear and certain rights relating to the use of bulk water supplies are of paramount importance to private participants in PPP projects.

Recommendations: Existing laws and regulations provide a solid basis upon which to build an improved and integrated water rights system. Extensive research and analysis in this area has already been conducted, and the resulting recommendations are essentially sound and sensible. As a first step, implementing guidelines under MOPW Reg. 49/90 should be issued providing specific guidance regarding the overall rights and obligations of the holders of water rights as well as the Government, including the nature of rights granted, the forms of granting instruments, the duration of the grant, rights and

procedures regarding modification, renewal and termination of the grant and the circumstances under which the grant may be transferred.

8. Access to Sufficient Funding Sources

The capital requirements for major infrastructural projects are huge. A key concern, therefore, is to ensure that the sponsors and investors in such projects have sufficient access to capital sources, both onshore and offshore.

Access to offshore funding sources by Governmental entities and apparently all PPP projects (due to the broad interpretation of "linkage") is severely restricted by the requirement of PKLN Team approval and queueing procedure. Moreover, State Banks, which represent a major pool of domestic capital, are prohibited from providing loans to foreign-invested PPP projects. In addition to reconsidering these restrictions, creative financing alternatives should be explored.

Revenue bonds, if structured properly, will attract capital investors, particularly those with existing capital reserves matched by long-term liabilities (such as pension funds and insurance reserves). The Indonesian commercial paper market is only just developing and issues relating to revenue bonds include tariff covenants, the legal status of bondholder liens and the nature and source of credit enhancements.

Recommendations: Infrastructure projects directly related to the public welfare should be given priority by the PKLN Team. MOF Letter S-1603/90 should be amended to allow foreign-invested infrastructure projects in the Target Sectors to borrow from State Banks. Also, specific legal and regulatory steps should be taken to allow Regional Governments and BUMDs to issue revenue bonds and employ other appropriate financing tools. Empowering legislation and implementing decrees, as appropriate, should be developed in coordination with the MOF, BAPEPAM, MOHA, and representatives of Regional Governments and BUMDs with input from interested private entities such as securities advisors and underwriters.

9. Sufficient and Certain Project Revenues

From an investor's point of view, project financing is feasible only if (a) the forecast stream of revenues is both sufficient for all financing and operational purposes and (b) the forecasts are perceived as reasonably certain to be met. In the water supply sector, difficulties in meeting these two criteria stem from current regulations and policies related to the term of tariff rates (i.e., maximum

term of three (3) years) and tariff rate levels (rates not reflective of true costs). In the other two Target Sectors, similar concerns exist.

Recommendations: Current MOHA decrees that establish guidelines relating to water tariffs should be amended to permit longer maximum tariff rate terms and/or to allow rates to be established that will reflect commercial and economic realities. Similar tariff mechanisms should be established for the other Target Sectors.

10. Security Interests and Credit Support

Given the long-term nature of the credit risks involved, together with the amounts of capital at risk and the limited track record of Regional Governments and BUMDs in PPP projects in the Target Sectors, investors will be keenly interested in the security interests obtained over the project and the availability of third-party credit support.

As indicated in Section 5.d. above, the practical enforcement of remedies in Indonesia is difficult and uncertain, and same types of security interests frequently required by creditors (e.g., fiduciary assignments of operating licenses) may not be permitted under Indonesian law and practice.

Moreover, normal types of third-party credit support such as bond insurance or governmental guarantees may not be available, at least as a practical matter, in Indonesia. Bank guarantees or standby letters of credit, however, may be one means of providing creditors and investors sufficient comfort to place their capital at risk in such PPP projects.

Recommendations: The legal basis of fiduciary assignments needs to be established and/or clarified. More specifically, fiduciary assignments relating to revenue encumbrances and operating license transfers within the context of PPP projects must be addressed. The establishment of a registration system for fiduciary transfers of proprietary rights is long overdue.

Existing restrictions on Governmental and State Banks guarantees should be reconsidered within the context of PPP projects and, perhaps, relaxed. Express authorization for the issuance of long-term guarantees or standby letters of credit by potential guarantor banks, including State Banks, should be adopted. Government should consider taking steps to foster the creation of bond insurance companies.

RINGKASAN

Kertas kerja ini berisi penelitian serta analisa yang luas dari kejanggalan-kejanggalan, kekurangan-kekurangan dan kekosongan hukum dalam kerangka hukum dan peraturan mengenai keterlibatan pihak swasta dalam proyek-proyek PSP dan PPP pada Sektor-sektor Sasaran. Kertas kerja ini menyimpulkan bahwa kemajuan yang nyata dan substansial dapat dicapai dengan mula-mula departemen-departemen Pemerintah tertentu memusatkan perhatian pada kepentingan-kepentingan praktis utama dari pihak swasta mengenai sektor-sektor pokok/kunci. Singkatnya, diusulkan bahwa hal-hal berikut (di bawah ini) selayaknya diberikan prioritas perhatian:

1. Diperlukan pendekatan inter-departemen menuju pembentukan prosedur yang jelas dari persetujuan dan pelaksanaan proyek. Departemen Dalam Negeri dan Departemen Pekerjaan Umum adalah departemen-departemen kunci dan masing-masing secara berdikari telah menerbitkan prosedur yang dapat diterapkan dan sudah sepantasnya dilakukan, tetapi koordinasi dari usaha-usaha ini sangat dibutuhkan untuk mencegah konflik dan ketidakjelasan. Ketentuan-ketentuan yang berhubungan dengan perijinan dan pemindahan, pengakhiran dan pelaporan lebih lanjut serta persyaratan-persyaratan setelah persetujuan harus diatur di dalam bentuk Keputusan Menteri Bersama, Peraturan Pemerintah atau mungkin terintegrasi ke dalam keseluruhan Peraturan atau Undang-undang Proyek PPP.

2. Petunjuk lebih lanjut mengenai penerapan hukum pajak Indonesia untuk proyek PPP merupakan hal yang mendasar, khususnya yang berkenaan dengan PPN, pajak-pajak impor dan biaya-biaya yang berhubungan dengan hal itu, pajak-pajak jasa konstruksi dan pajak yang dipotongkan dari pembayaran luar negeri. Menteri Keuangan telah mengambil langkah-langkah pertama sehubungan dengan hal ini dengan mengeluarkan Keputusan Menteri Keuangan No. 248/95 dan penjelasan lebih lanjut dalam hal ini akan memungkinkan perencanaan pajak dan pengembangan model-model pembiayaan yang terpercaya, di mana keduanya merupakan prasyarat bagi investasi skala besar.

3. Pengalaman Indonesia dengan proyek PPP khususnya dalam Sektor-Sektor Sasaran relatif terbatas tetapi akan berkembang secara cepat dalam dekade mendatang. Undang-undang atau Peraturan Pemerintah yang membahas sebagian atau semua permasalahan yang berkembang dalam kertas kerja ini akan merupakan peraturan-peraturan dasar yang akan menghapus banyak hal yang tidak jelas yang hingga saat ini meliputi proyek PPP. BAPPENAS mungkin merupakan unit pemerintah yang paling tepat untuk mengambil langkah dalam pembentukan undang-undang atau peraturan tersebut.

4. Investor-investor swasta di bidang penyediaan air dan proyek pengolahan air limbah akan menuntut bahwa alokasi sumber-sumber air yang tersedia dilaksanakan dengan suatu cara di mana kebutuhan proyek mereka dilaksanakan dengan cara-cara yang adil dan rasional. Seiring dengan meningkatnya permintaan terhadap sumber-sumber air Indonesia yang terbatas, maka diperlukan pula peningkatan metode-metode dan sistem pengelolaan air yang lebih canggih. Dalam rangka mengatur dasar-dasar pengelolaan yang diperlukan, kertas kerja ini menyarankan Sistem Hak Penggunaan Air yang dibentuk sejalan dengan sistem yang direkomendasikan dalam Draft Report, Water Use Rights System yang disponsori Menteri Pekerjaan Umum. Sebagai langkah pertama, pelaksanaan petunjuk di bawah Peraturan Menteri Pekerjaan Umum No. 49/90 harus segera ditetapkan.

5. Akses terhadap sumber pembiayaan yang memadai adalah merupakan suatu kondisi "sine qua non" dari partisipasi swasta di dalam proyek PPP. Khususnya sehubungan dengan sifat dasar dari pembangunan infrastruktur Sektor-sektor Sasaran, Menteri Keuangan harus mempertimbangkan pembatasan-pembatasan tertentu yang mempengaruhi pembiayaan proyek-proyek PPP, sebagai contoh adalah larangan dari Bank Pemerintah untuk membiayai proyek penanaman modal asing dan persyaratan persetujuan dari Tim PKLN terhadap pembiayaan luar negeri atas proyek-proyek yang berhubungan dengan Pemerintah Indonesia.

Di bawah ini merupakan ringkasan analisa dan saran-saran yang termuat di dalam kertas kerja ini:

1. Dasar Hukum bagi Partisipasi Swasta

Dasar hukum untuk proyek-proyek PSP (contoh: kontrak-kontrak jasa) pada dasarnya berbeda dengan dasar hukum untuk proyek-proyek PPP (contoh: perjanjian penyertaan modal yang besar), dan harus dipertimbangkan secara terpisah. Dalam hal proyek-proyek PPP, peraturan-peraturan khusus yang berhubungan dengan Sektor-sektor Sasaran harus diperhitungkan.

a. Proyek-proyek PSP

Peraturan-peraturan pengadaan yang diatur dalam Keppres 16/94 pada umumnya menetapkan dasar hukum bagi sektor swasta untuk menjual barang-barang dan jasa untuk Pemerintah Indonesia. Berdasarkan ketentuan-ketentuannya, Keppres 16/94 tidak mencakup (i) usaha pengadaan barang-barang dan jasa-jasa bagi BUMD untuk tujuan-tujuan "operasi/eksploitasi" dan (ii) "proyek-proyek instalasi air bersih" yang dijalankan oleh PDAM-PDAM. Pengecualian tipe-tipe usaha pengadaan barang ini dari ruang lingkup Keppres 16/94 menciptakan ketidakpastian sehubungan dengan apakah proyek-proyek

khusus PSP akan dipertimbangkan dalam ruang lingkup Keppres 16/94 dan juga mengenai prosedur-prosedur yang harus diikuti oleh pihak swasta sehubungan dengan kontrak-kontrak yang tidak tercakup dalam Keppres 16/94.

Saran-saran : Penjelasan sehubungan dengan ruang lingkup yang tepat dari Keppres 16/94 sangat diperlukan, sebagaimana halnya kumpulan contoh dari peraturan-peraturan pengadaan barang BUMD yang diterapkan oleh BUMD. Baik Tim EKKU maupun Tim Keppres 6/95 yang baru dibentuk harus mengambil peran utama sehubungan dengan hal ini.

b. **Proyek-proyek PPP**

Proyek-proyek PPP tidak termasuk dalam Keppres 16/94. Dasar hukum partisipasi swasta dalam proyek-proyek infrastruktur dengan modal besar dalam Sektor-sektor Sasaran hanya dapat ditemukan dengan cara merujuk pada bermacam-macam undang-undang dan peraturan-peraturan termasuk undang-undang dan peraturan-peraturan umum tentang penanaman modal serta pengaturan-pengaturan sektor khusus oleh pemerintah di tiap Sektor-sektor Sasaran.

Dasar hukum partisipasi swasta di proyek-proyek PPP penyediaan air pada umumnya diatur dengan baik, seperti dapat ditemukan dan dilihat di dalam Peraturan Pemerintah No. 20 tahun 1994, Undang-undang No. 11 tahun 1974 dan undang-undang serta peraturan-peraturan lainnya yang bersangkutan. Namun demikian, IPU terbaru yang diterbitkan oleh BKPM nampaknya menetapkan beberapa kejanggalan pada tipe-tipe proyek-proyek yang terbuka untuk sektor-sektor swasta serta ditentukan pula lokasi-lokasi geografis dimana proyek-proyek ini dapat dilaksanakan.

Saran-saran : Status hukum dari IPU harus diperjelas. Selanjutnya, pembatasan-pembatasan yang tidak penting sehubungan dengan tipe-tipe proyek dan lokasi-lokasi geografis harus dihapuskan.

Dasar hukum partisipasi swasta di proyek-proyek PPP air limbah ditetapkan oleh Peraturan Pemerintah No. 20 tahun 1990, tetapi hanya sedikit pedoman/petunjuk yang diberikan mengenai perizinan dan sifat dasar dan bidang dari partisipasi tersebut. Undang-undang dan peraturan-peraturan mengenai penanaman modal, termasuk DNI dan IPU, tidak menyebutkan apapun mengenai partisipasi swasta dalam proyek-proyek air limbah sehingga timbul anggapan bahwa partisipasi tersebut terbuka.

Saran-saran: Pedoman pemerintah lebih lanjut dalam bentuk Keputusan Menteri akan membantu dalam memperkuat dasar hukum keterlibatan pihak swasta dalam proyek-proyek PPP pengelolaan air limbah.

Satu-satunya dasar hukum positif untuk partisipasi swasta dalam Proyek-proyek PPP sampah ditemukan di IPU yang terbaru yang mengijinkan tipe-tipe tertentu proyek-proyek sampah, merinci tipe-tipe tertentu dari pengaturan-pengaturan kerjasama dengan pemerintah dan menentukan lokasi-lokasi tertentu di mana proyek-proyek itu dapat dilaksanakan. Dengan bertambah pentingnya pengelolaan sampah di Indonesia, sangatlah penting adanya perhatian terhadap hukum dan peraturan-peraturan dalam sektor ini.

Saran-saran: Selaras dengan komentar-komentar kami terhadap proyek-proyek PPP penyediaan air, kami menyarankan agar status hukum IPU harus diperjelas dan pembatasan-pembatasan yang tidak penting berdasarkan tipe-tipe dan lokasi-lokasi proyek agar dihilangkan. Begitu juga halnya, pembatasan-pembatasan yang tidak penting pada struktur-struktur kerjasama yang dapat dilakukan juga harus dihilangkan. Terakhir, dengan pentingnya sektor ini, undang-undang dan peraturan yang terpisah harus ditetapkan dalam membentuk dasar yang kokoh bagi partisipasi swasta.

2. Dasar hukum untuk partisipasi Pemerintah

Partisipasi swasta di proyek-proyek PPP atau PSP memerlukan kepastian, bahwa terdapat dasar hukum yang sah dan berlaku untuk tindakan-tindakan dan komitmen-komitmen dari pihak pemerintah. Pada umumnya, sebenarnya semua tanggung jawab atas pekerjaan-pekerjaan dibidang pekerjaan umum untuk Sektor-sektor Sasaran telah diserahkan kepada Pemerintah Daerah (Daerah Tingkat I) dan Kabupaten/Kotamadya (Daerah Tingkat II). Dengan memperhatikan seluruh wewenang pengawasan yang dimiliki oleh Pemerintah Pusat (termasuk Menteri Pekerjaan Umum dan Menteri Dalam Negeri), Pemerintah Daerah (dan dalam banyak hal BUMD-BUMD) memiliki tanggung jawab utama dalam pengembangan, pelaksanaan dan perawatan proyek-proyek infrastruktur dalam Sektor-sektor Sasaran.

a. Pemerintah Daerah

Dasar hukum Pemerintah Daerah untuk bekerjasama dengan "pihak ketiga" (termasuk badan-badan swasta) diatur dalam Peraturan Menteri Dalam Negeri 3/86 dan Penjelasan Resminya. Penjelasan Resmi berisi kejanggalan-kejanggalan yang serius terhadap fleksibilitas dari Pemerintah Daerah untuk bekerjasama dengan pihak swasta dengan mengatur bentuk-bentuk dan syarat-syarat kontrak di mana Pemerintah Daerah dapat berpartisipasi. Pemerintah Daerah oleh karena itu dibatasi untuk dapat melakukan bentuk kerjasama komersial yang feasible lainnya dengan pihak swasta.

Saran-saran : Peraturan Menteri Dalam Negeri 3/86, atau paling sedikit Penjelasan Resminya, harus ditarik kembali dengan tujuan agar pendekatan yang tertuang dalam Peraturan Menteri Dalam Negeri 4/90 dalam mengatur

kerjasama antara BUMD-BUMD dan pihak ketiga yang lebih fleksibel dapat tercapai.

b. **BUMD-BUMD**

Dasar hukum BUMD-BUMD untuk bekerjasama dengan pihak ketiga secara teoritis tidak jelas mengingat status "lame duck/peraturan yang sudah dicabut tetapi masih berlaku" dari UU No. 5/tahun 1962, dan pembatasan-pembatasan yang mendasar yang tampaknya bertujuan untuk menciptakan kemampuan hukum bagi BUMD-BUMD untuk bekerjasama dengan sektor swasta di bidang penyediaan air, dan kemungkinan proyek-proyek infrastruktur lainnya di Sektor-sektor Sasaran. Undang-undang No. 6 tahun 1969 mengantisipasi pencabutan dan penggantian Undang-undang No. 5 tahun 1962, tetapi sampai saat ini Undang-Undang No. 5 tahun 1962 tetap dijadikan acuan. Meskipun undang-undang selanjutnya (contoh : Undang-undang No. 11 tahun 1974), peraturan-peraturan (contoh: PP 20/1994) dan dalam praktek (contoh: keberadaan proyek-proyek PPP penyediaan air) semuanya mendukung secara faktual pencabutan pembatasan-pembatasan yang ditekankan pada Pasal 5 ayat 4 dari Undang-undang No. 5 tahun 1962, keberadaannya terus menciptakan permasalahan-permasalahan mengenai berlakunya Undang-undang No. 5/1962.

Sebagai tambahan, ruang-lingkup Keppres 16/94 membutuhkan penjelasan dalam konteks proyek-proyek PSP dan PPP dalam Sektor-sektor Sasaran.

Saran-saran : Undang-undang No. 5 tahun 1962 harus dicabut dan diganti dengan undang-undang yang baru mengenai BUMD-BUMD di mana harus diperhitungkan perubahan-perubahan dari struktur pemerintahan, kebutuhan dan rencana-rencana yang telah tercapai selama 30 tahun terakhir serta kebutuhan-kebutuhan pembangunan Indonesia di masa yang akan datang. Demikian pula terhadap Keppres 16 tahun 1994, Tim EKKU atau Tim Keppres 6/1995 harus mengeluarkan penjelasan-penjelasan yang dibutuhkan.

3. **Prosedur-prosedur dan Protokol-protokol dari Perijinan dan Pelaksanaan Proyek**

Peraturan-peraturan pelaksanaan mengenai pengaturan kerjasama antara BUMD-BUMD dan pihak ketiga menurut Keputusan Menteri Dalam Negeri No. 4 tahun 1990 tercantum dalam Instruksi Menteri Dalam Negeri No. 9 tahun 1995 yang baru diterbitkan, tetapi kedua peraturan tersebut tidak menjelaskan peranan instansi pemerintah tertentu termasuk BAPPENAS, Menteri Pekerjaan Umum, Menteri Keuangan dan Pemerintah Daerah yang bersangkutan. Satu hal yang lebih penting yang tidak dicantumkan dalam kerangka peraturan ialah kekurangan yang menyeluruh dari peraturan-peraturan

pelaksanaan sehubungan dengan kerjasama pihak swasta dengan BUMN-BUMN dan Pemerintah Daerah, meskipun tidak dicantumkannya tidak merupakan hal yang utama dalam konteks Sektor-sektor Sasaran.

Koordinasi peranan dan wewenang berbagai badan pemerintah sangat penting untuk menghindarkan pihak swasta dari kewajiban untuk memenuhi permintaan-permintaan ganda atau yang saling bertentangan dari badan-badan Pemerintah.

Dalam suatu contoh yang baru-baru ini terjadi, kekurangan tersebut telah diatasi, dengan pendekatan ad hoc, dengan pembentukan suatu tim koordinasi khusus yang dipimpin oleh Menteri Pekerjaan Umum, tetapi peraturan ini terlalu penting jika hanya diatasi dengan dasar kasuistis.

Saran-saran : Suatu tanggung jawab yang mendasar untuk Pemerintah Indonesia adalah menetapkan suatu prosedur antar departemen untuk persetujuan dan pelaksanaan proyek-proyek tersebut yang terkoordinasi. Suatu kesepakatan internal atas prosedur-prosedur dan protokol-protokol harus dapat dicapai dan hal ini harus tercermin dalam suatu peraturan Pemerintah yang sesuai, misalnya Keputusan Bersama Menteri, Keputusan Presiden, Peraturan Pemerintah atau Undang-undang tentang Proyek PPP.

4. **Akses yang tepat waktu terhadap Informasi Hukum**

Kurangnya kemudahan akses untuk mendapatkan informasi yang up-to-date adalah suatu hambatan yang cukup besar dalam meningkatkan partisipasi swasta dalam Sektor-sektor Sasaran dan bidang ekonomi lainnya. Lembaran Negara dan bermacam-macam tambahannya tidak lengkap dan juga tidak keluar tepat pada waktunya, dan sirkulasinya terbatas. Masalah-masalah ini menimbulkan ketidakpastian dan menurunkan kepercayaan pihak swasta. Sebagai tambahan, penelitian-penelitian yang dilakukan semata-mata untuk mengidentifikasikan undang-undang dan peraturan-peraturan yang relevan adalah berlebih-lebihan, hal ini mengakibatkan peningkatan biaya dan keterlambatan yang tidak perlu terjadi.

Saran-saran : Beberapa saran-saran khusus yang ditawarkan :

a. Mensyaratkan publikasi yang bersifat wajib dalam pengumuman harian resmi tentang semua undang-undang, peraturan-peraturan dan keputusan-keputusan sebelum hari berlakunya;

b. Memperbaiki dan memperluas sistem distribusi dari publikasi-publikasi pemerintah yang ada;

c. Melanjutkan usaha-usaha pihak swasta dan umum untuk meningkatkan komputerisasi data base informasi hukum;

d. Mengatur publikasi keputusan-keputusan pengadilan secara berkala dan sistimatis; dan

e. Mempertimbangkan subkontraktor swasta untuk membantu aktifitas tercantum pada b, c dan d diatas.

5. Persoalan-persoalan hukum dan peraturan-peraturan secara keseluruhan

Meskipun fokus dari kertas kerja ini terbatas pada penelitian terhadap kejanggalan-kejanggalan, kekurangan-kekurangan dan kekosongan-kekosongan yang terdapat pada undang-undang dan peraturan-peraturan yang berhubungan dengan proyek-proyek PSP dan PPP dalam Sektor-sektor Sasaran, masih ada suatu spektrum yang luas dari permasalahan-permasalahan umum yang terus berlanjut menjadi permasalahan serius yang dihadapi para investor di Indonesia. Hal ini mencakup permasalahan-permasalahan pajak, pembatasan-pembatasan tarif dan non-tarif impor secara substantif dan prosedural, sistem peradilan yang menanggung beban berlebihan dan dengan perangkat-perangkat yang tidak sehat, kesulitan-kesulitan praktis dalam pelaksanaan upaya hukum dan masalah Kitab Undang-undang Hukum Perdata dan Kitab Undang-undang Hukum Dagang yang sudah tidak sesuai dengan jaman.

Beberapa permasalahan tersebut telah merupakan subyek dari berbagai proyek-proyek reformasi hukum yang sudah berlangsung di Indonesia. Pembahasan tambahan dalam kertas kerja ini mengenai hal-hal yang perlu dipikirkan tersebut tidaklah bermaksud untuk mengurangi betapa pentingnya usaha-usaha tersebut; perbaikan undang-undang adalah penting untuk pengembangan kondisi hukum yang adil, terbuka, dapat dipercaya dan dapat dipastikan oleh investor-investor swasta. Analisa secara keseluruhan dari masing-masing persoalan ini diluar ruang lingkup dan tujuan makalah ini.

a. Undang-undang dan Administrasi Pajak

Dalam hal khususnya struktur-struktur pembiayaan yang rumit dalam proyek-proyek BOT dan BOO, permasalahan-permasalahan yang baru dan tidak lazim bagi badan-badan perpajakan yang berwenang mungkin timbul. Keputusan Menteri Keuangan No. 248 tahun 1995 membahas persoalan-persoalan pajak tertentu dari proyek-proyek BOT (tetapi masih membuka banyak persoalan-persoalan: dimana tidak dapat diterapkan pada BOO atau struktur pembiayaan yang lain, dan keputusan tersebut tidak mengatur PPN, Pajak Konstruksi, Pajak Impor atau pajak pendapatan atas pembayaran ke luar negeri). Administrasi undang-undang pajak tetap berlanjut lemah dan tidak konsisten.

Saran-saran : Tambahan penjelasan-penjelasan terhadap permasalahan pajak yang diidentifikasikan di atas sangat diharapkan. Perbaikan bagi administrasi pajak merupakan proyek jangka panjang yang memerlukan (i) program-program latihan dan pendidikan untuk pegawai-pegawai pajak (ii) prosedur-prosedur administrasi yang lebih baik (iii) keterbukaan dari interaksi-interaksi antara pegawai-pegawai pajak dan pihak swasta dan (iv) peningkatan sumber-sumber administrasi.

b. **Pengawasan impor dan administrasi**

Dalam beberapa proyek PPP atau PSP, kemampuan untuk mengimpor perlengkapan, mesin-mesin atau bahan-bahan material berdasarkan pembiayaan yang efisien dapat menjadi sangat penting untuk keberhasilan atau kegagalan proyek tersebut. Persoalan-persoalan ini berhubungan dengan (i) tingkat-tingkat tarif impor, (ii) pembatasan non-tarif impor termasuk lisensi impor dan persyaratan-persyaratan barter (counter-trade) dan (iii) penyelesaian administrasi pabean. Sehubungan dengan komitmen dalam Putaran Uruguay dari GATT, hambatan-hambatan tarif dan non-tarif di Indonesia secara bertahap dikurangi.

Saran-saran : Usaha-usaha reformasi dalam bidang ini harus dilanjutkan sejalan dengan GATT. Dibutuhkan usaha-usaha yang berkesinambungan untuk memperbaiki penyelesaian prosedur pabean dan operasi-operasi pelabuhan.

c. **Penyelesaian sengketa peradilan**

Sudah merupakan suatu persoalan yang diketahui umum dalam masyarakat bisnis di Indonesia di mana peradilan di Indonesia kurang mampu untuk memeriksa dan menyelesaikan perselisihan perdagangan yang adil, tidak memihak dan bebas. Subyek dari perbaikan peradilan adalah kompleks dan sensitif dan dibutuhkan usaha yang besar untuk menciptakan kemajuannya.

Saran-saran : Usulan-usulan perbaikan yang bermacam-macam meliputi: (i) mengadakan peradilan komersial yang terpisah dengan hakim-hakim yang telah dilatih, (ii) program-program pelatihan hukum yang khusus dalam permasalahan-permasalahan hukum komersial, perusahaan dan keuangan, (iii) publikasi resmi dari putusan-putusan peradilan, (iv) membentuk mekanisme-mekanisme pilihan penyelesaian sengketa.

d. **Pelaksanaan upaya hukum**

Proses banding yang lama dan tidak memilikinya sistem jaminan yang memadai, prosedur pelaksanaan keputusan yang sudah tidak sesuai lagi dan lemahnya itikad debitor dalam menghindari pelaksanaan putusan-putusan

pengadilan, kesemua hal tersebut secara bersama-sama menyulitkan pelaksanaan upaya hukum oleh para yuris "terkemuka" di Indonesia. Dalam prakteknya, pelaksanaan keputusan arbitrasi asing telah terbukti sulit meskipun Indonesia telah meratifikasi Konvensi New York, tentang Pengakuan dan Pelaksanaan Keputusan Arbitrasi Asing. Prestasi Indonesia yang minim dalam menjamin agar para debitur yang mampu memenuhi kewajiban mereka, sulit untuk memberi kepastian kepada para investor di segala bidang usaha.

Saran-saran : Beberapa kemungkinan cara-cara untuk memperbaiki yang dapat dikemukakan (i) penetapan Kitab Undang-undang Hukum Acara Perdata yang telah diperbaiki dan yang berlaku secara manunggal (ii) penetapan sistem jaminan pra-peradilan dan pasca-peradilan untuk memudahkan pelaksanaan praktis putusan-putusan peradilan dan (iii) perbaikan di dalam tubuh badan lelang negara dan penyederhanaan prosedur-prosedurnya.

e. **Perbaikan dari Kitab Undang-undang Hukum Perdata dan Dagang**

Kitab Undang-undang Hukum Perdata Indonesia dan Hukum Dagang yang diundangkan sejak pertengahan tahun 1800-an secara realita sudah tidak cocok di perdagangan modern.

Saran-saran : Perubahan keseluruhan Kitab Undang-undang Hukum Perdata dan Hukum Dagang sangat diperlukan untuk memajukan hukum Indonesia seiring dengan persiapan bangsa Indonesia memasuki abad ke 21.

6. **Keabsahan hukum tentang struktur-struktur investasi PPP**

Kekhawatiran pihak swasta dalam proyek-proyek PPP ialah keabsahan hukum dari struktur investasi di wilayah jurisdiksi tempat di mana proyek dilaksanakan. Bergantung pada perincian-perincian suatu proyek, beberapa bentuk kontrak dan struktur pembiayaan (misalnya, escrows dan obligasi) mungkin tidak lazim bagi pihak-pihak lokal dan badan-badan yang berwenang. Pengalaman Indonesia dengan proyek-proyek PPP (misalnya: proyek-proyek BOT) yang berkembang pesat tetapi masih terbatas, khususnya dalam konteks Sektor-sektor Sasaran. Mengingat kompleksitas pembiayaan, komersiality dan hukum yang timbul dari struktur BOT dalam pasar yang berkembang seperti Indonesia dorongan dan kemudahan-kemudahan akan diberikan bagi semua pihak dengan adanya suatu undang-undang pokok atau peraturan pokok (misalnya suatu undang-undang proyek PPP) yang berkaitan dengan keseluruhan kerangka kerja dari proyek-proyek PPP dalam Sektor-sektor Sasaran.

Saran-saran: Suatu Undang-undang atau peraturan pemerintah yang sesuai harus ditetapkan untuk membentuk keseluruhan kerangka hukum proyek-proyek PPP di Indonesia. Peraturan semacam itu harus mengakui dan menetapkan suatu batasan dari jenis proyek PPP yang dapat diterima, menentukan prosedur dan protokol persetujuan, memperjelas daya berlaku mekanisme hukum yang diperlukan (misalnya, penggunaan rekening escrow dan bentuk jaminan lainnya), mengakui kapasitas hukum dari Perusahaan-perusahaan Proyek dan/atau BUMD-BUMD untuk menerbitkan obligasi, menetapkan insentif-insentif khusus dalam penanaman modal dan membentuk mekanisme penyelesaian sengketa yang mengikat. Penetapan suatu undang-undang Proyek PPP dapat meredam keragu-raguan pihak swasta, dan mengurangi waktu dan biaya untuk memperoleh persetujuan dan pelaksanaan proyek PPP.

7. Hak-hak atas Tanah dan Hak-hak atas Air

a. Hak-hak atas Tanah

Hukum mengenai tanah di Indonesia bersifat kompleks dan sensitif baik mengenai latar belakangnya maupun alasan-alasan sosial politiknya.

Dalam konteks keterlibatan pihak swasta dalam proyek-proyek PPP, permasalahan-permasalahan timbul mengenai (i) perolehan tanah dan daya berlaku dari wewenang pemerintah untuk membebaskan tanah bagi keperluan umum (ii) hak-hak penggunaan tanah yang terbatas seperti easement dan (iii) masa berlaku dari hak-hak atas tanah.

Meskipun perolehan tanah oleh sektor swasta tetap memakan waktu lama dan mahal, kekhawatiran tersebut akan diatasi sepanjang proyek-proyek PPP mempercayakan pihak pemerintah untuk melaksanakan haknya untuk memperoleh tanah bagi kepentingan umum dalam rangka memperoleh tanah yang diperlukan. Namun begitu, hak-hak penggunaan yang terbatas seperti easements tidak dikenal dalam Undang-undang Pokok Agraria tahun 1960. Sebagai tambahan, para investor dapat diharapkan untuk mensyaratkan kepastian yang absolut di mana tenggang waktu keabsahan hak-hak atas tanah yang berhubungan akan selaras dengan masa pelaksanaan proyek tersebut.

Saran-saran: Mengingat jumlah investasi yang khususnya disyaratkan dalam proyek-proyek PPP, suatu jaminan mutlak atas keabsahan hak atas tanah yang berkesinambungan harus didapatkan oleh para pengembang dan kreditornya. Idealnya, hak bersyarat untuk "memperpanjang" atau "memperbaharui" HGB harus diganti dengan suatu sistem hak-hak absolut atas tanah untuk jangka panjang. Lebih jauh, kebutuhan-kebutuhan khusus atas tanah dari beberapa proyek PPP harus tercermin dalam undang-undang atau

peraturan baru yang memberikan sifat-sifat kemudahan dalam penggunaan tanah.

b. Hak-hak atas Air

Diakibatkan oleh tekanan yang diciptakan oleh perkembangan populasi dan ekonomi, pengelolaan sumber daya air menjadi bertambah penting untuk menjamin pemenuhan segala permintaan yang juga terus meningkat terhadap sumber daya yang terbatas ini, maka skala prioritas dalam penggunaan air dibentuk dan dilaksanakan dan hak-hak dan kewajiban-kewajiban kedua belah pihak swasta dan publik dipaparkan secara jelas. Khususnya pada sektor-sektor penyediaan air dan pembuangan air limbah, hak-hak yang jelas dan pasti yang berhubungan dengan penggunaan air dalam jumlah besar adalah sangat penting bagi pihak-pihak swasta dalam proyek-proyek PPP.

Saran-saran : Undang-undang dan peraturan-peraturan yang ada memberikan dasar yang kuat guna membentuk suatu sistem hak-hak atas air yang berkembang dan terintegrasi. Penelitian dan analisis yang intensif di lingkungan telah dijalankan, dan hasil rekomendasi-rekomendasi adalah penting dan dapat diterima. Sebagai langkah pertama, peraturan pelaksanaan Peraturan Menteri Pekerjaan Umum No. 49 tahun 1990 harus ditetapkan yang mengatur petunjuk khusus mengenai keseluruhan hak-hak dan kewajiban-kewajiban bagi pemegang hak-hak air, demikian halnya bagi Pemerintah termasuk sifat dari hak-hak yang diberikan, bentuk dari hak yang diberikan, masa berlaku hak yang diberikan. Hak-hak dan prosedur-prosedur mengenai perubahan, pembaharuan dan penghapusan hak tersebut dan kondisi-kondisi di mana hak tersebut dapat dialihkan.

8. **Akses pada Pembiayaan Sumber-sumber yang Cukup**

Persyaratan permodalan bagi proyek-proyek infrastruktur adalah sangat besar. Maka kunci kekhawatirannya, oleh karena itu, adalah untuk menjamin bahwa para pemberi sponsor dan para investor dalam proyek-proyek tersebut memiliki akses yang memadai terhadap sumber-sumber modal, baik dalam negeri maupun luar negeri.

Akses pada sumber-sumber pembiayaan luar negeri bagi badan-badan pemerintahan dan nampaknya bagi seluruh proyek-proyek PPP (mengingat interpretasi yang luas terhadap kata "terkait"), tertutup atau terbatas karena adanya persyaratan persetujuan oleh Tim PKLN dan prosedur antrian. Lebih lanjut, Bank-bank Pemerintah, yang merupakan pusat-pusat modal dalam negeri, dilarang untuk memberikan pinjaman kepada proyek-proyek PPP yang melibatkan modal asing. Alternatif-alternatif pembiayaan yang lain harus dicari sebagai tambahan untuk mempertimbangkan kembali pembatasan-pembatasan tersebut.

Obligasi, apabila diatur secara benar, akan menarik para penanam modal, khususnya bagi mereka yang memiliki cadangan modal jangka panjang (seperti halnya, dana-dana pensiun dan cadangan-cadangan asuransi). Perdagangan surat berharga di Indonesia baru saja berkembang dan permasalahan yang berhubungan dengan obligasi termasuk perjanjian-perjanjian tarif, status hukum pemegang obligasi dan sifat dan sumber dari peningkatan kredit.

Saran-saran: Proyek-proyek infrastruktur yang berhubungan langsung dengan kesejahteraan umum harus diutamakan oleh tim PKLN. Surat Menteri Keuangan No. S-1603/90 harus dirubah untuk memungkinan proyek-proyek infrastruktur yang melibatkan modal asing dalam Sektor-sektor Sasaran memperoleh dana dari Bank-bank Pemerintah. Juga langkah-langkah hukum khusus harus diambil untuk memungkinkan Pemerintah Daerah dan BUMD-BUMD untuk menerbitkan obligasi-obligasi dan mencari alat pembiayaan yang lain yang sesuai. Peraturan-peraturan dan Keputusan-keputusan pelaksanaan, sesuai dengan keperluan, harus ditetapkan secara terkoordinir dengan Menteri Keuangan, BAPEPAM, Menteri Dalam Negeri dan perwakilan-perwakilan Pemerintah Daerah dan BUMD-BUMD, juga dengan masukan-masukan dari badan-badan swasta yang terkait seperti konsultan-konsultan surat berharga dan para penjamin emisi.

9. Pendapatan Proyek Yang Cukup dan Pasti.

Dari sudut pandang seorang investor, pembiayaan proyek dapat dikatakan laik hanya apabila (a) perkiraan terhadap sumber pendapatan mencukupi tujuan pembiayaan dan operasional dan (b) perkiraan-perkiraan tersebut cukup meyakinkan untuk dapat dicapai. Dalam bidang penyediaan air, kesulitan-kesulitan untuk mencapai kedua kriteria tersebut bertumpu pada peraturan-peraturan dan kebijaksanaan yang ada yang berhubungan dengan jangka waktu penentuan tarif (misalnya maksimal jangka waktu untuk 3 (tiga) tahun) dan tingkatan tarif (tarif tidak mencerminkan biaya yang sebenarnya). Di dalam dua Sektor Sasaran lainnya, terdapat juga permasalahan yang sama.

Saran-saran: Keputusan-keputusan Menteri Dalam Negeri yang ada yang berhubungan dengan pedoman tarif air harus diubah untuk memberikan ijin yang lebih lama untuk jangka waktu penentuan tarif dan/atau memberikan keleluasaan untuk menentukan tarif yang mencerminkan kenyataan keadaan perniagaan dan ekonomi. Mekanisme tarif yang sama juga harus dilakukan untuk Sektor-sektor Sasaran lainnya.

10. Jaminan dan Dukungan Kredit

Memperhatikan resiko-resiko kredit jangka panjang yang ada, bersama dengan jumlah modal yang dipertaruhkan dan sedikitnya pengalaman

Pemerintah Daerah dan BUMD-BUMD dalam proyek-proyek PPP pada Sektor-sektor Sasaran, para investor akan sangat mengharapkan jaminan yang didapatkan dari proyek dan tersedianya dukungan kredit dari pihak ketiga.

Sebagaimana tercantum dalam Bagian 5.d diatas, dalam praktek pelaksanaan upaya hukum di Indonesia adalah sulit dan tidak jelas, dan pelaksanaan jaminan yang sering dibutuhkan oleh para kreditur (misalnya peralihan ijin operasi secara fidusia) mungkin tidak diperbolehkan oleh hukum Indonesia dan secara praktek.

Lebih dari itu, bentuk-bentuk umum dari dukungan kredit pihak ketiga seperti asuransi obligasi atau garansi pemerintah mungkin tidak tersedia, setidaknya dalam praktek di Indonesia. Garansi bank atau standby L/C, bagaimanapun, mungkin dapat merupakan salah satu alat yang dapat menenangkan para kreditor dan investor untuk mempertaruhkan modal mereka di proyek-proyek PPP.

Saran-saran: Dasar hukum penyerahan gadai perlu untuk dibentuk dan/atau diperjelas. Lebih khususnya, penyerahan secara fidusia yang berhubungan dengan pengikatan-pengikatan penghasilan dan pemindahan ijin operasi dalam konteks proyek-proyek PPP harus ditetapkan. Pembentukan sistem pendaftaran hak-hak pemilikan dari pemindahan secara fidusia sudah seharusnya telah dilaksanakan sebelumnya.

Pembatasan-pembatasan yang ada mengenai jaminan-jaminan Pemerintah dan bank-bank pemerintah harus dipertimbangkan kembali dalam konteks, atau bahkan dihapuskan, untuk kepentingan proyek-proyek PPP. Pernyataan pemberian kekuasaan untuk mengeluarkan garansi-garansi jangka panjang atau standby letter of credit oleh bank-bank pemberi garansi yang potential, termasuk bank-bank pemerintah, harus ditetapkan. Pemerintah harus mempertimbangkan langkah-langkah untuk membantu perkembangan pembentukan perusahaan asuransi obligasi.

I. INTRODUCTION TO THE INDONESIAN LEGAL AND POLITICAL SYSTEM

The fundamental structure of the legal and political system of the Republic of Indonesia is set out in the Constitution of 1945, which provides for executive, legislative and judicial branches in a republican form of government. Indonesia maintains a unitary system of government and its power is highly centralized. The President has a predominant role in establishing national agendas and policies, and indeed is the paramount figure in a society in which deference to authority is deeply rooted. He maintains a steady hand on the governance of the nation through his promulgation of Government Regulations (Peraturan Pemerintah), Presidential Decrees (Keputusan Presiden or "Keppres") and Presidential Instructions (Instruksi Presiden).

A. Executive Branch

The President is served by a thirty-eight member Cabinet which serves entirely at his discretion, although for the most part members tend to serve out the five-year terms to which the President appoints them. The Government of Indonesia ("GOI") is divided into departments, each of which is headed by a Cabinet Minister, as well as other governmental agencies and institutions such as Bank Indonesia (the central bank) and BKPM. Additionally, Coordinating Ministers and State Ministers are entrusted with important government functions, but without the responsibility for managing a full departmental bureaucracy. Each cabinet member may issue regulations (Peraturan Menteri or "Permen"), decrees (Keputusan Menteri or "Kepmen") and instructions (Instruksi Menteri or "Inmen"). From time to time, two or more Ministers issue joint decrees (Surat Keputusan Bersama Menteri), although it is also common for one Minister to issue a decree that impacts on matters within the jurisdiction of a different Department of the GOI. Additionally, Government Departments and their agencies (including, for example, Directorates General) may also issue circular letters (Surat Edaran), instructions (Instruksi) and other guidelines and policy statements.

B. Legislative Branch

The People's Consultative Assembly (Majelis Permusyawaratan Rakyat or "MPR") is the country's highest political body. It meets at five-year intervals to elect the President and Vice President and establish the Broad Outlines of State Policy (Garis-garis Besar Haluan Negara or "GBHN"). The MPR consists of the entire House of People's Representatives (Dewan Perwakilan Rakyat or "DPR") and an equal number of members appointed by the government in proportion to the results of the national election.

The legislative function of the GOI is carried out by the DPR. It has 460 members, of which 360 are elected and 100 are appointed by the President.

The DPR normally only considers bills submitted to it by the government and drafted by the various governmental departments, but it often amends such bills prior to their approval. Once passed, the bills are submitted to the President for signature after which they become statutory law. Deliberations of the DPR are aimed at reaching a unanimous consensus (mufakat). The DPR sits in session four times annually.

C. Judicial Branch

The Indonesian judiciary consists of four (4) types of courts: courts of general jurisdiction (both civil and criminal matters), religious Islamic courts, military courts and administrative courts (including tax appeals). The general jurisdiction courts have three levels: the district courts (trial level courts), the appellate courts and the Supreme Court (court of final appeal). The procedural system is based on Civil Law principles inherited from the Dutch. The Indonesian courts are generally acknowledged to require additional upgrading in order to fulfill the complex needs of a modern legal and economic system.

D. Regional Divisions and Decentralization

Administratively, Indonesia is divided into 27 provinces (including the three "special regions" of Jakarta, Yogyakarta and Aceh) referred to as Regional, Level I (Daerah Tingkat I) or Provincial Governments. Each is headed by a Governor who is elected by the province's local parliament subject to the approval of the President. A Governor may issue decrees (Surat Keputusan Gubernur) and instructions (Instruksi Gubernur).

The provincial legislature (Dewan Perwakilan Rakyat Daerah Tingkat I) is composed of both elected and appointed members. An enactment of a provincial legislature (referred to as a Peraturan Daerah or "PERDA") is normally drafted and submitted by the Governor and, once passed, is subject to "legalization" by the Minister of Home Affairs ("MOHA") prior to taking effect.

Provinces are subdivided into (a) municipalities (kotamadya) each headed by a mayor (walikota) and (b) in rural and less urbanized areas, regencies (kabupaten) each headed by a regent (bupati). Such subdivisions are referred to as Level II (Tingkat II) or Municipal Governments. At this level there are also legislative bodies (Dewan Perwakilan Rakyat Daerah Tingkat II) composed of elected and appointed members. Level II Governments are further divided into districts (kecamatan) which in turn are made up of subdistricts (kelurahan or desa).

Decentralization has long been a fundamental principle of the New Order government of President Soeharto.[1] That policy has been reflected in various other decrees including Government Regulation No. 14 of 1987 regarding Transfer of Part of Governmental Affairs in the Field of Public Works to the Regions (June 27, 1987) ("PP 14/87"), and most recently by President Soeharto's state address before parliament on the eve of Indonesia's 50th Independence Day celebration on August 17, 1995. In that speech the President endorsed the previously announced "pilot project" of regional autonomy involving twenty-six (26) select Municipal (Level II) Governments located in each of the Regions (Level I) of Indonesia, except Jakarta. To what extent this reintensified effort to decentralize Governmental functions will be successful remains to be seen. In the past a combination of local government shortcomings in experience and training plus reluctance from some officials in central government to release authority has led to an ineffectual program of decentralization.

II. DEFINITION OF PPP AND PSP PROJECTS

In order to provide a meaningful analysis of the legal constraints, deficiencies and omissions facing the private sector in its effort to participate with the GOI in infrastructure projects in the Target Sectors, we believe it helpful to first generally describe the two (2) basic forms of private participation under discussion and to then identify the fundamental legal and regulatory needs thereof.

The term "PPP", as defined in the PURSE/SSEK Subcontract, refers to "any **capital intensive infrastructure project** which is developed, financed and constructed by a private sector organization with the authorization and support of an agency of government to provide a public infrastructure service." PPP projects specifically include (without limitation) Build, Own and Transfer ("BOT"), Build, Own and Operate ("BOO") and turnkey projects.

The term "PSP", also as defined in the PURSE/SSEK Subcontract, refers to "any **non-capital intensive infrastructure project** which does not involve large capital expenditures, but which will provide a service under a contractual agreement with the GOI or its designated representative to provide a public domain infrastructure service." PSP projects specifically include, among others, Management Operating Contracts and Management Service Contracts (as defined in the PURSE/SSEK Subcontract).

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[1] Law No 1 of 1974 regarding Basic Principles of Regional Government (July 23, 1974) firmly established a policy of decentralization.

III. PRIVATE SECTOR PERSPECTIVE ON INDONESIAN LEGAL AND REGULATORY CONSTRAINTS, DEFICIENCIES AND OMISSIONS

In conducting a normal risk-reward analysis, the private sector will seek certain minimal assurances regarding the local legal and regulatory framework as a precondition to committing their financial, technical and human resources to PSP or PPP projects in any developing country, including Indonesia.

A. Common Minimal Assurances Needed for PPP and PSP Projects

These minimum assurances applicable to both PSP and PPP projects can be identified as follows:

1. a clear and unequivocal legal basis for the private participant to engage in the subject undertaking;

2. a clear and unequivocal legal basis for the governmental counterpart of the private participant to engage in the subject undertaking;

3. clear procedures and protocols of project approval and implementation;

4. access to all laws and regulations, together with authoritative interpretations thereof, that relate to the subject undertaking and/or the private participant's involvement therein;

5. a reasonable level of confidence in the overall legal and regulatory environment, including a fair tax system, available methods of independent and competent dispute resolution, and the practical enforceability of legally correct claims without undue cost or delay.

B. Special Concerns of PPP Projects

In addition to the minimum legal and regulatory requirements applicable to both PPP and PSP projects, private participants in capital intensive (PPP) undertakings will seek additional assurances due to the higher level of financial risk assumed by both the private participant (frequently in the form of an equity investment) and the lender providing financing for the project. From the point of view of developing countries, including Indonesia, a major attraction of PPP projects is the limited recourse financing typical of such projects. Indeed, under Keppres 59/72 and its progeny (discussed in Section IV.H.1), guarantees by the Central or any Regional Government of Indonesia are effectively prohibited, thereby assuring the limited recourse nature of PPP project financing. For purposes of this analysis, therefore, the interests of lenders as well as investors must be taken into account. The additional concerns of the private sector which come into play in a PPP project may be identified as follows:

1. the validity under local law of the contractual basis upon which the project is undertaken, e.g., BOT or BOO;

2. clear and sufficient rights of use and ownership pertaining to land and water resources;

3. access to adequate sources of funding, both onshore and offshore;

4. an assured project revenue source, over projected time periods and at projected pricing levels, to provide adequate funding for both operating costs and debt service; and

5. confidence in the nature and enforceability of the security package available to the lender, including recourse to marketable assets or creditworthy parties in the event the project is abandoned or never reaches the stipulated performance levels.

The analysis that follows looks at the applicable laws and regulations of Indonesia as they relate to each of the ten (10) areas of concern identified above, and comments upon their adequacy in light of the practical and commercial needs of the private sector. Where appropriate, specific recommendations are made in respect of legal or regulatory changes that would facilitate the realization of PSP and PPP projects in the target sectors of water supply, waste water and solid waste management (collectively, the "Target Sectors").

IV. ANALYSIS OF LEGAL AND REGULATORY CONSTRAINTS, DEFICIENCIES AND OMISSIONS IN INDONESIA

A. Legal Basis for Private Participation in PSP and PPP Projects

In discussing the legal basis for private participation in the Target Sectors, a distinction must be made between PSP and PPP projects due to the fundamental difference in the nature of private participation in those respective business structures (i.e., mere contractual relations versus equity participation). Furthermore, in the case of PPP projects, a further distinction must be made among the legal bases for private sector involvement in each of the three Target Sectors, since particular regulatory promulgations have been issued in respect of each of them.

1. Private Participation in PSP Projects

With the exception of certain Drinking Water Regional Enterprises (Perusahaan Daerah Air Minum or "PDAM"), the experience of Regional Governments and Regional Enterprises (Badan Usaha Milik Daerah or "BUMD")

in awarding service contracts to the private sector is somewhat limited. As discussed in the Narrative Description, primary responsibility for the Target Sectors has been transferred in large part from the Department of Public Works to the Regional Governments pursuant to PP 14/87.[2] Accordingly, the award of Target Sector service contracts to private participants is within the power of the Regional Governments and, by extension, of BUMDs as well. The nature and scope of that power will be addressed in the following section. In this section we deal with the legal basis upon which a private participant may act as a contractor in providing services to government customers in the Target Sectors.

a. PSP Projects outside the Scope of Keppres 16/94

In principle, procurement of goods and services by both Regional Governments and BUMDs is governed by Presidential Decree No. 16 of 1994 (March 22, 1994) ("Keppres 16/94"). In the case of BUMDs, however (but not in the case of Regional Governments), Keppres 16/94 makes an important distinction. Article 23(5) limits the strict applicability of Keppres 16/94 to BUMD procurement of goods and services for "investment purposes". In cases where the procurement is for "operational/exploitational purposes" Keppres 16/94 instructs the Boards of Directors of BUMDs to be "guided by" its provisions, implementing the procurement on "principles of appropriateness, effectiveness and efficiency" (Id., Article 23(5)(c)).

The concepts of "investment purposes" and "operational/ exploitational purposes" are not defined in Keppres 16/94. The Official Elucidation to Keppres 16/94, however, explains that goods and services which are operational/exploitational in nature may be either "expensed" or "non-expensed" items. This statement, however, appears to contradict the general thrust of the elucidation that fixed assets (i.e., capital goods which are normally considered "non-expensed items") are considered to be "for investment purposes" within the meaning of Article 23(5)(a), whereas consumable and assets with a limited period of economic benefit are considered to be "operational/exploitational" in nature and, therefore, not strictly within the ambit of Keppres 16/94.

Based on the language of Keppres 16/94 and its Official Elucidation, it appears that most, if not all, service contracts awarded by BUMDs to private participants in the Target Sectors would be considered "operational/ exploitational" in nature and, therefore, not within the scope of Keppres 16/94. The risk in such case is that the procedures established by Keppres 16/94 to ensure a fair, honest and transparent system of procurement may be

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[2] PP 14/87 replaced Government Regulation No. 18 of 1953 regarding Implementation of Transfer of Part of Governmental Affairs in the Field of Public Works to the Provinces and Confirmation of Public Works Duties from Regency, Big Cities and Small Cities in Java (April 16, 1953) which itself provided for a transfer of a significant portion of the Central Government's functions in the field of public works to the Regional Governments.

circumvented in cases where service contracts in the Target Sectors are to be awarded to private parties by BUMDs.

The Official Elucidation attempts to address this concern by requiring that BUMD Boards of Directors be guided by Keppres 16/94 in such cases and, moreover, that written regulations regarding procurement of operational/exploitational goods and services be promulgated (Id., Art. 23(5)(a)) Based on past experience, difficulties may be anticipated in implementing such requirement effectively. Even when such written regulations are promulgated (which could take an inordinate length of time), the clarity, distribution and actual implementation of those regulations may each be problematic.

A partial, and perhaps practical solution, would be for the Economic and Finance Department (Ekonomi dan Keuangan or "EKKU") or the newly established Procurement Evaluation Team[3] ("Keppres 6/95 Team") to (a) provide additional clarification regarding the scope of Keppres 16/94 as it applies to operational/exploitational services and (b) issue a model set of procurement regulations or applicable guidelines relating to BUMD procurement of such services.

b. PSP Projects within the Scope of Keppres 16/94

As to service contracts to be awarded to private participants directly by any Regional Government and most service contracts awarded by BUMDs that would be deemed "for investment purposes" within the meaning of Keppres 16/94,[4] the legal basis for private sector participation would be governed by the rules set out in Keppres 16/94.

The eligibility requirements for bidding for government contracts under Keppres 16/94 are briefly summarized in the Narrative Description, Section VII, A5 (p.29). Depending on the type of tender involved, the private sector participant may need to be registered on the List of Capable Contractors (Daftar Rekanan Mampu or "DRM") as well as the List of Selected Contractors (Daftar Rekanan Terseleksi or "DRT"). "Local contractors" and private participants from the "economically weak group" are entitled to certain preferences.

"Clean water installation projects" undertaken by PDAMs are expressly exempted from the public tender and limited tender requirements of Keppres 16/94 (Id., Art. 22 (10)(a)). Accordingly, PSP projects for investment

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[3] The Procurement Evaluation Team was established by Presidential Decree No. 6 of 1995 regarding Procurement Evaluation Team (February 2, 1995) ("Keppres 6/95") and is responsible for, among other things, the monitoring and coordination of procurement definitions and the conduct of administration to strengthen procurement. Id., Art. 4(2)(e) and (f).

[4] As mentioned in Section IV.B.1.a., it is unclear what type of PSP project, if any, would be considered "for investment purposes" within the meaning of Keppres 16/94.

purposes undertaken in the water supply sector with PDAMs may be awarded by direct selection and/or direct procurement, although the private sector participant must be listed on the DRM and/or the DRT. The other Target Sectors are not subject to any such exception, so that PSP projects undertaken with BUMDs in the waste water and solid waste sectors for investment purposes are subject to all requirements of Keppres 16/94. It may bear repeating at this point that **all** PSP projects in which the contract is awarded by a Regional Government itself are also within the scope of Keppres 16/94.

Technical guidelines for Keppres 16/94 have been issued in the form of a Joint Decree of the Minister of Finance and the State Minister for National Development Planning/Chairman of the National Development Planning Agency No. Kep-27/MK.3/8/1994 and Kep-166/KET/8/1994 dated August 4, 1994 ("Juknis"). It is anticipated that official English translations of both Keppres 16/94 and the Juknis will be issued and distributed to assist foreign contractors in competing for GOI contracts.

Keppres 16/94, at least on paper, is a significant improvement in the procurement system of the GOI. Notwithstanding the express preferences for local contractors, local content and the economically weak group enshrined in Keppres 16/94, it provides the basis for a fair, transparent and competitive procurement system.

2. Private Participation in PPP Projects

Unlike private participation in PSP projects, Keppres 16/94 has no direct relevance to private participation in PPP projects. Whereas a PSP project typically establishes only a contractual relationship between participants from the public and private sectors, a PPP project typically requires the formation of a new joint-equity legal entity to undertake the project, i.e., a "Project Company." In addition to raising issues relating to the legal ability of public sector entities to enter into joint ventures with private companies (as discussed below in Section IV.C.), PPP projects, particularly in the area of water supply, raise fundamental issues concerning the legal right of the private sector to participate in strategic activities related to the "prosperity of the people" of Indonesia. This Section analyzes the applicable laws and regulations pertaining to the legal basis of private sector participation in water supply as well as the other Target Sectors.

a. Water Supply

(i) Investment Law and Regulations

Although not entirely free from question, the legal ability of the private sector to participate in water supply projects has been recognized for nearly 30 years and has been most recently clarified by promulgation of Government Regulation No. 20 of 1994 regarding Share Ownership in

Companies Established within the Framework of Foreign Investment (May 19, 1994) ("PP 20/94"). A remaining cloud, however, exists in the form of Law No. 5 of 1962 regarding Regional Enterprises (February 14, 1962) ("Law No. 5/62"), although, as discussed below, subsequent legislation as well as practice seems to have rendered the issue moot.

Law No. 1 of 1967 regarding Foreign Investment (January 10, 1967), as amended by Law No.11 of 1970 (August 7, 1970) ("Foreign Investment Law"), provides that nine (9) sectors of the economy considered of special importance to the nation, including "drinking water", may not be placed under the "full control" of foreign ownership. Although "full control" is not defined, it presumably refers to 100 percent foreign ownership which was generally permitted at the time the Foreign Investment Law was enacted. This interpretation is bolstered by reference to subsequent "Priority Lists" (Daftar Skala Prioritas or "DSPs") in which "drinking water plants" were listed as open to both foreign and domestic investment[5]. The most recent and definitive GOI pronouncement on the subject, however, is found in PP 20/94. PP 20/94 expressly allows foreign investment in "drinking water" projects[6], provided the maximum foreign equity is 95 percent, thus removing any doubts about foreign (and, by implication, domestic) capital participation in the water supply sector. Since GOI policy is not to favor foreign capital over domestic capital (in fact, the reverse is true to some extent), the confirmation that the water supply sector is open to foreign investment necessarily implies that it is open to domestic investment as well. PP 20/94 does not, however, provide any guidance as to whether the local joint venture party can or must be a PDAM, Regional Government, other governmental entity or even another private participant.

In March 1994, BKPM issued the most current version of its Information on Business Opportunities (Informasi Peluang Usaha or "IPU") which provides additional guidance to investors in determining what types of projects will receive favorable consideration by BKPM[7]. Although the IPU predates PP 20/94 by two months, it lists five (5) separate types of clean water projects[8] in which private investment (both domestic and foreign) is permitted and identifies eleven (11) geographic areas in which such projects can be undertaken.

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[5] For a more complete discussion of this topic, see the Narrative Description, Section VII, B2.

[6] Lack of consistent terminology is a common problem faced in the interpretation of GOI laws and regulations. It is generally understood in the absence of any indication to the contrary that the terms "drinking water", "clean water" and "water" when used in this context all refer to fresh, treated, though not necessarily potable, water. "Standard water" as used in the IPU is understood to mean raw, untreated fresh water.

[7] The IPU in some respects is a reversion to the old Investment Priority List (DSP) procedure for determining the sectors in which private investment in Indonesia was permitted. The IPU is a booklet first published in 1992 and although its preface is under the name of the Minister of Investment Affairs/Chairman of BKPM, it is not in the form of a ministerial decree or instruction. Although it does not have the same official status as the Priority List once had, the mere existence of the IPU calls into question the functional status of the Negative List (DNI).

[8] The clean water projects listed in the IPU are (1) Absorbing/taking of standard [i.e., raw or untreated] water including constructing dams/reservoirs for standard water if necessary, (2) Transmitting standard water, (3) Producing clean water, (4) Transmitting clean water (bulk), and (5) Distributing clean water (covering services for industrial zones, sea ports, tourism/recreation zones, real estates and public/social services).

Perhaps more significantly, however, the IPU describes the form of investments permitted for such projects. Private sector investment, according to Section 12, Item IV 3.b. of the IPU, may be in the form of joint ventures with Regional Governments or PDAMs, or may be wholly privately owned provided (a) such projects are "under supervision" of the Regional Government and (b) are "not directly related to the public". Examples are given of projects not directly related to the public: seaports, industrial zones, and tourism and recreational zones. Read together with PP 20/94, the IPU clearly provides a regulatory basis for the private sector to engage in PPP projects in at least the five (5) types of projects identified in the IPU and, moreover, to undertake such projects for limited enclaves without equity participation by the public sector. It should be emphasized, however, that the IPU is merely "information" provided by BKPM and, as such, does not have the legal force and effect of a Law or other conventional governmental promulgation. In practice, the IPU serves as a supplement to the DNI, but its technical legal status remains unclear.

(ii) Law No. 11 of 1974 regarding Water Resources

In identifying the legal basis for private sector participation in water supply projects, reference should also be made to Law No. 11 of 1974 on Water Resources (December 26, 1974) ("Law No. 11/74"). Article 4 of Law No. 11/74 and its Official Elucidation expressly contemplate the transfer of authority over the exploitation of water resources to the private sector pursuant to applicable government regulations.[9]

Some doubt, however, is cast over the ability of the private sector to participate in water supply projects due to certain provisions in Law No. 5/62. Further analysis of the status of Law No. 5/62 is provided below in Section IV.C.2.a., in the context of the legal ability of the public sector to cooperate with the private sector in water supply projects. For present purposes it is sufficient to state that any interpretation of Law No. 5/62 excluding the private sector from PPP projects in water supply must take into account the provisions of Law No. 11/74 which expressly contemplate cooperative undertakings between the private and public sectors in this area. Although Law No. 11/74 does not by its terms repeal all prior legislation inconsistent with its provisions, two basic rules of statutory construction may be applied here. The first is that the specific controls the general, and the second is that the more recent of two promulgations of equal authoritative weight prevails. As Law No. 11/74 is both more specific[10]

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[9] Moreover, Article 11 of Law No. 11/74 as explained in the Official Elucidation, encourages entrepreneurs to cooperate with the public sector in the exploitation of water resources in order to maximize the benefit of such resources to society. For a further discussion of Law No. 11/74, see the Narrative Description, Section VII, B3., pp. 33-35.

[10] Article 5(4) of Law No. 5/62 refers to unspecified important activities relating to the prosperity of the region, but does not expressly refer to water supply projects. Law No. 11/74, on the other hand, specifically concerns the exploitation of water resources.

and more recent[11] than Law No.5/62, it is reasonable to conclude that the provisions of Law No. 11/74 control.[12]

In summary, therefore, the legal basis for the private sector to participate in PPP water supply projects is well-founded. Law No. 11/74 provides a solid legal basis for cooperation between the private and public sectors in this sector, and Indonesian investment laws and regulations have consistently regarded water supply as an area open to investment, albeit subject to certain limitations. To the extent Law No. 5/62 could be interpreted as preventing private sector cooperation with BUMDs, subsequent laws and current practice, as further discussed in Section IV.C.2.a. below, both effectively undercut such interpretation. Nevertheless, for the sake of consistency and good order, Law No. 5/62 should be replaced by a new law regarding BUMDs.

b. Waste Water

The involvement of the private sector in waste water is less sensitive than its involvement in water supply, resulting in fewer government promulgations relating to such activities. Investment in waste water projects is not restricted in any way in the current Negative Investment List (Daftar Negatif Investasi or "DNI"), thus raising a presumption that such projects are open to private investment without any equity participation by the public sector. Curiously, no mention of waste water projects is made in the current IPU, although both the water supply and solid waste sectors are treated in some detail.

A positive legal basis for private participation in waste water projects is provided by Government Regulation No. 20 of 1990 regarding Water Pollution Control (June 5, 1990) ("PP 20/90"). As discussed in the Narrative Description,[13] the Official Elucidation of PP 20/90 provides that waste water treatment and disposal activities can be conducted by Municipal (Level I) authorities themselves or contracted out to the private sector. The language of the Official Elucidation implies, but does not directly state, that a private company would not be required to enter into a joint venture with the Regional Government for the purpose of providing such services.

Based on PP 20/90 and its Official Elucidation, therefore, the private sector is permitted to engage in PPP projects in waste water treatment and disposal without any equity participation by the public sector or any other particular restriction. This conclusion, however, is based on an interpretation of relatively minimal references in PP 20/90 which, however reasonable, could

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[11] Law No. 5/62 was promulgated in 1962, Law No. 11 in 1974.

[12] This same analysis is valid in respect of the Foreign Investment Law, although the applicable provision in that law restricts rather than opens access to water projects to foreign investment. Nevertheless, it appears to allow foreign investment in water projects on a less than "full control" basis.

[13] Narrative Description, Section VII, C1., pp. 43-44.

prove to be at odds with the prevailing view of a particular Municipal (Level I) government official or with other GOI departments or agencies that might claim jurisdiction over such a project.[14] Accordingly, a clarification in the form of a Ministerial Decree or other promulgation would be helpful in determining the legal basis of private sector participation in PPP waste water projects.

c. Solid Waste

The only current Central Government promulgation dealing with general solid waste management[15] is the relevant information provided in the IPU. As set out in Section 12, Item IV 4.a. of the IPU, solid waste (sampah) management can be any or all of the following:

(i) collection from residential, industrial, commercial, recreational and other sources;

(ii) transportation of solid waste from collection point to processing facility or final disposal site;

(iii) processing of solid waste; and

(iv) final disposal of solid waste.

The IPU further states that both local and foreign private participants may form joint ventures with Regional Governments or Regional Sanitation Enterprises (Perusahaan Daerah Kebersihan or "PDK") to conduct such activities. In the alternative, private companies themselves, "under supervision" of the Regional Government may undertake such activities except those "directly related to the public" (IPU, Section 12, Item IV 4.b.). By way of example, the IPU identifies certain transportation activities as being open wholly private enterprises, although it would seem that all of the other activities described in the IPU, except residential garbage collection, could be reasonably interpreted as being "directly related to the public."

The IPU goes on to list eleven (11) geographic locations in which such activities may be carried out.

As previously mentioned, the legal status of the IPU is somewhat vague. It purports to be merely an information booklet, yet it appears to impose geographic and other restrictions on private investment without any other legal

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[14] It may be reasonably anticipated, for example, that the restrictions on water supply and solid waste contained in the IPU limiting wholly privately owned projects to enclaves not directly related to the public could also be applied to waste water projects.

[15] Government Regulation No. 19 of 1994 regarding the Management of Hazardous Waste and Toxic Materials (April 30, 1994) is discussed in the Narrative Description (Section VII.D1., pp. 49-50), but is not relevant to general solid waste management issues.

basis or authority whatsoever. For example, by the omission of the Province of North Sumatera from the IPU, it appears the private sector is precluded from considering PPP projects in solid waste management in that region, but there is no underlying regulation or decree on which this "information" is based. The legal status of the IPU needs clarification. It is not in the form of any conventional Government promulgation such as a decree, regulation or instruction. Nor is it clear whether the lists of activities and geographic areas "open" to investment are intended to be exclusive or whether the private sector would be permitted to explore other possibilities. Consideration should be given to revoking the IPU altogether.

Additionally, given the growing importance of solid waste management and disposal, the development of PPP and PSP urban infrastructure projects in this sector would be well-served by promulgation of an appropriate law or regulation dealing with this subject. The draft Solid Waste Management Regulations (PURSE Report No. 101.02.2/94/020) provides a good point of departure in addressing this concern.

B. Legal Basis for Governmental Participation in PSP and PPP Projects

Essentially all public works responsibility for the Target Sectors has been transferred to Level I and Level II Governments pursuant to PP 14/87.[16] The autonomy granted to the Regional Governments by PP 14/87, however, is far from complete. Heads of the Regional Governments must submit periodic reports regarding public works affairs to both the Ministry of Public Work ("MOPW") and the MOHA, and the Central Government retains the power to withdraw the delegated responsibilities under PP 14/87 if it deems necessary. Nevertheless, it is clear that the Regional Governments (in many cases acting through BUMDs) have primary responsibility for developing, operating and maintaining infrastructural projects within the Target Sectors.

With respect to business relationships with the private sector, Regional Governments must be distinguished from BUMDs, and separate regulations dealing with each such type of relationship exist. Additionally, the legal basis and procedures applicable to Regional Governments on one hand and BUMDs on the other will differ depending upon whether the subject project would be categorized as PPP or PSP. Finally, in some instances, specific regulations dealing with a particular Target Sector will impact upon the analysis.

[16] See discussion in Narrative Description, Section VII A1., pp. 24-26.

1. Participation by Regional Governments

a. Regional Government Participation in PSP Projects

Regional Governments have the legal right and capacity to purchase goods and services from the private sector and, indeed, Keppres 16/94 (Government Procurement Decree) is expressly applicable to Regional Governments (Id., Arts. 23(1) and (4)). As discussed above in Section IV.A.1.b., Keppres 16/94 provides a relatively clear and accessible regulatory basis upon which to implement a procurement system characterized by fairness, transparency and competitiveness. Final analysis of the success of Keppres 16/94 in achieving these goals must wait until its practical implementation has been observed over a period of time.

While Keppres 16/94 provides the procedures to be followed by Regional Governments in awarding service and supply contracts to the private sector, the various sanctioned forms of cooperation between Regional Governments and "third parties" are set out in MOHA Regulation No.3 of 1986 regarding Participation of Regional Government Capital in Third Party Undertakings (October 1, 1986) ("MOHA Reg.3/86"). "Third parties", within the context of MOHA Reg. 3/86, includes both foreign and domestic private sector entities, as well as any other entity outside the organizational structure of the subject Regional Government (Id., Art. 1 (i)).

MOHA Reg. 3/86 permits Regional Governments to (i) acquire shares in an existing corporation, (ii) establish a joint venture corporation or (iii) enter into any of the five (5) types of agreements as described in the Official Elucidation. The five (5) types of agreements are identified as (i) Management Agreements, (ii) Production Contracts, (iii) Profit Sharing Contracts, (iv) Production Sharing Contracts and (v) Facility Sharing Contracts. Based on the descriptions of these arrangements set out in the Official Elucidation, it appears that a Management Agreement would fall within the working definition of PSP projects, whereas the other arrangements all refer to "capital contributions" to be made by the third party partner and/or the Regional Government. Accordingly, in this Section we comment only upon the form of Management Agreement described in MOHA Reg. 3/86 and defer discussion of the other forms of cooperation to Section IV.C.1.b. below dealing with Regional Government participation in PPP projects.

The Official Elucidation to MOHA Reg. 3/86 describes a Management Agreement as one in which the Regional Government makes an in-kind capital contribution "in the form of goods" towards a commercial enterprise, the management of which is carried out by a third party which receives an agreed upon fee based on the profits of the enterprise (Id., Art. 3/General Elucidation 2.C.1). Although this description is fairly reasonable as far as it goes, if interpreted as the only model of Management Agreement that a Regional

Government is permitted to enter into, it poses a number of constraints. For example, it provides that the third party manager's fees are to be based on profits. If interpreted strictly, this requirement forecloses discussion concerning other fee structures (e.g., fees based on gross sales) as well as raising questions about how "profits" should be defined in any particular case. Moreover, the concept of "management" in this context may itself present some uncertainty since, in the description of Profit Sharing Contract, a distinction is apparently made between the concepts of "management" and "operational responsibility" of the enterprise. Accordingly, it is not altogether clear whether a Management Agreement as contemplated by MOHA Reg. 3/86 would encompass either a Management Operating Contract or a Management Services Contract as those terms are defined in the PURSE/SSEK Subcontract.

As further discussed in Section IV.C.1.b. below, the Official Elucidation describes the various forms of contract in specific detail, with the perhaps unintended result of imposing unnecessary inflexibility on the part of the Regional Government by preventing it from exploring mutually beneficial contractual structures with the private sector. This detail-oriented approach contrasts sharply with the more general approach found in MOHA Regulation No.4 of 1990 regarding the Procedure of Cooperation Between Regional Enterprises and Third Parties (March 16, 1990) ("MOHA Reg. 4/90") which merely identifies by name a wide variety of cooperative efforts permitted between BUMDs and third parties. The approach of MOHA Reg. 4/90 would be appropriate and welcomed by both the Regional Governments and the private sector, and could be accomplished by the MOHA rescinding items (1) through (5) of Section I, 2.c. of the Official Elucidation.

b. Regional Government Participation in PPP Projects

As already noted, MOHA Reg. 3/86 permits Regional Governments to acquire shares in existing corporations, form new corporations and enter into certain types of contracts with third parties. In addition to Management Agreements discussed above in Section IV.C.1.a., the Official Elucidation of MOHA Reg. 3/86 sanctions the following arrangements:

- **Production Contract** in which the Regional Government makes an in-kind capital contribution "in the form of goods" towards a commercial enterprise, the management of which is carried out by a third party, provided that the third party (i) contributes "investment" or "working" capital, (ii) pays an agreed upon fee (royalty) to the Regional Government and (iii) assumes the profit and loss risks of the enterprise;

- **Profit Sharing Contract** in which the Regional Government makes an in-kind capital contribution "in the form of goods or rights over goods" towards a commercial enterprise, the management of which

is carried out by a third party, provided that the third party (i) contributes "investment" or "working" capital, (ii) assumes operational responsibility for the enterprise and (iii) shares the "proceeds or profits" of the enterprise with the Regional Government in accordance with agreed upon percentages;

- **Production Sharing Contract** in which the third party first invests the necessary capital and/or provides the necessary equipment and facilities to permit production by, or operation of, the enterprise, the management of which will be carried out by the Regional Government, with the products or output of the enterprise to be divided between the parties in accordance with agreed upon percentages; and

- **Facility Sharing Contract** in which the Regional Government makes an in-kind capital contribution in the form of land subject to a "Right of Environmental Management" (Hak Pengelolaan Lingkungan or "HPL") and enters into an agreement with a third party on the following basis:

  (i) the third party shall assume all construction costs;
  (ii) a portion of the constructed facility shall be used or managed by the third party and the remaining portion shall be used, or have its status determined, by the Regional Government;
  (iii) the third party shall be issued a Right to Build (Hak Guna Bangunan or "HGB") on the HPL land;
  (iv) the constructed facilities shall be deemed part of the Regional Government's assets;
  (v) the third party shall be given full management authority over its part of the constructed facilities for the term of the HGB; and
  (vi) following expiration of the HGB, the entire constructed facility shall become the property of the Regional Government.

MOHA Reg. 3/86 also sets out the procedures to be followed in entering into the various types of undertakings described above including, in the case of contracts having a term of more than five (5) years, obtaining the approval of MOHA (Id., Art. 8 (3)).

The guidelines and procedures applicable to the capital participation of a Regional Government in a newly-formed or existing limited liability company as set out in MOHA Reg. 3/86 are relatively few, simple and clear. The guidelines applicable to the various types of contracts described in MOHA Reg. 3/86 and its Official Elucidation are, by comparison, unnecessarily detailed, limiting and vague. MOHA Reg. 3/86, by its nature, was required to be broad in scope and general in description since it sought to encompass every

type of capital participation in which Regional Governments might engage. In describing the acceptable forms of third-party contracts, however, it departed from providing general guidelines and sought to mandate fairly specific contract terms which, however well-intentioned, impose serious constraints on the part of both the Regional Governments and private participants to explore commercially feasible structures of cooperation.

For example, in connection with a Production Sharing Contract, the requirement that the third party provide **all** necessary capital and facilities and, moreover, relinquish management control to the Regional Government, appear to be unrealistic conditions if private sector capital is seriously being sought. Although a general description of the various types of joint capital undertakings in which Regional Governments may participate would be helpful, the parameters for these contracts established by the Official Elucidation to MOHA Reg. 3/86 are counterproductive.

Moreover, the third-party contract descriptions are in some respects unclear. For example, in connection with Production Sharing Contracts and Profit Sharing Contracts, reference is made to third-party contribution of "investment" capital. Since under such contracts no separate joint venture entity would be formed, the meaning of "investment" is unclear in this context. As another example, there is a lack of clarity in the meaning and purpose of the distinction made between "goods" as used in respect of Management and Production Contracts and "goods or rights over goods" as used in respect of Profit Sharing Contracts.

Further analysis would reveal additional difficulties with the terms apparently mandated by the descriptions of these forms of contracts. For present purposes, however, it is sufficient to observe that these contract descriptions, particularly if rigidly applied, constitute a constraint on private participants in their ability to fashion viable project structures with Regional Governments. A preferable approach is embodied in MOHA Reg. 4/90 which simply identifies by title the various structures that BUMDs may consider in entering into business relationships with third parties.

The underlying goal of the GOI in this regard, i.e., to ensure that Regional Governments do not enter into unfair or lopsided contracts with third parties, is already served by the existing requirement that all such contract structures with a duration of more than five (5) years be subject to MOHA ratification, failing which the contract is void. Although, admittedly, such hands-on control by the Central Government is at odds with the policy of decentralization inherent in PP 14/87, it is undoubtedly true that the Central Government continues (and will continue for the foreseeable future) to exercise pervasive supervisory powers over the Regional Governments. Such control is a sufficient safeguard against ill-advised decisions of the Regional Governments. Removing the constraints on the forms of contract into which Regional

Governments can enter would not significantly increase the autonomy of the Regional Governments, but would merely allow for greater flexibility in the structuring of PPP projects.

2. Participation by Regional Enterprises (BUMDs)

a. Status of Law No. 5 of 1962

A threshold difficulty in determining the legal basis upon which a Regional Enterprise (BUMD) may cooperate with the private sector stems from the uncertain status of the law governing BUMDs as well as questions concerning the proper interpretation of certain of its provisions. As discussed in the Narrative Description (Section VII, B 11, pp. 42-43), Law No.5/62 was revoked by Law No. 6 of 1969 regarding Declaration to Invalidate Various Laws and Government Regulations in Lieu of Laws (July 5, 1969) ("Law No.6/69") on the assumption that a replacement law would soon be put into place. No replacement law was ever enacted, resulting in Law No.5/62 being something of a legal "lame duck". As a matter of practical necessity Law No.5/62 continues to be recognized as operative law, but its replacement is long overdue.

Under Law No.5/62, a BUMD can come into existence in two ways: it can be established by a PERDA passed by the provincial legislature and legalized by MOHA, or it can be created by the transfer from the Central Government to a Regional Government of a state enterprise previously operated by the Central Government.

The language of Article 5(4) of Law No.5/62 appears to create fundamental constraints in the ability of BUMDs to cooperate with the private sector in water supply and, perhaps, other infrastructural projects. Although Law No.5/62 expressly permits BUMDs to cooperate with the private sector (Id., Art. 6(1)), Article 5(4) excludes from the scope of such cooperation "important production branches and those affecting the well-being of the region's residents", which category would presumably encompass water supply and perhaps one or both of the other Target Sectors as well. With respect to such "important activities", Article 5(4) further provides that they may be undertaken only by Regional Enterprises in which the capital is owned entirely by the Regional Government. The practical implications of such provision would appear to be three-fold: (a) such important activities may only be carried out by a BUMD (or presumably the Regional Government itself), (b) a BUMD engaged in such an important activity may not go public or otherwise introduce private equity capital into its corporate structure, and (c) BUMDs are prohibited from entering into equity joint ventures, and perhaps all types of PPP projects, for the purpose of undertaking any such important activity. More recent governmental promulgations as well as the actual practice of the public sector in water supply projects, however, seem to have overcome (or at least overlooked) these constraints.

As discussed in Section IV.B.2.a.(ii) above, the validity of Article 5(4) (at least in the water supply sector) has been undercut by Law No. 11/74 as well as the investment laws and regulations of Indonesia. Such evisceration of Article 5(4), however, does not appear to have been intentional and indeed rests upon subsequent legislation being construed in accordance with rules of statutory construction previously mentioned. (See text at footnotes 10 ~ 12.)

Law No. 5/62 must also be read in light of the provisions of MOHA Reg. 4/90. MOHA Reg. 4/90 has as its stated purpose the promotion of BUMDs as a "source of regional revenue" and as a driving force behind the enhancement of regional economies and national development (Id., Preamble and Art. 4). To effect such goal, MOHA Reg. 4/90 identifies a wide variety of "joint venture" arrangements[17] into which a BUMD may enter with a "third party." The term "third party", as in MOHA Reg. 3/86 discussed in Section IV.C.1.a. above, is defined to include private sector entities (MOHA Reg. 4/90, Art. 1 (i)). Unlike MOHA Reg. 3/86, however, MOHA Reg. 4/90 does not attempt to set the terms of the various types of contracts and arrangements identified. Instead, MOHA Reg. 4/90 simply provides a nearly exhaustive list of business structures encompassing both PSP and PPP projects. Although, no express reference to BOT or BOO projects is made in MOHA Reg. 4/90, both a definition and explicit approval of BOT projects are set out in MOHA Instruction 9/95. Although neither MOHA Reg. 4/90 nor MOHA Instruction 9/95 directly contradict the provisions of Law No. 5/62, Article 5(4),[18] their general thrust seems at odds with the constraints imposed on BUMDs under Law No. 5/62.[19]

Regardless of such technical legal concerns, the current position of the GOI regarding BUMD cooperation with the private sector in water supply projects is best evidenced by recent practice. In March 1991, a joint venture agreement was entered into between three (3) private investors and the PDAM for Kabupaten Badung, Bali, for the purpose of forming P.T. Tirtaartha Buana Mulia ("TBM") and undertaking the "Nusa Dua Water Supply Project." TBM is the joint venture company for a BOT project to control water supply and distribution in the southern sector of Kabupaten Badung in Bali, i.e., the areas

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[17] The term "joint venture" as used in MOHA Reg. 4/90 is not limited to equity joint venture companies, but is used in a looser sense to cover a broad range of contractual arrangements between parties. For a complete listing, see footnote 21 herein. MOHA Instruction 9 of 1995 regarding Guidelines for Cooperation between Regional Enterprises and Third Parties (March 28, 1995) confirms the continuing validity of these various forms of cooperation (Art. II.B.).

[18] Indeed, Law No. 5/62 is cited in the Preamble of MOHA Reg. 4/90 as one of the legal bases upon which the MOHA relied in issuing that regulation, and it is referred to again in Article 1(e) in defining the term "Regional Enterprise."

[19] MOHA Reg. 4/90 is in fact cited in the Purse Project Case Study Materials on the Nusa Dua Water Supply Project (Paragraph 2.1) as the legal basis upon which the Nusa Dua Water Supply Project was implemented. Such reliance, however, is misplaced for at least two reasons. First, MOHA Reg. 4/90 makes no mention of the types of activities in which BUMDs may engage with third parties; it merely names (without further elaboration) the types of business forms that such cooperation may take. Accordingly, MOHA Reg. 4/90 may, and technically should, be read as applicable only to those activities in which BUMDs are otherwise legally able to cooperate with third parties and not to those activities referred to in Article 5(4) of Law No. 5/62 which must be undertaken by BUMDs wholly owned by Regional Governments. Additionally, as a matter of legal hierarchy in Indonesia, a Ministerial Regulation is of less authority than a Law. In the event of any conflict between the two, express or implicit, the provisions of the Law would prevail. See, (Provisional) National Assembly (MPRS) Decree No. 20 of 1966 regarding Memorandum of Gotong Royong Parliament regarding Legal Order Sources and Regulations Hierarchy in the Republic of Indonesia.

known as Nusa Dua and Kuta. TBM received a 20-year concession from the PDAM to sell water to customers in the subject area (most of whom are hotels and other tourism establishments). PDAM holds 45% of the equity of TBM.

The Nusa Dua Water Supply Project is the first of its kind in Indonesia, but will not be the last. As this is written, a pilot project is underway in Medan and the Jakarta city water company, PAM Jaya, is negotiating with two (2) different private groups in contemplation of entering into contracts relating to the upgrading and expansion of Jakarta's water distribution system.[20]

Although in practice the restrictions contained in Law No.5/62 seem to have been pragmatically overlooked, such restrictions constitute a technical legal deficiency in the basic legislation pertaining to BUMDs and, in particular, the legal basis upon which PDAMs can join with private enterprise in the development and operation of water supply projects. This deficiency can and should be corrected by replacing Law No.5/62 with a new Law on Regional Enterprises that takes into account the changes in both governmental structure and private sector capabilities over the last 30 years as well as the future developmental needs of Indonesia.

b. BUMD Participation in PSP Projects

As separate legal entities formed in accordance with the provisions of Law No. 5/62, BUMDs have the legal capacity to enter into contracts with third parties, including private sector participants, for purposes within the scope of the particular BUMD's mission statement. The procedures applicable to BUMDs entering into PSP-type contracts with the private sector are generally governed by Keppres 16/94 with important exceptions as already reviewed in Section IV.B.1. In short, Keppres 16/94 will apply to PSP projects "for investment purposes" tendered by BUMDs except that contracts exceeding Rp. 50 million tendered by PDAMs in connection with "clean water installation projects" are exempt from the normal tendering procedures of Keppres 16/94. PSP projects "for operational/exploitational purposes", which would seem to include most if not all PSP projects, are not strictly subject to Keppres 16/94 procedures, although BUMDs are instructed to issue written procurement regulations based on the principles of Keppres 16/94 for such purposes.

For the sake of efficiency and consistency it is suggested that EKKU or the Keppres 6/95 Team take the lead in clarifying the scope of "operational/exploitational purposes" and issuing a model set of guidelines for adoption by BUMDs.

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[20] These two planned cooperative arrangements are the subject of MOPW Decree No. 249 of 1995 regarding Establishment of Coordinating Team for Preparing Water Supply Projects in Jakarta and Surrounding Areas with Private Sector Involvement (July 6, 1995) which establishes a project-specific interdepartmental National Coordinating Team headed by a representative of DOPW.

With respect to the form of contract that may be entered into between a BUMD and private third party, MOHA Reg. 4/90 allows for a broad range of options.[21] Indeed, the list of contract types in MOHA Reg. 4/90 appears to be exhaustive, although the inclusion of a catchall category allowing BUMDs maximum flexibility in structuring their arrangements with third parties would have been a welcomed addition. Most importantly, however, MOHA Reg. 4/90 happily avoids the detailed description of each contract form as found in the Official Elucidation of MOHA Reg. 3/86, thus appearing to allow BUMDs greater flexibility in working with third parties including private sector participants.

MOHA Instruction 9/95 confirms that the forms of cooperation itemized in MOHA Reg. 4/90 continue to be recognized as acceptable and goes on to set out the minimum legal requirements for both Regional Enterprises and third parties for entering into cooperative arrangements as well as the basic protocol to be followed in obtaining all necessary governmental approvals. MOHA Instruction 9/95 is discussed in further detail in Section IV.C., below.

c. BUMD Participation in PPP Projects.

Subject to the lingering constraints arising from Article 5(4) of Law No. 5/62, the types of PPP projects into which BUMD may enter are also reflected in MOHA Reg. 4/90, as clarified by MOHA Instruction 9/95. In addition to the PSP-type arrangements already noted, MOHA Reg. 4/90 permits BUMDs to enter into various equity and quasi-equity arrangements with third parties. Specifically, BUMDs are permitted to enter into joint venture arrangements, purchase shares or bonds from existing corporations, and issue shares or bonds by way of private placement or public offering. Although MOHA Reg. 4/90 made no reference to BOT or BOO projects, MOHA Instruction 9/95 identifies BOT projects as one of the forms of cooperation permitted under Article 5(g) of MOHA Reg. 4/90. This explicit recognition of BOT structures is a positive development in confirming the legal basis of BUMD cooperation with the private sector in infrastructure projects in the Target Sectors.

d. PDAMs and BPAMs

Perhaps due to the importance, complexity and sensitivity of water supply, separate ministerial decrees have been issued regarding PDAMs and BPAMs.

PDAMs are simply a form of BUMD established and existing pursuant to Law No. 5/62. The Joint Decree of MOHA and MOPW No. 4 of 1984 and No. 27/KPTS/1984 regarding Guidelines for Drinking Water Regional

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[21] As set out in the Narrative Description, Section VII A2., such contract forms may include, among others, (a) cooperative arrangements on management, operations, profit sharing, financing or production sharing, (b) management, production, profit sharing or facility sharing contracts, (c) bond purchases, (d) agency and dealership arrangements, (e) licensing agreements and (f) technical assistance agreements

Enterprises (January 23, 1984) ("JD 4-27/84") outlines the responsibilities and manner of supervision of PDAMs.[22] There are no particular inconsistencies between the provisions of JD 4-27/84 and the provisions of other laws and regulations discussed herein relating to BUMD involvement in PSP and PPP projects.

BPAMs, on the other hand, are not BUMDs, but exist pursuant to MOPW Decree No. 269/KPTS/1984 regarding the Establishment of Management Board of Drinking Water (August 8, 1984) ("MOPW Decree 269/84"). A Drinking Water Managing Board (Badan Pengelola Air Minum or "BPAM") is a temporary management board based in a Municipal (Level II) Government, the purpose of which is to operate and manage existing clean water supply projects and facilities until such time as a PDAM is established to take over such responsibilities. Apparently, all BPAMs have already been converted to PDAMs and further discussion is, therefore, unnecessary.[23]

C. Clear Procedures and Protocols of Project Approval and Implementation

One of the biggest practical impediments to private sector participation in PSP and PPP projects has been the lack of clear procedures and protocols relating to both the approval and the implementation of Target Sector projects. The adoption of Keppres 16/94 has resolved most of the procedural issues relating to PSP projects. As mentioned in Section IV.A.2, however, Keppres 16/94 does not apply to PPP projects since, by their nature, they do not fall within the category of Government procurement. Recently, procedures applicable to PPP projects in the Target Sectors were promulgated (MOHA Instruction 9/95), but as discussed below, these procedures stet short of a comprehensive set of procedural guidelines.

Prior to the promulgation of MOHA Instruction 9/95, there were no written procedures for purposes of implementing the cooperative arrangements (i.e., PPP-type projects) between BUMDs and third parties as contemplated in MOHA Regulation 4/90. While MOHA Instruction 9/95 represents a positive step forward, it bears mentioning that similar procedural guides for both Regional Governments (under MOHA Regulation 3/86) and BUMNs have yet to be issued. Such omissions have little or no impact on the Target Sectors, however, since authority therefor has formally been transferred to the Regional and Municipal levels.

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[22] See Narrative Description Section VII, B9., p. 40.

[23] See Narrative Description Section VII, B8., pp. 39-40. A BPAM is not an independent legal entity and, therefore, lacks legal capacity to enter into contracts in its own name. BPAMs do not hold title to property relating to a project. Revenues generated by the project are not "owned" by the BPAM but are allocated towards the operation and maintenance of the project. A BPAM, therefore, would not itself be in a position to be a contract party to a PSP or PPP project. Any such contract would need to be entered into with the appropriate Regional Government and/or the appropriate department of the Central Government; the involvement of the BPAM, if any, would be merely that of an interim manager or operator pending establishment of a PDAM.

Although perhaps not perfect, MOHA Instruction 9/95 sets out a rational, step-by-step set of procedures for approving cooperative arrangements between BUMDs and third parties. Its chief weakness lies in its omissions: it makes no reference to the roles of MOPW, the National Planning and Development Board (BAPPENAS) or MOF. All of these Government bodies have jurisdiction over certain aspects of PPP projects and the private sector needs an understanding of (a) the scope of authority of each entity, (b) the procedures and protocols to be followed in obtaining approval of the project and (c) the requirements relating to licensing, assignments, terminations and further reporting and approval requirements in respect of the implementation of the project. Given the divergent perspectives and sometimes completing interests of the various Governmental entities with an interest in PPP projects in the Target Sectors, coordination of their respective roles, authorities and responsibilities is essential.

In particular, the respective roles of MOHA and MOPW need further clarification. The insufficiency of MOHA Instruction 9/95 in this regard was the apparent reason leading to the promulgation of MOPW Decree 249 of 1995 regarding Establishment of Coordinating Team for Preparing Water Supply Projects in Jakarta and Surrounding Areas with Involvement of the Private Sector (July 6, 1995) ("MOPW Decree 249/95"). MOPW Decree 249/95, pursuant to Presidential Guidance of June 12, 1995, established an ad hoc Coordinating Team comprised of representatives of MOPW (Cipta Karya), PAM Jaya, BAPPENAS, MOHA (PUOD), DOF, the Jatiluhur Water Authority and the private sector enterprises involved. The fact that such ad hoc team was assembled is a tacit acknowledgement of the need for general coordination of the roles and responsibilities of interested Governmental agencies.

Each Government agency has a different focus of concern and a different agenda,[24] in some instances causing intra-Governmental conflict and competition which impedes the approval and implementation of PPP projects in the Target Sectors. It is the role of the GOI to reconcile those divergent concerns and establish a coordinated, interdepartmental approval and monitoring protocol for such projects.

The draft paper regarding private participation in the Target Sectors referred to in footnote 24, read in conjunction with MOHA Instruction 9/95, is a reasonable starting point from which to begin building a consensus within the

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[24] The viewpoint of the Directorate General of Housing, Planning and Development within the DOPW is set out in the July 28, 1995 draft paper entitled "Private Participation Development Policy in the Areas of Clean Water Supply, Waste Water Management and Solid Waste Management in Indonesia". Among other things, this paper provides DOPW's view on the appropriate scope of private participation in the Target Sectors, the appropriate scope of private participation in the Target Sectors, the appropriate forms of cooperation, the correct roles of each Governmental entity in such projects, risk allocation among the parties and summaries of the project approval mechanism and relevant contract documents. Although the various positions taken by DOPW on the issues addressed may not be fully acceptable to the other interested parties, both public and private, this paper represents a good first step towards a coordinated overall approach to PPP project approval and monitoring.

GOI regarding the appropriate procedures. Such consensus should then be promulgated in an appropriate manner, e.g., a Joint Ministerial Decree, Presidential Decree, Government Regulation or perhaps incorporated into a PPP Project Law.

D. Timely Access to Legal Information

1. Nature of the Problem

A fundamental constraint affecting all private commercial enterprise in Indonesia, including private sector participation in the Target Sectors, is the lack of access to legal information in a convenient and timely manner. Laws, regulations, ministerial decrees, judicial decisions and virtually all other types of promulgations of the GOI suffer from the common problems of too few copies distributed too slowly to too few people.

The difficulty in obtaining complete and current legal information is a costly and time-consuming impediment to the mobilization of private sector involvement in the Target Sectors.

2. Existing Legal Information System

Laws, Government Regulations and those Presidential Decrees pertaining to treaties and other international agreements must be published in the State Gazette of the Republic of Indonesia (Lembaran Negara Republik Indonesia)[25]. In addition to the State Gazette, there are three (3) supplementary gazettes:

- **Supplement to the State Gazette (Tambahan Lembaran Negara):** This contains the official elucidations of Laws and Government Regulations published in the State Gazette.

- **State Reports (Berita Negara):** This contains various official notices. Some departmental regulations are published in the State Reports, but such publication is not mandatory and has no official status.

- **Supplement to the State Reports (Tambahan Berita Negara):** This consists of several individually published volumes containing, among other things, the full text of the articles of association of Indonesian corporations and other legal entities, and trademarks registered with the Indonesian Office of Copyrights, Patents and Trademarks.

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[25] Pursuant to Law No. 2 of 1950 regarding the Emergency Law regarding Publication of State Gazette and State Reports of Republic of Indonesia and Publishing, Announcing and Validity of Federal Law and Governmental Regulation (May 15, 1950), the State Gazette is the official governmental publication of the Republic of Indonesia.

Several comments regarding the State Gazette and its various Supplements must be made. First and foremost, not all governmental rules are required to be published; Presidential Decrees unrelated to treaties, Presidential Instructions, Ministerial Decrees and virtually all other subordinate promulgations are not required to be published or distributed through any official source. Additionally, the State Gazette is published in limited numbers and appears to be distributed primarily to senior government officials. Neither law libraries nor general reference libraries are included on the distribution list, and private subscriptions are reportedly difficult to maintain in some cases. Lastly, the State Gazette is not published in a timely manner. It normally takes a year or more for any particular Law, Government Regulation or Presidential Decree to actually be published in the State Gazette.

Another official publication, the Compilation of State Regulations (Himpunan Peraturan Negara) is published quarterly by the State Secretariat and improves upon the State Gazette in at least two respects: its scope is broader in that it includes Presidential Decrees and Presidential Instructions not found in the State Gazette, and it is made available to senior government officials sooner than the State Gazette. Unfortunately, it is not made available to the public.

As one descends the hierarchy of governmental promulgations, the difficulty in obtaining them increases. Cabinet Ministers as well as their subordinates within the various governmental departments periodically issue decrees, decisions, rules and policies, sometimes further elaborated upon by subsequent circular letters. There is no official publication or other system of disseminating these materials, thereby leading to uncertainty and lack of knowledge within the private sector and frequently among officials within the particular governmental department itself.

To a limited extent, this void has been filled by two commercial newsletters, Warta CAFI and Business News, which publish bi-lingual full texts of many newly-issued regulations and decrees. These newsletters are not in any way official or authorized, however, and publish only a limited selection governmental regulations. Other private sector efforts are underway to improve the legal information system of Indonesia. These include the monthly subject and title catalogs published by the Legal Documentation Center (Pusat Dokumentasi Hukum) of the University of Indonesia, the legal database for on-line use currently being prepared by the Kompas Information Centre and the tax law, capital markets law and other databases being prepared by the Economic Law and Improved Procurement System ("ELIPS") Project. Although laudatory in their goals, none of these projects should be expected to take on the overall responsibility of the GOI to ensure that its own laws and regulations are accurately and widely disseminated on a timely basis.

3. Specific Recommendations

There are several specific recommendations that may be offered to improve general access to legal information. They are as follows:

- **Effectiveness upon Publication:** The GOI should adopt the principle that no law or regulation is legally effective until it actually appears in print in an officially authorized publication generally available to the public. Such principle should be established by a Law (or, at a minimum, a Government Regulation) and should also provide the means for its implementation. Preferably, a daily government gazette would be established in which **all** Central and Regional Government laws, regulations, decrees, decisions, instructions, circular letters and other promulgations would be published and indexed. Such a daily gazette should provide full, official and accurate texts of all government promulgations and should be made available immediately to both government offices and, through subscription, to the private sector.

  Consideration would need to be given as to which office would coordinate the collection of the materials for publication (e.g., the State Printing Office or the State Secretariat or "Sekneg") and how such undertaking would be funded (e.g., through private sector subscription fees). These practical issues, however, are unlikely to present serious obstacles to implementation if the basic principle of the requirement of publication prior to effectiveness is embraced by the GOI.

- **Improved Distribution:** The distribution of existing GOI publications should be expanded. Currently too few copies of most publications are printed and distribution is relatively limited. For example, publications of BKPM are frequently in short supply and, to the extent available, can only be obtained through BKPM's main office.

  Short of upgrading and restructuring the State Printing Office, it may be possible to subcontract some printing and distribution functions to the private sector. Fees generated from the increased sales of government publications should defray most or even all of the costs involved. Additionally, consideration should be given to establishing general outlets for government publications, similar to the Government Bookstores found in the United States and other developed countries. Again, it is expected that such undertakings would be entirely, or at least mostly, self-funding.

- **Creation of Computerized Databases:** Efforts have begun, both in the public sector and the private sector, to create computerized databases of legal information. The Legal Office of the Department of Finance, the National Law Development Agency as well as other organizations previously mentioned, have all made progress in assembling computerized databases of laws, regulations and other legal materials. These efforts should be encouraged and expanded. On-line access and CD-ROMs should be made available to the general public at the earliest possible time and at a reasonable cost.

- **Publication of Court Decisions:** As a Civil Law system, Indonesia places less emphasis on judicial decisions than it does on legislation and regulations. Currently, the Supreme Court publishes selected decisions on an annual basis in Indonesia Jurisprudence (Yurisprudensi Indonesia), and the Department of Justice publishes selected decisions of the lower courts in the semi-annual Compilation of Court Decisions (Himpunan Putusan-putusan Pengadilan Negeri). Although helpful, these publications are also limited in numbers printed and distribution, and offer no indexing system for research and cross-referencing.

  In Civil Law jurisdictions, prior court decisions do not carry the same weight as in Common Law jurisdictions, but nonetheless many Civil Law states publish full texts and/or commentaries on recent judicial decisions, and with good reason. Publication of judicial decisions permits the courts and legal practitioners alike to understand the reasoning and principles used by the judiciary in interpreting applicable law, thus contributing to a consistent and predictable application of laws. This in turn instills greater public confidence in the legal system and encourages private sector investment. Publication of judicial decisions also has the effect of exposing (and hopefully reducing) faulty reasoning and the inconsistent treatment of similar cases, again leading to higher levels of confidence in the system.

  An increase in the scope and frequency of published decisions could be accomplished in much the same manner as suggested above (with the exception that judicial decisions would obviously take effect prior to their publication). An indexing system, on the other hand, might best be left to academic or commercial institutions with the acquiescence (if not tangible support) of the GOI.

E. Overall Legal and Regulatory Environment

The range of legal and regulatory concerns facing private participants considering PSP or PPP projects in the Target Sectors in Indonesia is exceedingly broad. This paper focuses on what are believed to be the most critical issues pertaining most directly to PSP and PPP projects in the Target Sectors. There are additional issues touching on a broad spectrum of legal and regulatory matters, however, that continue to be of serious concern to the general business community in Indonesia and must be addressed at least briefly herein. The relatively limited analysis offered in connection with these laws and regulations is not intended to minimize their importance. Indeed, in any particular case, an issue arising in one of the following categories could effectively prevent an intended project from going forward. Although it is not the intent to diffuse the focus of this paper by including every potential legal issue that can arise in any business venture in Indonesia, the following selected legal and regulatory areas are typically important factors in a private participant's decision as to whether or not to pursue an urban infrastructure project in Indonesia.

1. Tax Law and Administration

In January 1995, the first major revision of Indonesia's 1984 tax laws took effect. In many instances tax rates were reduced although the tax base was widened by including both transactions (e.g., sales of founders' shares in public companies) and legal entities (e.g., Indonesian foundations or "yayasans") that were previously exempt from income tax. The manner in which these tax laws are interpreted and applied will be, perhaps, the single most important factor in determining the net profitability of PPP and PSP projects.

For private sponsors of PPP projects, the tax treatment of investment and financing structures (such as BOT and BOO Projects) that may be new and unfamiliar to the relevant tax officials will be crucial in determining the viability of proposed projects. MOF Decree No. 248 of 1995 regarding Income Tax Treatment of Parties Engaged in Cooperation under Build, Operate and Transfer Agreements (June 2, 1995) ("MOF Decree 248/95") and a related tax circular were the first and so far only official tax guidance provided by the authorities specifically relating to BOT Projects. Its scope, however, is limited to BOT arrangements as defined therein,[26] i.e., it is of questionable validity to BOO or other types of project financing structures. MOF Decree 248/95 clarifies several important technical points,[27] but stops far short of providing comprehensive

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[26] MOF Decree 248/95 defines a BOT Project as "a form of cooperation between holders of land titles and investors, in which land title holders grant the right to investors to erect buildings during the period of the relevant BOT agreement and transfer ownership of the buildings to the land title holders after the BOT period is over" (Art. 1). This definition is different than, though not necessarily contradictory to, the definition of BOT found in MOHA Instruction 9/95.

[27] MOF Decree 248/95 provides, inter alia, that no income tax is imposed on the grant of a concession under a BOT Project, the Project Company (i.e., the entity enjoying the use of the land) may amortize construction costs over the period of use and sets out guidelines for transfer taxes at the end of the BOT period.

guidance on the tax treatment of BOT Projects. For example, the application of VAT laws and regulations to BOT Projects has not been formally addressed. Other issues requiring clarification may include applicable taxes on construction, scope of relief from import duties and consideration of applicable tax rates on offshore payments of technical assistance fees, royalties and interest.

Notwithstanding such shortcomings, the mere fact that MOF Decree 248/95 was promulgated is an encouraging signal that the authorities are attuned to the special needs and concerns of PPP projects. Hopefully, this awareness will be reflected in further regulatory clarifications as well as the smooth administration and implementation of the tax laws in respect of PPP projects.

The administration of the tax laws in general, however, continues to be area of concern. Notwithstanding the generally acknowledged progress made by the tax office in this regard, a recent survey of the members of the American Chamber of Commerce in Indonesia concluded that Indonesia's tax administration continues to be perceived as weak and inconsistent. Such perceptions are bound to negatively impact the private sector's willingness to make major commitments relating to the development of Indonesia's infrastructure. No quick fix is at hand. Long-term education of tax officials, improved administrative procedures, increased transparency in interactions between tax officials and the private sector, and enhanced administrative resources for the tax office are all needed to bolster the reform efforts already undertaken.

2. Foreign Exchange Controls

Foreign lenders and project sponsors will each need assurances regarding the availability of foreign exchange in Indonesia and the ability to transfer necessary amounts overseas.

Exchange controls in Indonesia are minimal. Foreign investment is subject to approval (in most instances) by the BKPM, but the Rupiah is a freely convertible currency and transfers of funds to and from foreign countries are not restricted. For the purpose of recording invested capital and giving effect to investment guarantees contained in the Foreign Investment Law, all investment in foreign currencies must be reported to Bank Indonesia. Certain reporting and approval requirements also exist in respect of offshore loans whether or not such loans are related to an investment under the Foreign Investment Law. In general, the exchange controls currently in place do not seriously hamper the foreign private sector in Indonesia.[28] On the other hand, the approval

[28] One administrative issue affecting some foreign investors has arisen, however, which should be remedied. Under current Bank Indonesia practice, approval for offshore loans to be received by a PMA company as part of its "intended investment" (thereby making such loans eligible for the repatriation guarantees contained in the Foreign Investment Law) will not be given until the company's articles of association ("AoA") have been approved by the Minister of Justice. Such

requirements of the PKLN Team, discussed in Section IV.H., serve some of the same purposes and impose some of the same constraints on the private sector as foreign exchange controls.

3. Import Controls and Administration

Three distinct issues may be identified under this heading which may impact on PSP and PPP projects in which significant equipment, machinery or materials will need to be imported for purposes of the project. Those issues are (a) import tariff levels, (b) non-tariff barriers to imports and (c) customs clearance administration, each of which is addressed below.

a. Import Tariff Levels

Although the GOI has cut duty rates on many items in recent years, Indonesia continues to have a moderately high level of import tariffs by world standards. In addition to customs duty, imported goods are subject to value-added tax at rates ranging from zero to 10 percent and to luxury tax at rates up to 35 percent. Although the trend in reducing duty rates is encouraging, high costs for imported goods continues to be a constraint faced by the private sector.[29]

b. Non-Tariff Barriers to Imports

Successive trade reforms introduced since 1985 have significantly reduced non-tariff barriers. The vast majority of all tariff items may now be imported by general importers, although only domestic companies wholly owned by Indonesian parties are eligible to obtain a general importer's license. PMA and PMDN companies are granted a limited importer's license number (Angka Pengenal Importir Terbatas or "APIT") to cover their own import requirements. Goods which are still restricted, however, must be imported by one of the four (4) types of special license holders, i.e., (i) state enterprise importers, (ii) producer importers (private or state companies licensed to import goods that compete with those they produce domestically), (iii) importer producers (companies licensed to import goods necessary for production and not available locally), and (iv) sole agents licensed by the Minister of Industry.

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approval frequently takes many months following the submission of the AoA in notarial deed form to the Department of Justice. The AoA can be executed by the founders and submitted to the Department of Justice for approval only after Notification of Presidential Approval or SPPP is received from BKPM. As a result, the foreign investor is presented a dilemma: whether to postpone its debt financing of the project for a period that may easily exceed six months after receipt of the BKPM investment approval, or to attempt to persuade the lender to grant the loan outside of the scope of the "intended investment" thereby depriving the lender of the repatriation guarantees in the Foreign Investment Law. This Bank Indonesia policy runs counter to the interest of the GOI to realize as quickly as possible BKPM-approved foreign investment and creates undue delay in implementing investments. This policy is not set out in any decree or instruction and could presumably be altered by a decision or instruction issued by the Board of Directors of Bank Indonesia.

[29] PMA and PMDN companies (i.e., BKPM-approved companies) are eligible for certain favorable exemptions, reductions and deferrals of import-related duties and taxes.

Another form of non-tariff barrier is embodied in the counter-trade regulations of the GOI. Indonesia is one of several countries that have sought to improve their external debt position while at the same time gaining broader access to international markets through the implementation of counter-trade policies. Essentially, counter-trade policies require foreign suppliers of capital goods to purchase host-country goods of equal value through a barter arrangement.

Indonesian counter-trade rules apply to all sales exceeding Rp. 500 million made to private and/or public sector purchasers within Indonesia. The exports used to counter such sales may not include oil, and their value must at least equal the imported goods' value less the amount spent in Indonesia for wages, services, taxes and duties. Trading companies will assist foreign suppliers in satisfying this counter-trade requirement for a commission based on the transaction value. Four (4) broad categories of sales are exempted from Indonesia's counter-trade regulations, including services requiring special expertise (e.g., surveying and consulting services).[30] Given that all PPP projects in the Target Sectors will require specialized expertise in one or more facets of the project, it would appear that counter-trade requirements should not impose an obstacle on private sector participation under prevailing regulations and policies.

c. Customs Clearance Administration

Regularizing the customs process has been a keynote success of Indonesian trade reform over the last 10 years. In response to private sector complaints regarding the irregularity of customs administrations, in 1985 the GOI shifted all customs functions relating to imports with a value exceeding US$5000 (five thousand U.S. dollars) to the Swiss firm of Societe Generale de Surveillance ("SGS"). Specifically, SGS was assigned responsibility to verify import shipments in the country of origin. Improvements were dramatic and immediate. In August 1991, however, in accordance with the GOI's original plan, responsibility for all pre-shipment inspection of imports was transferred to Surveyor Indonesia, a joint venture between SGS (P.T. Sucofindo) and the GOI acting through the MOF. SGS has continued to provide certain contract services to Surveyor Indonesia, but recent reports indicate these will be phased out shortly.

Unfortunately, the transition of responsibility from SGS to Surveyor Indonesia is reported to have revived old problems of long delays and high

[30] The other exemptions are (a) sales financed by soft loans or financings from development institutions such as the World Bank, (b) sales of goods using domestic components and (c) purchases by a PMA company in which a state-owned entity is a shareholder.

For example, it seemed likely that the evaluation process favored the Alimenta/GCU bid and that the process gave them every chance to succeed. One clear reason for preferring the GCU/Alimenta bid was the involvement of GCU. The Government saw this as a way to retain some influence over the newly-privatized company. After all, GCU, though nominally private, was highly dependent on Government for its survival. Furthermore, one would expect the evaluation committee to question GCU's ability to purchase its share of the equity in the new company, since it was heavily indebted to the commercial banks and the Asset Management Recovery Corporation, and had pledged all of its assets as collateral.

In the absence of a formal legal agreement between GCU and Alimenta, it is also reasonable to ask what Alimenta's intentions were with respect to GCU's participation in the venture. Many observers assumed that Alimenta included GCU in its bid as a means of improving its chances of winning, but that it never had any intention of involving GCU in the new company. The inability of GCU to purchase its shares, and its subsequent exclusion from any role in the management of the new company, further contributed to the perception of flaws in the transaction. For this reason, the process would have benefitted by having a formal contractual agreement between the two partners. The contract would have held one or both parties legally responsible for the joint-venture breakdown, thereby helping to rectify existing speculation about corporate plots and hidden agendas.

The issue was further muddied by the departure on indefinite leave of the former general manager of GCU due to allegations of misappropriation of funds. Although the charges were unrelated to the Alimenta transaction, suspicions continued regarding financial improprieties within GCU.

C. Donor Involvement: Economic Reform and Privatization

Upstream Intervention

The donors unquestionably succeeded in creating an enabling economic environment for GPMB's privatization. Backed by the World Bank and other donors, GOTG implemented programs such as Economic Recovery Program and the Program for Sustained Development which provided the enabling macroeconomic environment for GPMB's privatization. Within this context, USAID twice made privatization a conditionality for the release of financial aid; first in 1986 with a food aid program, then in 1990 with the Financial and Private Enterprise Funds. In response, in 1990, the Government liberalized the groundnut sector and presented USAID with a plan for GPMB's privatization.

An upstream area in which donors could have been more involved was the strengthening of public information mechanisms. By encouraging broad-based public support, donors could have helped mitigate public perceptions of an opaque privatization process.

costs, creating unwarranted barriers for both foreign and domestic investors alike.

4. Fair and Independent Dispute Resolution

A nearly universal concern within the Indonesian business community is the inability of the Indonesian judicial system to hear and resolve commercial disputes in a fair, impartial and independent manner. Both Indonesian and foreign businessmen, as well as many legal practitioners, believe that any attempt to obtain a fair resolution of a business dispute through Indonesia's judiciary is an exercise in futility. This viewpoint stems in part from the perceived inability of Indonesian judges to deal competently with complex commercial transactions, and in part from a concern regarding the influence of external considerations in the decision-making process of the courts.

The GOI is well-aware of the difficulties existing in the Indonesian judicial system, and the magnitude of the reform effort that will be required to effect any substantial progress in this area. The subject of judicial reform in Indonesia is complex and sensitive, and well beyond the scope of this paper. For present purposes, however, it may be helpful to note some of the various reform proposals that have been made over the past several years.

- **Establishment of a Commercial Court:** One proposal is to establish a separate panel of judges with specialized training in commercial, corporate and financial legal matters to hear disputes in those areas. Salaries of these judges should be commensurate with their skills in order to attract and keep the most highly qualified individuals possible.

- **Intensive Training Programs:** To the extent that lack of familiarity with commercial law matters is a problem, specialized judicial training programs, overseas internships and other educational assistance would all be helpful.

- **Publication of Judicial Decisions:** As discussed in Section IV.D.3., the expanded publication of judicial decisions would contribute toward consistency and predictability in judicial reasoning.

- **Arbitration and Other Forms of Alternative Dispute Resolution:** For a variety of reasons, litigants in the United States and other developed nations are increasingly turning toward arbitration and other forms of alternative dispute resolution, e.g., mediation and conciliation, and truly binding and enforceable arbitration, to settle business disagreements. One problem with the use of such mechanisms in Indonesia is the practical difficulty of enforcing

judgments and awards against an uncooperative debtor as discussed in Section IV.E.5. below.

5. Enforceable Remedies

The ultimate test of the effectiveness of a judicial system in enforcing commercial rights and obligations is the practical ability of victorious litigants to obtain compensation from solvent but uncooperative losers. Against this measure, the Indonesian judicial system does not score well.

In principle, under Indonesian civil procedure, only a final judgment of a court may serve as the basis for the judgment creditor to use the enforcement mechanisms of the legal system to require the judgment debtor to satisfy the amount due as determined by the court. As a general rule, a "final judgment" exists only when all rights of appeal have been waived or exhausted. Many successful litigants in Indonesia have found, however, that obtaining a final judgment does not ensure that their claims will be actually satisfied. Several reasons for this may be identified.

The appellate process in most legal systems takes a long time to complete and Indonesia's is no exception. A party losing a case in a District Court may appeal to a High Court and then to the Supreme Court. This procedure may take up to five years during which time the judgment creditor cannot seize or foreclose upon the assets of the judgment debtor.[31] During this period, the judgment debtor not only retains title and use of its assets, it has ample opportunity to dispose of or otherwise conceal their existence and/or whereabouts. Even in the case of secured assets, a judgment debtor may be able to fashion a scheme where title to the secured assets (e.g., shares of stock or land titles) have been conveyed to an apparent good faith purchaser thereby thwarting, or at least making more difficult, the judgment creditor's efforts to foreclose against those secured assets.

The difficulty in enforcing legal rights in Indonesia is perhaps best illustrated by the complete frustration of attempts by foreign lenders to foreclose upon real property secured by a hypothec (mortgage) following a default by their borrowers. Although the statement is nearly impossible to verify due to the limited publication of judicial decisions and for other reasons, it is commonly believed that no foreign bank branch in Indonesia has ever successfully foreclosed upon secured real property without the cooperation of the judgment debtor. Given that hypothecs, which must be in notarial deed form and registered with the appropriate Agrarian Office, are the strongest form of security

[31] Under Article 180 of the Code of Civil Procedure (Herziene Indonesische Reglement or "HIR") a district court may in certain specified instances order that its judgment be executed immediately. The Supreme Court, however, has cautioned the lower courts to make limited use of such procedure with the result that such immediate enforcement is rarely ordered.

interest available in Indonesian law, the difficulty in enforcing them underscores the weaknesses in the Indonesian legal system's enforcement mechanisms as a whole.

The enforcement of foreign arbitral awards has also proven difficult, notwithstanding Indonesia's accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the adoption by the Supreme Court of implementing regulations in the form of Supreme Court Regulation No. 1 of 1990 regarding Procedure for the Enforcement of Foreign Arbitral Awards (March 1, 1990). To date, there have been no reports of a foreign arbitral award having been enforced in Indonesia in the face of opposition by the indebted party.[32]

While the subject of reforming the enforcement procedures and mechanisms of the Indonesian legal system cannot be adequately addressed within the context of this paper, several possible avenues of improvement may be suggested:

- **Adoption of a Unified Code of Civil Procedure:** Although the "HIR" (Hindische Indonesian Regiment) is the basic Code of Civil Procedure in Indonesia, another procedural code known as the "RV" (Reglement op de Rechtsvordering) also exists although its legal status is ambiguous. In pre-independence Indonesia, separate court systems existed for the indigenous population and for the Europeans and other population groups. Consequently, two different procedural systems were in force; the HIR was a relatively simple procedural code used by the indigenous courts, while the RV was a more elaborate and sophisticated code used by the European courts. Upon Indonesia's independence, the European courts were abolished but the RV was never formally repealed. Although it has no binding effect, the RV is sometimes used by Indonesian judges for guidance on matters not provided for in the HIR.

  As with the Civil and Commercial Codes of Indonesia, the HIR is outdated (last revised in 1941), has never been officially translated from Dutch to Indonesian, and is generally inadequate to deal with modern legal concerns. Adoption of a new comprehensive procedural code, incorporating relevant provisions of the RV, would be a major step toward the improvement of the legal system's enforcement mechanisms.

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[32] In one well-publicized and controversial case, the Supreme Court of Indonesia invalidated its own writ of enforcement of a foreign arbitral award and instead affirmed the decisions of the lower Indonesian courts which had held the underlying contract between the parties void on rather questionable public policy grounds. ED&F Man (Sugar) Ltd. v. Yani Haryanto (1991, unpublished). This action of the Supreme Court was generally viewed as a setback for enforceability of foreign arbitral awards.

- **Pre-Judgment Attachment:** Consideration may be given to a system of pre-judgment attachment under which a claimant under certain conditions may freeze the assets of the other party to prevent their disposal or concealment. Although Indonesian law currently allows for this, it is rarely if ever used. To avoid bad faith claims and damage to the defendant, the claimant would need to post a bond with the court.

- **Appellate Bond System:** An appellate bond system would allow a successful judgment creditor in district court to post a bond in order to permit immediate execution against the assets of the judgment debtor. If successful on appeal, the judgment debtor would have recourse to the bond.

- **Improvement of State Auction Office:** The State Auction Office, which is charged with the responsibility of auctioning off the judgment debtors' assets to satisfy the claims of judgment creditors, could be improved by providing training and education to the auction officials, clarifying auction procedures and generally enhancing its administrative resources. Alternatively procedural laws, where necessary, could be changed to permit private auction houses to sell off assets of judgment debtors after adequate public notice and compliance with other procedures.

6. Authoritative and/or Revised Civil and Commercial Codes

A fundamental impediment to the economic development of Indonesia is the lack of modern and comprehensive codes of law. Both the Indonesian Commercial Code and Civil Code were adopted in 1847 and have continued in effect until now, largely without amendment,[33] notwithstanding that the Dutch codes upon which they are based have undergone a number of major revisions. The very age of these Codes make them deficient for modern commercial realities. Moreover, the existing Codes have never been officially translated from the Dutch to the Indonesian language.

The bedrock of any Civil Law system is its Civil and Commercial Codes. Although a comprehensive overhaul of these codes is a monumental undertaking, nothing short of that is required to bring the Indonesian legal system up-to-date as it prepares to enter the 21st century.

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[33] There is a new limited liability company law that will go into effect in 1996, Law No.1 of 1995 regarding Limited Liability Companies (March 7, 1995).

F. Legal Validity of Investment Structure of PPP Projects

An overriding concern of a private participant in a PPP project is the legal validity of the overall investment structure in the host jurisdiction. Viewed from a legal perspective, a BOT Project (by way of example) is essentially a complex edifice of contracts, all of which are important (and some of which are critical) to the overall success of the project. A material default by any party to any of those contracts may have dire consequences for all concerned. Particularly in the context of less mature legal systems such as that of Indonesia, private participants will require confidence that each component of the project legal structure is valid, binding and enforceable, and that the same is true of the structure taken as a whole.

Many of the contracts involved in a BOT Project are common and familiar to the Indonesian legal system; others are less so. Joint venture agreements, construction contracts and loan agreements are all well-known legal documents in Indonesia and are generally understood by the courts, regulatory authorities (such as BKPM) and legal practitioners alike. Escrow arrangements, cooperation (or implementation) agreements and concession agreements (at least in the Target Sectors) are not so common, thereby increasing the potential for misinterpretation by the parties and/or governmental authorities involved. New-to-Indonesia financing structures such as revenue bonds and other BOT-specific issues are sufficiently complex that consideration should be given to addressing them in a single place and in a coordinated and coherent manner.

Indonesia's experience with BOT and other forms of PPP projects is still limited,[34] but there are strong signals that the GOI will look increasingly to the private sector to develop the basic infrastructural needs of the nation including those in the Target Sectors. A significant omission in the existing legal framework of Indonesia as it relates to PPP projects is the lack of any single law or regulation which recognizes the validity of BOT and similar project structures, and provides guidance to both the private and public sectors regarding the development and implementation of such projects.

In addressing the need of private investors and lenders for legal certainty in large infrastructural undertakings, governments have taken a variety of approaches. In some instances the legislative backing has been project-specific (e.g., the Sydney Harbour Tunnel Act in Australia), in others it has been sector-specific such as toll roads (e.g., the Federal Roads (Private Management) Act in Malaysia), and in others it has broadly covered a wide range of infrastructure projects (e.g., The Amended Build-Operate-Transfer Law in the Philippines). Each of these approaches has strengths and weaknesses, but they share a common feature in that they provide the comfort and encouragement that a solid

[34] See Narrative Description Section VII A3 and A4 pp. 28-29.

legal basis provides to both the public and private participants in a complex PPP project.

In Indonesia, adoption of a Law or promulgation of a Government Regulation covering PPP projects in one or more of the Target Sectors or, in the alternative, a broader law or regulation covering PPP projects in a variety of infrastructure sectors, would encourage private participation by filling in several omissions in the current legal framework, mentioned elsewhere in this paper. For example, it could identify the general types of cooperative arrangements recognized by the authorities thereby ensuring a firm legal basis for both private and public participants.[35] Clarifications regarding licensing, transfers and terminations could be included, particular investment incentives could be identified and the procedures and protocol of project approval could be addressed. Such new promulgation could also recognize binding arbitration or other alternative dispute resolution mechanisms.

G. Land Titles and Water Rights

1. Land Titles

a. Context, Issues and Existing Land Law

The land requirements of PPP projects will vary widely depending on the physical facilities involved. Some projects may not be faced with especially complicated land title issues (e.g., building a single water purification plant), whereas others may involve difficult issues involving a large number of interested parties (e.g., water supply projects requiring land rights for pipelines). Depending on the land needs of the project, issues of concern to investors and lenders alike may include (i) acquisition of land titles and the applicability of powers of eminent domain, (ii) the nature of the land rights available for limited uses (e.g., installation and maintenance of pipelines) and (iii) duration of land title validity. Prior to addressing each of these issues it will be helpful to provide a brief overview of the existing land laws of Indonesia.

Land rights and ownership issues in Indonesia are legally complex and politically sensitive. Prior to Law No. 5 of 1960 regarding the Basic Agrarian Law (September 24, 1960) ("Law No. 5/60"), land titles were governed by colonial-era principles. The legal status of land was characterized as "Indigenous", "Western" or "Chinese" depending on which of the various legal systems then co-existing in Indonesia was used to define the land's legal characteristics. Adding to the complexity of this system was the fact that the

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[35] In addition to BOT and BOO Projects, generally recognized types of project financings include Build and Transfer (BT), Build, Lease and Transfer (BLT), Build, Transfer and Operate (BTO), Contract, Add and Transfer (CAT), Rehabilitate, Operate and Transfer (ROT), and Rehabilitate, Own and Operate (ROO). Some promulgations in Indonesia recognize BOT and BOO Project schemes; others are stated to apply to BOT projects only. The perhaps less common forms identified in this footnote do not appear to be acknowledged in any Indonesian law, regulation or decree.

status of the land was not automatically determined by the population group of its owner.

Following independence, the colonial agrarian law system was determined to be unsatisfactory and steps were taken to formulate a new, uniform, national land law. After twelve years of proposals, debate, interim legislation and still more debate, Law No. 5/60 was passed by the legislature and signed into law by the President.

As a fundamental principle, adat law, i.e., the unwritten, customary law of the indigenous population of Indonesia, is the basis of all land law in Indonesia (Law No. 5/60, Art. 5), except to the extent that adat law conflicts with the Basic Agrarian Law itself (Law No. 5/60, Arts. 5 and 58). This conceptual basis, although arguably a vast improvement over colonial law, raises difficult legal issues in many instances and generally results in fundamental uncertainties regarding land rights.

Investors, both foreign[36] and domestic, seeking to acquire land in Indonesia often encounter expensive and time-consuming difficulties. Most land, particularly outside of major urban areas, is not registered with the Agrarian Office and is governed by adat law. This fact alone raises serious problems. Determining the applicable adat law in any particular case is a daunting undertaking since so little is known about it and authoritative sources, if any, are few. Nor is adat law uniform; it varies from region to region throughout Indonesia. Lastly, adat law is primarily a system of regulation for rural, agricultural communities and its principles rarely accommodate the needs of modern corporate and financial entities.

Adding to the confusion, it is not uncommon to find that various rights over the same piece of land are owned by different persons, or that there are conflicting claims to a piece of land. Where large tracts of land are needed, the identification of all land owners and the resolution of conflicting claims may take considerable time and effort. The task is frequently exacerbated by incomplete or non-existent records.

With this background, the specific land title concerns of the private sector in PPP projects can be better understood.

b. Land Acquisition

There are two basic avenues through which land titles can be acquired for purposes of a PPP project: (i) the project company can itself

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[36] Foreigners cannot directly own land in Indonesia, although resident foreign individuals and entities can enter into lease agreements. PMA companies, as domestic legal entities, can hold certain land titles including the Right to Build (Hak Guna Bangunan or "HGB") and the Right to Cultivate (Hak Guna Usaha or "HGU").

purchase title from the existing land owners by following normal acquisition procedures or (ii) the relevant Regional Government can, at least in some cases, exercise its powers of eminent domain. Each of these is discussed below.

(i) Private Purchase of Land Titles

In most cases, the purchase of land title by the Project Company would not be a viable alternative for several reasons. First, for reasons alluded to in Section IV.G.1.a above, the private acquisition of land is frequently an expensive, time-consuming undertaking, and neither the ultimate cost nor the time frame of the acquisition can be predicted with certainty at the outset.[37] Second, in many if not all PPP projects, land title will eventually be transferred to the public sector participant. It is unlikely that lenders will view security interests over government-related infrastructure facilities as having any marketable value and, therefore, there appears to be no particular reason not to place title in the name of the public sector participant from the beginning. Doing so will eliminate title transfer costs at the conclusion of the project. Presumably, it would also place the obligation to acquire the needed land in the hands of the public sector which, under the regulations discussed immediately below, has the right to exercise powers of eminent domain.

(ii) Eminent Domain

Presidential Decree No. 55 of 1993 regarding Land Appropriation for the Implementation of Construction in the Interest of the Public (June 17, 1993) ("Keppres 55/93") revoked several MOHA Decrees relating to Government land acquisitions and established new policies and procedures in connection therewith. Authority over eminent domain procedures was shifted to the State Minister of Agrarian Affairs/Head of the National Land Bureau ("SMAA").

Keppres 55/93 was followed up by SMAA Regulation No. 1 of 1994 regarding the Implementation of Keppres 55/93 (June 14, 1994) ("SMAA Reg. 1/94") which provides detailed procedures, compensation calculations and appellate rights relating to eminent domain takings. SMAA Circular Letter No. 500-1988 of 1994 regarding Implementation Guidance of KEPPRES 55/93 (June 29, 1994) expands the scope of SMAA Reg. 1/94 by establishing the procedure whereby BUMNs and BUMDs can commence proceedings.

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[37] Land acquisition procedures for PMA and PMDN companies were simplified and clarified as part of the October 1993 deregulation package in the form of the State Minister of Agrarian Affairs/Head of the National Land Bureau Regulation No. 2 of 1993 regarding Procedure for Acquiring Location License and Right on Land for Companies in the Framework of Capital Investment (October 23, 1993) ("SMAA Reg. 2/93"). Although the procedures set out in SMAA Reg. 2/93 represent a welcomed departure from prior practice, the expenditures of time, money and effort required for private investors to obtain land in Indonesia continue to be excessive.

Keppres 55/93 identifies the types of projects for which the Government may exercise its powers of eminent domain (Art. 5(1)). Although the enumerated projects include "water disposal sewers" and "reservoirs, dams and other water structures" it does not refer to solid waste treatment facilities. The list is intended to be exclusive and any activities not falling within those set out in Keppres 55/93 must be stipulated by Presidential Decree (Art 5(2)). Keppres 55/93 also requires that all such activities be on a "non-profit" basis (Art. 5(1)), although neither Keppres 55/93 nor SMAA Reg. 1/94 elaborates on this requirement. In practice, the National Land Bureau does not interpret "non-profit" so as to deny eminent domain powers to Government entities cooperating with the private sector in PPP projects.

Title to the land acquired through eminent domain proceedings will of course be held by the moving Government entity; in no event could it be held by the private participant. This is so even though the financing for such land acquisition could, in principle, come from the private sector. In such cases, the private investors and lenders funding the project will be at a loss to obtain any meaningful security over perhaps the most valuable tangible asset of the project company, i.e., the land and buildings, and therefore may be reluctant to extend financing. While this could be viewed as an impediment to private participation, it is probably better seen as a reason for the public participant to expect to be required to bear the responsibility, including the costs, of all land acquisitions in PPP projects.

c. Special Land Title Issues

Law No. 5/60 categorizes land titles into eleven (11) different types.[38] None of these, however, is equivalent to the limited use rights over another party's land known in other jurisdictions as easements.[39] This may be viewed as a deficiency in the current land law since projects needing access, on a limited basis, to extensive private lands, e.g., installation of a new water supply pipeline, will be faced with a technical legal hurdle.

Neither long-term leases (which cannot be recorded under Indonesian law) nor the outright purchase of land titles are practical approaches. In the past, apparently, Indonesian utility companies have taken a somewhat informal approach in dealing with this issue, dealing with it on a case-by-case basis as the need arises. While BUMDs and other governmental entities may feel sufficiently secure with such an ad hoc approach, institutional investors and

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[38] The land titles identified in the Basic Agrarian Law are as follows: (1) hak milik (right of ownership); (2) hak guna usaha (right to cultivate); (3) hak guna bangunan (right to build); (4) hak pakai (right of use); (5) hak sewa untuk bangunan (right of lease for building); (6) hak sewa tanah pertanian (right of lease in farmland); (7) hak membuka tanah (right to clear land); (8) hak memungut hasil hutan (right to harvest forest products); (9) hak gadai (right of pawn); (10) hak usaha bagi hasil (right of sharecropping); and (11) hak menumpang (right of lodging).

[39] In the United States, for example, easements are registerable on the title deed and are frequently used, among other things, to allow utility companies to install, operate and maintain cables, pipelines and the like across, under or above private land.

other private sector participants in a PPP project will generally demand strict adherence to well-established legal norms. Recognition of any form of new land title would require an amendment to Law No. 5/60. It must be recognized, however, that any attempt to amend the Basic Agrarian Law would be politically controversial and could probably not be done on a piecemeal basis.

d. Duration of Land Title Validity

As with other types of land-intensive, long-payback types of projects, e.g., plantations, the duration of land title validity will arise as an important concern in some types of PPP projects. Land titles in Indonesia generally have limited periods of validity, subject to Government-approved extensions and renewals.[40] Perhaps the most important of these for most PPP projects would be the Right to Build (Hak Guna Bangunan or "HGB"). An HGB title gives the holder the right to erect and to own buildings on the land. It can be sold, bequeathed or otherwise transferred and can be encumbered by means of a hypothec. Under Law No. 5/60, the grant of an HGB must be for a fixed period of time, not exceeding 30 (thirty) years. Under SMAA Regulation No. 21 of 1994, the holder of an HGB is guaranteed that the land title will be extended for an additional maximum period of twenty (20) years and thereafter renewed for an additional maximum period of 30 (thirty) years.

The biggest concern of the private investor concerning an HGB title is whether the duration of the title is sufficient for their investment purposes. Although still not an ideal arrangement, SMAA Regulation No. 21 of 1994 has given investors greater confidence that extensions of land titles will not be unreasonably denied by the Government. Additionally, as noted in Section IV.G.1.b.(ii) above, it is reasonable to expect the Government counterpart to bear full responsibility for ensuring that all land needs of the project are met.

2. Water Rights

With respect to both water supply and waste water projects, private sector participants must have a fundamental assurance that the allocation of available water resources will be made in a fair and rational manner and that their particular project needs will be understood and, to the maximum extent possible, satisfied by the regulatory authorities. The ability of the Government to provide such assurance is not simply a matter of good faith or political will. As population and development pressures increase, so too will competition for limited natural resources such as water. The capability of the Government to manage the resources under its control in an optimum manner will in large part be dependent on the management systems and tools available to it. Without a sophisticated

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[40] Important exceptions of course include Right of Ownership (Hak Milik) which is a title not limited in duration but which may be held only by Indonesian individuals and a few types of legal entities not including Regional Governments, BUMNs or BUMDs, and Right of Use (Hak Pakai) which may or may not be limited in time depending on the terms of the grant.

approach to water management, it is doubtful that the Government will be able to allocate its increasingly scarce water resources in a manner that provides the private sector with the assurance of good management that it requires.

The 1945 Constitution establishes the fundamental principle that soil, water and natural resources contained therein are owned and controlled by the Government and are to be utilized for the welfare of the Indonesian people (Id. Art. 33(3)). The legal and regulatory framework built upon this principle is described in the Narrative Description, Section VII.B, pages 32-43. Additionally, Minister of Public Works Regulation No. 49 of 1990 regarding Procedure and Condition of Water and Water Resources Licensing (December 5, 1990) ("MOPW Reg. 49/90") provides the basic rules relating to licensing procedures for various types of water use.

Although the laws and regulations applicable to water rights in Indonesia are reasonable as far as they go, taken as a whole they lack the cohesion and coherency that an integrated, formal Water Use Rights System ("WURS") would provide. Under the direction of MOPW, substantial research and analysis in this regard has already been accomplished resulting in the conclusions and recommendations contained in the Draft Report, Water Use Rights System, Java Irrigation Improvement and Water Resources Management Project (October 1994) ("WURS Draft Report").

The WURS Draft Report is a thorough and thoughtful study of a complex area and its recommendations are worthy of serious consideration. In summary, the WURS Draft Report calls for extending and improving the existing legal and regulatory framework to create an integrated water management system, administratively divided into water basins. Such a system would facilitate accomplishing the tasks of water allocation planning, real-time water allocation, water quality control, drought management, revenue collection and effective monitoring and enforcement of the relevant regulations. As a first step, guidelines implementing MOPW Reg. 49/90 (as contemplated therein) should be adopted taking into account the proposals contained in the WURS Draft Report together with other analysis being carried out by MOPW. Specifically, regulations should be adopted requiring all current water users to declare and register their claimed water use right with MOPW or other appropriate Governmental entity. Doing so would be a preliminary step toward the establishment of a comprehensive WURS, encompassing all water users including legal but formally unlicensed users (e.g., domestic consumers in connection with drinking, cooking, bathing and other household needs) and formally licensed users (e.g., commercial users in connection with farming, industry, mining and urban distribution). For purposes of effective water management, including small, unlicensed users taking water directly from a natural source within the scope of a WURS is crucial in order to allow regulatory authorities to accurately identify actual total water needs for a given

management area, efficiently plan and manage water consumption and use levels, and rationally prioritize water utilization in times of shortages.

As contemplated by the WURS Draft Report, the WURS recommended for adoption in Indonesia would divide water use into three (3) broad categories: consumptive use, non-consumptive use and polluting use. Doing so would allow licensing fees to be allocated more fairly based on the actual burden on the water supply system created by the user and, furthermore, would bring relevant environmental controls (e.g., waste water discharge licenses) within the framework of an integrated WURS.

Other features of an integrated WURS would include a clear delineation of the rights and obligations of the holders of the various water rights as well as the Government entity involved, together with specific guidance regarding the nature of the rights granted, the forms of granting instruments, the duration of grants, procedures regarding modification, renewal and termination of grants and controls regarding the transfer of grants to third parties.

H. Access to Adequate Funding Sources

The financing structures of PPP projects are varied and complex, due to the unique features of such projects. A typical BOT Project, for example, has the following characteristics:

- Substantial initial capital investment;
- Long payback period;
- Long-term financing required at low and stable interest rates;
- Cash flow deficit in early years;
- Devaluation risk (both creeping and sudden) if foreign currency debt financing used;
- Limited growth prospects;
- Limited but stable revenues;
- Limited capital gains;
- Low internal rate of return; and
- Inability of Project Company to diversify or expand.

Accordingly, a fundamental need of any PPP project sponsor is the ability to have access to the broadest range of financing sources in order to obtain the required long-term funding on the best possible terms. Certain Indonesian regulations restrict the ability of public sector as well as the private sector to do so. In general, certain restrictions limit the ability of public sector entities to obtain offshore financing, while others limit the ability of the private sector to obtain loans from State Banks[41] in Indonesia.

1. Access to Offshore Financing: Hard Currency Borrowing Constraints

The GOI maintains a rather complex system of registration, approval and reporting requirements with respect to offshore credits. The specific requirements applicable to any particular credit facility will depend, generally speaking, on the legal status of the borrower, the purpose of the borrowing and the term, nature and amount of the credit facility.

The general effect of these regulations is to curtail the ready access to sufficient foreign funding for most, if not all, PPP projects in the Target Sectors because (a) for large scale projects sufficient domestic capital at competitive rates may not be available and (b) in foreign investment projects access to funding by State Banks is permitted. An impasse may arise where the private investor is unwilling to contractually commit to a project without having adequate long-term financing in place, and PKLN Team approval of the offshore portion of such financing has not been (and may not be) obtained. While contractually, the private party's duty to perform may be made conditional upon receipt of PKLN Team approval, such an approach is frequently unacceptable to both parties for a variety of reasons. Accordingly, the approval and queuing system relating to hard currency credits in Indonesian is a major hurdle in the way of PPP projects in the Target Sectors.

The basic regulatory framework governing offshore loans to Indonesian borrowers is set out in one MOF and two presidential decrees, as amended and supplemented by various subsequent promulgations. That basic framework is identified and defined in the footnote.[42]

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[41] There are eight (8) State Banks. The largest, Bank Bumi Daya, provides finance for plantations, mines and export-commodity production. Bank Rakyat Indonesia, which ranks second, concentrates on financing agricultural and rural activities. Third-ranking Bank Negara Indonesia 1946 specializes in agriculture, industry, transport and export commodities. Other State Banks include Bank Dagang Negara, which finances mining and export-commodity production, and Bank Ekspor Impor Indonesia, which focuses on export financing, Bank Pembangunan Indonesia (BAPINDO), Bank Tabungan Negara (BTN) and Bank Pembangunan Daerah (BPD).

[42] The basic regulatory framework for offshore loans is established by three Decrees: (i) Presidential Decree No. 59 of 1972 regarding Receipt of Foreign Credits (October 12, 1972), as amended by Presidential Decree No. 15 of 1991 regarding the the Receipt of Offshore Loan and the Issuance of Bank Guarantees for the Receipt of Offshore Loan by the State Banks and Regional Development Banks Appointed as Foreign Exchange Banks (March 18, 1991), (collectively referred to as "Keppres 59/72"), (ii) Minister of Finance Decree No. 261 of 1973 regarding Executive Provisions on the Receipt of Foreign Credits (May 3, 1973), as amended by Minister of Finance Decree No. 417 of 1989 regarding the Amendment to Article 2 of the Minister of Finance Decree No. 261 of 1973 on the Implementation of the Receipt of Foreign Credits (May 1, 1989) (collectively referred to as "MOF Decree 261/73"), and (iii) Presidential Decree No. 39 of 1991 (September 4, 1991) regarding the Management Coordination of Offshore Commercial Loans, and its implementing regulations (collectively referred to as "Keppres 39/91").

The most significant constraints to PPP projects in the Target Sectors are found in Keppres 39/91. Keppres 39/91 established the so-called PKLN Team comprised of certain cabinet-level officials[43] and granted it the authority to coordinate and limit the access of Indonesian borrowers to offshore capital markets. More specifically, the PKLN Team has responsibility for establishing, by economic sector, five-year ceilings for offshore borrowing and implementing a "queuing system" whereby offshore loans and other financings are prioritized within the established limits. Keppres 39/91 does not cover guarantees of offshore obligations, however, which does open up other avenues of structuring offshore financings as discussed in Section IV.J.3.

Of specific concern within the context of this paper is the requirement for private sector borrowers to obtain PKLN approval for offshore loans which are "linked in any manner" to the GOI or a state-owned company, or in which there is any participation by a State Bank. Each of these constraints is discussed below.

a. Linkage with Government

Borrowers in which a BUMN or BUMD holds an equity interest must obtain approval from the PKLN Team for offshore commercial loans. Moreover, even wholly privately-owned borrowers must obtain PKLN Team approval for offshore commercial loans if the loan is used to finance a project related (i.e. "linked") to the Government or a state-owned enterprise. In such instances neither the amount of the loan nor the percentage of the Governmental entity's equity participation is relevant. Similarly, the level of "linkage" does not appear to be a factor. This means, for example, that if the Government or one of its companies is either a primary supplier to, or a buyer from, the project, PKLN Team approval is required. Even indirect and remote linkages appear to trigger the requirement of PKLN Team approval; the current view of the PKLN Team appears to be that linkage will be found based on the mere collection of fees from consumers in the context of a water distribution project, since such fees, in the absence of the PPP project, would have been revenues of a BUMD. Given this broad interpretation of linkage, it is probably fair to say that virtually all PPP projects in the Target Sectors will require PKLN Team approval for their offshore borrowings regardless of amount and/or tenor of the credit.

b. Participation of State Banks

Approval of the PKLN Team may also be required if the subject credit is obtained through a State Bank or if there is "any participation" by a State Bank in the credit. Predictably, the PKLN Team views "participation" in its

[43] The PKLN Team is comprised of the following Ministers and other cabinet-level officials: the Coordinating Minister for the Economy and Finance (EKKU), as its Chairman, and the Minister of the State Secretariat, the Minister of Finance, the Minister of BAPPENAS, the Minister of Industry, the State Minister for Research and Technology, the Minister of Communications, the Minister of Post, Telecommunications and Tourism, the Minister of Public Works, and the Governor of Bank Indonesia.

broadest sense. For example, if a State Bank merely acts as an agent, or is a minor member of a lending syndicate, the PKLN Team deems there is State Bank participation and PKLN Team approval will be required if the amount of the overall credit (not merely the amount of the State Bank's participation) exceeds US$20 million in any year. Credits under US$20 million do not require PKLN Team approval, although normal reporting obligations must be fulfilled.

2. Access to Onshore Financing: State Bank Lending Restrictions

Pursuant to MOF Letter No. S-1603/MK.013/1990 of December 7, 1990 ("MOF Letter S-1603/90"), State Banks are prohibited from providing "investment credits" to foreign companies and joint ventures in which a foreign investor holds equity. The result of this policy is to exclude foreign investors (and PMA companies in which they hold an interest) from access to the huge capital resources available to the State Banks. At least as to foreign participants, such restriction creates an additional obstacle to private sector participation in the Target Sectors.

Given the social benefits obtained through PPP projects in the Target Sectors, an exception to the policy contained in MOF Letter S-1603 should be made to allow borrowings by foreign investment Project Companies engaged in infrastructural projects for the public welfare, including of course projects in the Target Sectors.

3. An Alternative to Bank Financing: Revenue Bonds

There is a growing realization that traditional funding methods will be unable to satisfy the capital demands of infrastructure projects, not only in Indonesia but throughout the Asia Pacific region, over the next several years. Estimates of capital needs for infrastructure development in the region, including the Target Sectors, electric power, roads and transportation facilities, run into the hundreds of billions of dollars.

Traditionally, projects have been funded by any one or a mix of funds provided by governments, developmental banks and institutions such as the World Bank, Asian Development Bank and IGGI, export credit agencies, loans from commercial banks and equity financing. According to an Indonesian Government spokesman, virtually all urban infrastructure development throughout the mid-1980s was funded directly from the central budget,[44] but this approach is no longer viable. Given the huge capital needs of infrastructure development, it is inevitable that project sponsors look to other capital markets for financing. Indeed, MOHA Reg. 4/90 expressly permits BUMDs to issue bonds by way of private placement or public offering.

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[44] H. Sumitro Maskun, Director General of PUOD, Opening Address at the Policy Conference on Policy Action Plan for Local Government Bonds in Indonesia (August 13, 1994).

Tapping the capital pools of institutional investors essentially requires an issuing entity, e.g., a PDAM or Project Company, to float an offer of long-term debt securities (i.e., bonds) supported by projected revenue streams and perhaps other credit support in the form of guarantees or other undertakings.[45] The issuance of revenue bonds cannot be done without extensive prior study and preparation, including the identification of suitable projects, the improvement of financial planning and reporting methods, verification that the proposed bond issuance complies with all legal and regulatory requirements and a determination that the pricing and maturity of the bonds will be competitive in the targeted capital market. Additionally, as in other revenue bond issues throughout the world, standards must be developed to allow independent rating agencies (e.g., Moody's Investors Services or, in Indonesia, P.T. Pemeringkat Efek Indonesia) to objectively evaluate and assign a rating to the debt issue.

Lastly, the applicable securities laws and regulations must be conducive to long-term bond issued by Government entities and Project Companies. The DPR has just recently passed a new Capital Market law which establishes a reformed framework of securities regulation in Indonesia. It is still awaiting Presidential signature and no version of the law has been made publicly available, so it is premature to comment in detail on how the new law will affect the regulatory environment for revenue bond issues.[46] Ideally, however, it will impose no special burdens on bond issuances related to infrastructure projects (even assuming "linkage" as that term is understood in the context of PKLN Team approval discussed in Section IV.H.1.(a)) and would permit somewhat relaxed disclosure and other requirements for private placements or limited offerings made to "qualified" or "sophisticated" investors only. Pending Presidential signature, and the issuance of implementing regulations by BAPEPAM and other interested Government departments, specific comment on the regulatory environment for revenue bonds must wait.

The long-term bond market in Indonesia is still in its infancy. Although it promises rapid growth over the next few years, growing pains can be expected. Several of the current policies and practices of Regional Governments and BUMDs are not easily reconcilable with the normal legal commitments typically required of a bond issuer. For example, a revenue bond will normally include a tariff covenant requiring the issuer to generate sufficient revenues to meet agreed operating costs, debt service, taxes and other expenses. Given the existing tariff rate setting policies in the Target Sectors as discussed in Section IV.I, such a covenant would be impossible to obtain.

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[45] "Revenue bonds" are distinguished from "general obligation bonds" in that they are secured by a specific revenue source, such as water tariffs, but do not represent a general undertaking of the Government. General obligation bonds, on the other hand, represent "full-faith-and-credit" obligations backed by the Government's general tax revenues. General obligation bonds involve considerations beyond pure project financing and, therefore, are not discussed herein.

[46] The fact that the law is widely expected to come into force on January 1, 1996, but until signed will not be released to the public, suggests the difficulty in obtaining legal information in Indonesia as discussed in Section IV.D.

Another issue likely to arise is the legal status of the lien or other encumbrance that the bondholders would require over the assets and revenues of the issuer. As discussed in Section IV.J.1.a.(ii), the encumbrance of Governmental revenues may be problematic due to legal and contractual restrictions, not to mention the political sensitivities that could be raised.

Another critical matter to be addressed is the nature and source of third-party credit enhancement that will be made available to provide investors with an adequate level of comfort. Especially in light of the prevailing prohibition against GOI guarantees of offshore credits combined with the lack of proven creditworthiness of most (if not all) potential Indonesian revenue bond issuers, identifying and structuring suitable third-party credit support may be a somewhat daunting task. Possible approaches are identified and analyzed in Sections IV.J.2. and 3.

The discussion of how best to implement a revenue bond program in Indonesia has already begun,[47] but further study and preparation will be required before a successful revenue bond issuance program can be realized. Coordination of efforts among MOHA, BAPEPAM, MOF and other interested Governmental departments is essential, and input should also be sought from securities advisors, underwriters, legal experts and other consultants on an as-needed basis.

I. Sufficient and Certain Project Revenues (Tariff Rates)

Tariffs rates are at the heart of any PPP project. Private sector companies look to collected tariffs as the revenue stream that makes PPP projects viable. The projected revenues to be generated by the project must be both sufficient and relatively certain over the lifetime of the project to induce private sector investors and lenders to commit the necessary capital, technical and personnel resources required of any proposed project.

The sufficiency of the projected revenues will be determined taking into account both historical and projected data. Private sector companies providing Target Sector services have detailed knowledge of the real costs of such services, including operations, maintenance and capital. These costs plus profit must be met by the tariffs collected. The current Target Sector tariff structures in many cases may not be sufficient to cover these financial requirements. For example, water has been historically underpriced in Indonesia.[48] An unfortunate reality is that the cost of water to consumers will almost certainly need to be raised to meet the real cost of its distribution, and the private sector needs

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[47] See, for example, The Policy Action Plan for Local Government Bonds in Indonesia (August 13, 1994) prepared by MOHA in collaboration with MOF and USAID.

[48] See discussion in Project Paper Annexes (USAID/PURSE Project) September 30, 1991, Annex A-2, "Economic Analysis", p.7 and Annex A-3(A), "Urban Services Analysis" p.12.

assurances that the tariff-setting authorities are prepared to approve the necessary rate increases.

Tariff authority and procedures for water supply in Indonesia are relatively clear and well-established, although not without drawbacks as discussed below. Tariff setting for Waste Water and Solid Waste Projects is somewhat less regulated. Tariff rate setting in each of the Target Sectors is discussed below.

1. Tariff Rates in Drinking Water Projects

There are nearly three hundred PDAMs established throughout Indonesia. Almost all are Municipal (Level II) PDAMs, although three are constituted at the Regional Level (Level I).[49] The rate setting authority and procedures for both Level I and Level II PDAMs are the same, except that all Level I tariffs are subject to validation by MOHA, whereas Level II tariffs are finally approved by the Governor of the relevant Region.

In short, the rate-setting procedure is as follows: A Tariff Calculation Team, headed by the President Director of the PDAM, is established and based on its analysis of collected data develops a proposed schedule of tariffs. This is subject to review and approval by the Board of Directors and the Board of Supervisors of the PDAM. In the case of Level I PDAMs, such proposal is approved by The Governor and submitted to MOHA for final approval or validation. In the case of Level II PDAMs, the proposal is submitted to the local Level II head (the Bupati or Walikota) who in turn submits it to the Governor for final approval. In both instances, however, the proposed tariff schedule cannot be approved for a period exceeding three (3) years, and in practice is normally adjusted annually.[50] Such short-term tariff rate validity simply does not meet with the long-term financing needs of PPP projects in the Target Sectors.

Given the competing needs of the private sector (e.g. assurance of adequate revenue stream) and the public sector (e.g., providing water at acceptable rates, especially to non-commercial users), one possible approach is to tie tariffs to one or more general economic indicators, such as the Consumer Price Index, to ensure that revenues rise in proportion to costs over time. This suggestion, however, does not address the foreign exchange risks inherent in the offshore financing such projects, and in any event may not be a wholly satisfactory solution. In this area, specific legal and regulatory changes can only be made once appropriate changes in policy have been made, and these should be based on solid economic and financial analysis.

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[49] The Regional (Level I) PDAMs are PAM Jaya (for Jakarta), PDAM Tirtonadi Medan and PDAM Riau.

[50] A very thorough analysis of the policies and administration of water tariffs in Indonesia in contained in Water Tariff Policy in Indonesia (November 1994) prepared as part of the PURSE Project submitted by Chemonics International in association with Resource Management International and Shelading Associates under Contract No. AID497-0373-C-00-3030-00.

2. Tariff Rates in Waste Water and Solid Waste Projects

Tariff rates for waste water and solid waste services are somewhat less stringently regulated. No Central Government guidelines exist in respect of such tariffs; rate setting in these Target Sectors is apparently at the discretion of the individual Regional Governments. Taking the applicable regulations for DKI Jakarta as an example, waste water tariffs are set by the Board of Directors of PD PAL Jaya (Jakarta's Waste Water Management Corporation) with no official guidance regarding the validity period of such tariffs or the formula for their calculation.[51] For solid waste collection services, applicable guidelines spell out in some detail the categories and costs of sanitation services, but do not set validity periods for the tariffs.[52]

As in the case of water supply projects, investors and lenders must be provided with assurances that tariff revenues will be both certain and sufficient to meet all project costs. Within that context, the Regional Government involved must be willing to work with the private sector to determine viable tariff policies.

J. Security Interests and Credit Support under Indonesian Law

Assuming a proposed PPP project makes technical and financial sense to a prospective lender, a primary consideration will be the nature and enforceability of the security package and the availability of other types of credit support. This Section compares a lender's normal security requirements in the context of a typical BOT project against the current law and practice of secured transactions in Indonesia, and provides an analysis and recommendations based on that comparison. It further reviews current policies regarding Government guarantees in Indonesia as well as alternative forms of credit support.

1. Security Interests

BOT projects are essentially a form of limited recourse project finance. The private sector project sponsor will seek limited recourse project financing to ensure that its ultimate exposure does not go beyond its equity contribution. The project sponsor/investor typically is not willing to act as a guarantor of the project's borrowings, leaving aside the question of whether the private sponsor in any event would have the creditworthiness to promote the project on a full recourse basis. In Indonesia, Government guarantees in general are not available to support PPP projects.[53] In such context, the lender understands that

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[51] General guidance as to the categories of services for which tariffs are to be collected is set out in DKI Jakarta Governor Decree No. 211 of 1994 regarding PD PAL Jaya Waste Water Disposal Service Rates (February 17, 1994).

[52] Applicable guidelines and procedures are set out in DKI Jakarta Regulation No. 5 of 1988 regarding Environmental Sanitation in DKI Jakarta (May 14, 1988) and DKI Jakarta Governor Decree No. 168 of 1994 regarding Technical Guidance on Sanitation Fees in DKI Jakarta (December 23, 1994).

[53] Under prevailing regulations and policies, neither the Central nor any Regional Government may issue a guarantee of offshore credit facilities. Further discussion regarding current policies in this regard may be found in Section IV.J.

the last best hope for satisfaction of its claims will be the security interests obtained over the project itself.

In normal commercial financings, the lender requires a mortgage over the financed project's land, buildings and other immovable property. Moveable assets of the project (equipment, vehicles, inventory, etc.) are frequently also encumbered. The lender will insist that the project be adequately insured by reliable carriers against as many risks as practicable and that a typical "banker's clause" or other acceptable arrangement is provided for in the policy to protect the lender's interests. The lender will also seek written assurance from governmental licensing authorities that in the event of a foreclosure the licenses and permits granted to the project will be transferable to a third-party buyer of the project and will seek similar assurances that any offtake agreements will be freely assignable to such third party.

The lender frequently requires control of the borrower's bank accounts during the life of the loan, including the account into which all project revenues are required to be paid. By means of a pledge of the account or escrow arrangements, the lender will exercise strict control over the release of funds from those accounts to the borrower or third parties.

To provide a choice of remedies and to facilitate foreclosure proceedings, the lender may also require a pledge of the shares of the Project Company. Doing so allows the lender to transfer ownership interest in the company as a whole rather than exercise its remedies against the individual assets of the borrower, and it may avoid difficulties relating to the transfer of government-issued licenses. On the other hand, third parties may be reluctant to step into the shoes of the shareholders in a defaulting borrower due to the risk of undisclosed liabilities.

The right of the lender to take over the project upon default is of paramount importance to the lender and it will seek to obtain assurances of its right to do so by the insertion of appropriate provisions in all relevant contracts including most importantly the concession agreement (or other form of contract) between the Project Company and its Governmental counterpart. To this end, the lender will seek an acceptable level of confidence that the legal system in the host country will allow foreclosure by the lender following a default, and further allow a subsequent sale of the project, as a whole, in the most unrestricted manner possible in order to recover the outstanding loan proceeds. To the extent a lender lacks such confidence, it will be unwilling to provide financing without additional support in the form of government guarantees, recourse to the private sponsor's assets or other third-party credit enhancement.

Each of these security mechanisms raises questions of perfection and effective enforceability. The most significant legal constraints and deficiencies facing lenders to PPP projects in the context of such security mechanisms are addressed below.

a. Assignments

In general, lenders want an assignment in fiducia or some other form of security interest in all contractual rights and other intangible assets required to construct, operate and/or maintain the facility, including among other things, all project contracts, project revenues, insurance policies, operating licenses and bank accounts. A basic feature of a fiduciary assignment is that the assignee, i.e. the lender, has all of the contractual rights of the assignor, i.e., the borrower, against the account party, e.g., a subcontractor, but is not obligated to perform all the duties of the assignor towards the account party. For example, to finance a construction project a lender typically asks for a fiduciary assignment of, among other things, the prime contract and all subcontracts. If the borrower (assignor) defaults under the loan agreement, the lender (assignee) needs the ability to enforce the subcontracts against the subcontractors and also the right (but not the obligation) to cure any events of default of the borrower under such subcontracts, but in no event will the lender assume liability as a surety or guarantor of the borrower's performance thereunder. In short, the lender wishes to maintain the assigned contracts in a "holding pattern" until a new principal can be found to step into the shoes of the defaulting borrower.

In this context, there are at least three (3) legal obstacles that may arise in Indonesia. First, Indonesian law on fiduciary assignments of contractual rights (without an assumption of the corresponding obligations) is unclear. Second, project revenues are essentially Government revenues thus posing special difficulties in encumbering such funds for the benefit of a private entity. Third, in general, licenses and approvals issued by any Governmental entity are not transferable thereby complicating any sort of work-out arrangement displacing the original Project Company. Each of these constraints is discussed below.

(i) Assignment of Rights without Obligations

Some legal commentators and practitioners take the view that, in general, Indonesian law does not recognize assignments of rights without a corresponding delegation of duties. The effect of this view is that most forms of security assignments, as commonly used in the United States for example, would be unenforceable. The legal basis for this view is a theoretical analysis of the distinction between in personam rights and in rem rights under Indonesian law. There is no express statutory or codified prohibition, against such assignments in fiducia, however, and even the proponents of this view will

readily admit the validity of a fiduciary assignment of accounts receivable (i.e., a so-called cessie).[54]

To the contrary, Article 1338 of the Civil Code grants parties so-called "freedom of contract", i.e., the right to fashion legal, valid and binding contracts according to their needs, provided they are consistent with law, good morals and public policy. Given that fiduciary assignments are negotiated agreements that do not offend any apparent public policies, that they are widely used in other jurisdictions in connection with similar types of projects, and that there is no express legal prohibition against such assignments, the better view is that such assignments are legal, valid and binding under Indonesian law. Unfortunately, this position is also merely a theoretical legal basis. Positive legal recognition of this form of security, perhaps by reference in a general PPP Project Law, would be welcomed.

(ii) Assignment of Project Revenues

Of all the assets owned by any of the parties to a PPP project, the single most important from the lender's perspective will be the revenue stream generated by the sale of the projects' goods (i.e., drinking water) and/or services. In principle, an assignment of accounts receivable or "cessie" should be sufficient for a lender's needs, but BUMNs, BUMDs and other Governmental entities may not easily agree to encumbering such funds due to internal political and legal considerations as well as preexisting contractual constraints. Under the terms of loan agreements entered into by the GOI (or its Departments) with international development banks and other institutions, creating encumbrances on such funds may trigger applicable default provisions.[55]

One possible solution is the use of an escrow account into which all project revenues are deposited and distributed only in accordance with pre-agreed escrow instructions allocating certain monies for debt service, operational costs, service fees, etc. Unfortunately, the concept of escrow accounts is not well-developed in Indonesia thereby posing additional difficulties from the lender's perspective. This is another area where a PPP Project Law could create a legal mechanism to address the concerns of all parties, e.g., by providing for the use of escrow accounts.

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[54] A fiduciary assignment of accounts receivable entitles the assignee to receive payments due to the assignor from an account party, although the account party has no legal basis to claim against the assignee for non-performance by the assignor.

[55] In at least some loan agreements between the World Bank and the GOI, negative covenants restrict any Governmental agencies receiving the benefit of such credits from encumbering their liquid assets.

(iii) Non-Transferability of Licenses

As a matter of policy, Governmental licenses may not be transferred to third parties without the express written consent of the issuing Governmental agency, and in practice such consent is rarely, if ever, given.

The separate Governmental licenses a Project Company requires will depend largely on the nature of the project and the scope of work undertaken. To some extent, the Project Company can operate under licenses held by the public participant, e.g., land titles, abstraction licenses and excavation permits. This is workable insofar as it goes, but many licenses, such as a Construction Business Operating License (SIUJK) and a Contractor Registration Certificate (TDR), must be obtained by the Project Company itself. The only way these can be transferred to a new investor is by a sale of shares which exposes the new investor to unforeseen liabilities and, therefore, is not a satisfactory approach.

Recognizing the legitimate interest of the Government in ensuring that a "secondary market" for Governmental licenses does not come into existence, it may nonetheless be possible for certain comfort to be given to lenders by the Government formally acknowledging this concern and ensuring potential lenders that the Government will not act arbitrarily or capriciously in the event a transfer of licenses becomes necessary. Again, the appropriate form of such acknowledgment and assurance may be open for discussion, but guidance in this regard could be included in a PPP Project Law.

b. Hypothecs

Hypothecs (or mortgages) are security interests over real property governed by Civil Code Articles 1162 through 1232. The formalities of establishment of hypothecs are set out in Law No. 5/60 and its implementing regulations.

Although security interests over land are normally of paramount interest to project lenders, in the case of PPP projects in Indonesia less emphasis may be placed on them for two (2) reasons: (a) the nature of the project and land rights involved, and (b) the difficulty of enforcement referred to in Section IV.E.5. above.

Since, by definition, PPP projects in the Target Sectors will involve infrastructure projects providing basic services to an urban population, the commercial market value of land dedicated to such use is negligible. Moreover, land titles will almost certainly be held in the name of the Government counterpart rather than the Project Company, thus raising both legal and practical impediments to enforcement. Notwithstanding their theoretical value as security, therefore, real property assets in a PPP project are not likely to be

viewed as having any practical worth as security from a lender's perspective. Accordingly, further discussion of establishment and enforcement issues (of which there are several) need not be discussed further.

c. Pledges

Other than the hypothec, the only form of security over personal property, whether tangible or intangible, recognized by the Civil Code is the pledge. A pledge is an indivisible security right over specific assets and entitles the pledgee to a right of preferential satisfaction of his claim from the proceeds of the sale of the pledged property, subject only to the priority of costs of execution and safekeeping the property.

As a practical matter, the value of pledges as security instruments is lessened by the requirement that the pledged property be removed from the pledgor's control. It is probably chiefly used to obtain security over intangibles such as bank accounts, shipping documents and shares.

On default by the debtor, the pledgee is not entitled to appropriate the pledged property, and any agreement to the contrary is null and void. Unless otherwise agreed by the parties, the right of the pledgee is to sell the property by public auction and satisfy his claim from the proceeds of the sale.

In the case of PPP projects, the most important use of a pledge would most likely be to encumber the shares of the Project Company in favor of the creditors to permit a transfer of the shares to new investors should the pledgee(s) default on their obligations. The value of a pledge of shares will depend primarily on the underlying value of the Project Company, but the biggest concern to lenders will be the enforceability issue addressed generally in Section IV.E.5. above.

d. Fiduciary Transfers of Proprietary Rights

This security device is not provided by statute but is widely used and has been accepted by Indonesian courts, due in part to Dutch legal precedent in this regard and in part to provide a practical alternative to a pledge (which, as seen above, requires removal of the collateral from the pledgor's possession). A fiduciary transfer can create security rights in both tangible and intangible goods. It constitutes a transfer of ownership in fiducia and is not merely a lieu. It is created by written agreement between the creditor and debtor.

A primary shortcoming of the fiduciary transfer if that there is no registration system in which it may be recorded so as to allow notice to third parties. Accordingly, since the fiduciary transfer agreement permits the debtor to remain in possession of the subject goods, there is little protection against

fraudulent conveyances by the debtor. A registration system is sorely needed as is action relating to practical enforceability as discussed in Section IV.E.5. above.

2. Government Guarantees

The highest and best form of credit support from a lender's point of view is an express Government guarantee of the debt incurred by the Project Company. In Indonesia, such undertakings are generally prohibited by Keppres 59/72, as amended. In relevant part it provides that BUMNs, BUMDs and wholly privately-owned companies may obtain offshore financing only if there is no requirement of a guarantee from the GOI, including Bank Indonesia, and no obligation whatsoever on the GOI is created thereby. Keppres 59/72 also expressly prohibits BUMNs and BUMDs from issuing guarantees to offshore creditors in connection with loans received by private companies. An exception to such prohibition is contained in Keppres 15/91 and MOF Decree 417/1989, which together constitute a blanket approval for State Banks holding a foreign exchange license to, among other things, issue guarantees of foreign credits.

In rare instances, the GOI has shown a willingness to provide something in the nature of sovereign credit support. In a private electrical power project, for example, the MOF, representing the GOI, issued what was essentially a "comfort letter." The letter did not expressly guarantee the obligations of the state-owned electricity company (Perusahaan Listrik Negara or "PLN"), but is an undertaking from the MOF, on behalf of the GOI, to cause PLN to pay its obligations under the Power Purchase Agreement between PLN and the Project Company. Under prevailing Government policies, such a letter is probably the most that can be expected in the way of direct Governmental credit support.[56]

3. Other Third-Party Credit Support

Third-party credit support can take several forms. In the United States, the most common form is bond insurance. Local government issuers purchase insurance from one of several monoline bond insurance companies which then commits to paying the bondholders in the case of default. All bond insurance

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[56] The prevailing view of the GOI in respect of PPP water projects was summarized by the Coordinating Minister for Industry and Trade in a speech before the World Infrastructure Forum: Asia 1994 in October 1994 where he stated:

> It is the Government's policy that water enterprises now be run on a more commercial basis in balance with fulfilling social service obligations. Even so, full cost recovery on commercial terms is sometimes not viable in the first few years of projects. To respond to this, the Government will require local government enterprises to raise tariffs faster than inflation up to economic cost recovery levels before system expansions will be assisted. In turn, **the Government will consider each case on its merits for complimentary investments and other interim financing supports** that will reduce the short term burden to consumers of meeting full economic cost recovery. The private sector now also is enabled to invest in providing water on a commercial contract basis directly to special areas, such as groups of industries. (Emphasis added.)

It appears, therefore, that the GOI may entertain the possibility of some sort of credit support for PPP water projects at least on an ad hoc basis.

companies in the United States are rated triple-A, the highest rating category. Bonds issued by governments that purchase bond insurance are, in turn, also rated triple-A, thereby providing significant protection to bondholders against default. No such bond insurance companies exist in Indonesia, and without active encouragement of the GOI, through the MOF, it is doubtful that existing market conditions would favor their establishment.

Another form of third-party credit enhancement is a bank guarantee. Onshore Rupiah-denominated obligations of bond issuers may be issued by all commercial banks. Pursuant to the blanket exemption granted under Keppres 15/91 and MOF Decree 417/89, State Banks with foreign exchange licenses may issue guarantees for offshore credits without the necessity for PKLN Team approval.[57] Similarly, commercial foreign exchange banks may also issue bank guarantees for offshore credits without PKLN Team approval. Moreover, under current banking regulations there are no limits on the term for which a bank guarantee can be issued although the applicable capital reserve requirement limits aggregate bank guarantees of offshore credits to twenty percent (20%) of the bank's capital.[58] Given the enormous capital requirements of contemplated infrastructure projects in the Target Sectors as well as projects related to power generation and distribution, telecommunications, and sea, air, rail and road transportation, not to mention guarantees issued in the course of ordinary commercial banking business, it is questionable to what extent the aggregate capital resources of the Indonesian banking industry are sufficient to meet these demands. Except for such capital reserve requirement (which does not appear unreasonable) bank guarantees appear to be a viable means of third-party credit support for a range of financing structures including onshore and offshore loans as well as revenue bond issuances.

Lastly, donor countries and institutions offer a wide array of credit supports in the form of export financing and, in some cases, loan guarantees and concessionary lending. The United States offers various assistance programs through the U.S. Export-Import Bank and the Overseas Private Investment Corporation (OPIC), as well as The U.S. - Asia Environmental Program (US - AEP) and its infrastructure Project Promotion Fund. Japan supports infrastructure projects through its Official Development Assistance (ODA) and, of course, the IGGI, the World Bank and other developmental institutions offer grants, soft loans and/or guarantee facilities. One concern here is that the documentation executed in connection with such developmental aid not unduly restrict the ability of the GOI and its subdivisions from making necessary and appropriate commitments in connection with other projects. On this point, see discussion in Section IV.J.1.a.(ii).

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[57] PKLN Team approval, as discussed in Section IV.H., is required only for loans and other types of absolute debt obligations; it is not required for contingent obligations such as guarantees.

[58] See. Bank Indonesia Board of Directors Decree No.23/88/Kep/Dir concerning Bank Guarantees (March 18, 1991); and Bank Indonesia Circular Letter No.23/7/UKU regarding Bank Guarantees (March 18, 1991). It is not altogether clear whether "capital" in the context of these regulations refers to authorized, issued or paid-in capital of the bank.

V. CONCLUSION

The legal and regulatory constraints, deficiencies and omissions affecting private participation in PPP and PSP projects in the Target Sectors are many and varied. Many of the concerns identified in this paper fall outside the scope of the PURSE Project and in some instances are simply too large to be dealt with in as narrow a context as the Target Sectors (e.g., the overhaul of the Civil and Commercial Codes). Others have been and/or continue to be the subject of intensive study and analysis (e.g., tariff policies). On the other hand, certain of the issues raised in this paper fall squarely within the scope of the PURSE Project and are ripe for consideration. Progress in addressing those matters could go a long way towards encouraging private sector participation. Specifically, the following areas should be made the focus of intensified efforts:

1. MOHA, MOPW and other interested Government departments should prepare and adopt clear procedures and protocols of project approval and implementation (Section IV.C);

2. MOF should provide further clarification of applicable tax treatment of PPP projects particularly regarding VAT, import duties, construction taxes and withholding taxes on offshore payments (Section IV.E.1);

3. BAPPENAS should coordinate drafting of a PPP Project law or regulation to firmly establish the legal basis of such projects (Section IV.F);

4. Implementing guidelines under MOPW Reg. 49/90 should be issued as the next step towards development of a fully integrated WURS (Section IV.G.2); and

5. MOF should review existing restrictions affecting the financing of PPP projects in the Target Sectors, particularly those relating to PKLN approval of offshore financings and the prohibition of State Bank funding of foreign-invested projects (Section IV.H).

In some instances, substantial work has already be done in implementing these suggestions (e.g., nos. 1 and 4), and such efforts should of course be built upon. Other areas of concern may require new initiatives to implement the suggested course of action (e.g., adoption of a PPP project law or regulation), but even in such cases experience in Indonesia as well as other countries can serve as the bedrock for building an appropriate legal and regulatory framework.

For the third and final phase of SSEK's participation in the PURSE Project, we propose preparing an academic draft of a "PPP Project Law" which would incorporate a comprehensive set of procedures for project approval and

implementation. Such academic draft, therefore, would encompass items 1 and 3 above. We believe promulgation of such a law would be a major improvement in the legal and regulatory structure applicable to PPP Projects and would consequently encourage private participation in the Target Sectors.

Additionally, if requested by the PURSE Steering Committee, we will also prepare an academic draft of implementing guidelines of MOPW Reg. 49/90 (item 4 above). Although important to the development of a WURS in Indonesia, we understand that the MOPW is in the process of preparing such guidelines and preparation of an academic draft by SSEK may be duplicative. In this regard, further instruction is sought.

As to the remaining items identified above (Nos. 2 and 5), we suggest that the MOF and/or Bank Indonesia consider the analysis and recommendations contained herein and promulgate appropriate circular letters and/or decrees. Given the complexity and sensitivity of the policy issues raised by our recommendations regarding these items combined with the relatively limited legal drafting that would be involved in implementing our recommendations, we believe it would be both premature and inappropriate for SSEK to prepare academic drafts relating to these items and suggest that the MOF and/or Bank Indonesia take the lead in addressing the issues raised.

D. TIMELY ACCESS TO LEGAL INFORMATION

Constraints, Deficiencies and/or Omissions	Resulting Difficulties	Recommendations
o Most legally binding promulgations are not officially published. o Few court decisions are published. o Distribution is too limited and too slow.	o Uncertainty regarding applicable legal basis leads to lack of confidence. o Time-consuming research increases costs and creates delays.	o Require mandatory publication of all laws and regulations prior to their effectiveness. o Expand distribution generally and consider establishment of one-stop government publication outlets. o Create computer databases using both CD Rom and on-line technology. o Publish and distribute court decisions. o Consider subcontracting certain tasks to private sector.

A. LEGAL BASIS FOR PRIVATE PARTICIPATION

1. PSP Projects		
Constraints, Deficiencies and/or Omissions	**Resulting Difficulties**	**Recommendations**
o Keppres 16/94 excludes from its coverage service contracts for "operational/exploitational" purposes. o Each BUMD is required by Keppres 16/94 to issue its own procurement regulations.	o Some lack of certainty regarding scope of applicability of Keppres 16/94. o Potential for unnecessary inconsistency among BUMDs.	o EKKU or Keppres 6/95 Team should take lead role in clarification of scope of Keppres 16/94. o Prepare model set of BUMD procurement regulations for service contracts.
2. PPP Projects		
Constraints, Deficiencies and/or Omissions	**Resulting Difficulties**	**Recommendations**
o The IPU identifies (and appears to limit) water supply and solid waste projects open to investments by project type and geographic location, but without a clear legal basis. o No definite legal basis for private sector role in solid waste management	o IPU is a throwback to prior restrictive policies reflected in DSP. o Such limitations may exclude otherwise desireable PPP Projects from consideration.	o Clarify legal status of IPU. o Eliminate all restrictions relating to project type and geographic location. o Promulgate solid waste management regulation

B. LEGAL BASIS FOR GOVERNMENT PARTICIPATION

1. Regional Governments		
Constraints, Deficiencies and/or Omissions	**Resulting Difficulties**	**Recommendations**
o The Official Elucidation of MOHA Reg. 3/86 limits Regional Government participation to certain rigid forms of contracts in both PSP and PPP projects. o Such guidelines appear to be mandatory and are both constraining and vague in certain respects.	o Such constraints result in lack of flexibility to explore commercially feasible alternative structures of cooperation.	o Repeal or amend MOHA Reg. 3/86 (Elucidation) provisions restricting Regional Governments to certain forms of cooperative arrangements. o Adopt the more flexible approach of MOHA Reg. 4/90 re cooperation between BUMDs and third parties.

C. PROCEDURES AND PROTOCOLS OF PROJECT APPROVAL AND IMPLEMENTATION

Constraints, Deficiencies and/or Omissions	Resulting Difficulties	Recommendations
o MOHA Instruction 9/95 does not address roles of BAPPENAS, MOPW, MOF and Regional Governments o No issued implementing regulations regarding BUMN and Regional Government cooperation with private sector o Little guidance regarding respective roles of various Government departments.	o Unclear procedures and protocols of project approval and implementation. o Confusion as to scope of authority of MOHA, MOPW and other Government agencies. o Ad hoc approach to inter-departmental coordination	o GOI must build an inter-departmental consensus on suitable procedures and protocols of project approval and implementation. o Appropriate law, decree or regulation specifying procedures should be put in place.

2. BUMDs		
Constraints, Deficiencies and/or Omissions	**Resulting Difficulties**	**Recommendations**
o Law No. 5/62, by its terms, severely limits BUMD joint cooperation with private sector in PPP projects. o Legal status of Law No. 5/62 is unclear. o In respect of PSP projects, clarifications and model BUMD procurement regulations under Keppres 16/94 are lacking.	o Unclear status of Law No. 5/62 creates uncertainty and lack of confidence. o Uncertainty re scope of Keppres 16/94 o Potential for unnecessary inconsistency among BUMDs.	o Replace Law No. 5/62 as contemplated Law No. 6/69 with new legislation regarding Regional Enterprises. o EKKU or Keppres 6/95 Team should clarify scope of Keppres 16/94. o EKKU or Keppres 6/95 Team should issue model BUMD procurement regulations.

E. OVERALL LEGAL AND REGULATORY ENVIRONMENT

Constraints, Deficiencies and/or Omissions	Resulting Difficulties	Recommendations
o MOF Decree 248/95 is a positive step, but tax treatment of PPP projects require greater clarification o Tariff and non-tariff import barriers continue to pose obstacles and increase costs of offshore procurement o Court system remains ill-equipped to handle complex commercial litigation. o Enforcement of remedies frequently proves to be impractical. o Civil and Commercial Codes are outdated.	o All of these factors combine to undermine the confidence of investors, lenders, contractors and other private sector participants.	o Address special PPP project tax issues, including VAT, construction taxes, import duty relief and withholding rates on offshore payments of technical assistance fees, royalties and interest. o Continue customs reform and reduction of tariff and non-tariff barriers. o Implement judicial reform including establishment of Commercial Court,intensive training programs, publication of judicial decisions and institution of effective arbitration or other alternative dispute resolution forums. o Facilitate enforcement of remedies by adopting unified code of civil procedure, pre-judgment attachment system, appellate bond system and upgrade the State Auction Office. o Adopt revised and updated Civil and Commercial Codes.

F. LEGAL VALIDITY OF PPP INVESTMENT STRUCTURE

Constraints, Deficiencies and/or Omissions	Resulting Difficulties	Recommendations
o No existing law or regulation is specifically applicable to PPP projects in the Target Sectors.	o Lack of certainty and confidence that all aspects of PPP investment structures, including financing arrangements, are legally valid, binding and enforceable.	o Adopt appropriate PPP Project Law, Regulation or Joint Decree.

G. LAND TITLES AND WATER RIGHTS

Constraints, Deficiencies and/or Omissions	Resulting Difficulties	Recommendations
o Private acquisition of land continues to be inordinately time-consuming and expensive. o Duration of land titles (e.g., HGB) is limited. o Easements are unknown under Indonesian law. o Existing water rights system is incomplete and not integrated.	o Limited land title duration impedes ability to raise long term financing. o Arrangement of necessary land rights in certain PPP projects (e.g., water supply) may be somewhat vague and informal. o Lack of formal water rights system creates uncertainties regarding bulk water allocation and leads to under-pricing of water to consumers.	o Some clarification could be included within a PPP Law, e.g., special land acquisition rights and/or procedures. o Consideration should be given legal recognition of easements or similar land title. o Issue implementing guidelines under MOPW Reg. 49/90 specifying, inter alia: a. nature of rights granted; b. forms of granting instruments; c. duration of grants; d. modification, renewal and termination of grants; and e. transferability of grants.

H. ACCESS TO ADEQUATE FINANCING SOURCES

Constraints, Deficiencies and/or Omissions	Resulting Difficulties	Recommendations
o Due to "linkage" concept, off-shore financing in all PPP projects is subject to PKLN Team approval. o State Banks loans not available to foreign-invested PPP projects. o Issuance of revenue bonds by Regional Governments or BUMDs Hindered by necessity of tariff covenants, private liens on Government assets and likely need of third-party credit support.	o Given the huge capital requirements, any restraint on access to capital sources is an obstacle to PPP projects. o Inflexible and unrealistic restrictions on financing alternatives may be fatal to PPP projects.	o Infrastructure projects for public welfare should be given priority by PKLN Team. o MOF Letter S-1603/90 should be amended to allow foreign-invested infrastructure projects access to State Bank funds. o Coordinated steps should be taken to implement a revenue bond program at the earliest possible time.

I. SUFFICIENT AND CERTAIN PROJECT REVENUES (TARIFF RATES)

Constraints, Deficiencies and/or Omissions	Resulting Difficulties	Recommendations
o Relatively short validity periods for tariffs (3 years) relating to water supply PPP projects.	o Lack of assurances regarding future cash flow of project undermine private sector confidence. o Short-term tariff rates are likely to run counter to revenue bond covenants.	o Revamp tariff rate-setting procedures to comply with long-term financing requirements. o Consider tying future rates to economic indicator(s) such as the Consumer Price Index. o Coordinate efforts between public and private sectors to determine viable tariff policies.

J. SECURITY INTERESTS AND CREDIT SUPPORT

Constraints, Deficiencies and/or Omissions	Resulting Difficulties	Recommendations
o Fiduciary assignments (other than for accounts receivable) have a questionable legal basis in Indonesia. o Particular issues are posed by fiduciary assignments of project revenues and Governmental licenses. o No registration system exists for the recording of fiduciary transfers of proprietary rights. o Government guarantees of offshore credits, are essentially prohibited under prevailing policies. o No bond insurance companies exist, nor are likely to be formed without active GOI encouragement.	o Questions regarding security interests and credit support undermine confidence of investors and lenders.	o Establish firm legal basis for fiduciary assignments. o Address issues of revenue encumbrance and license transfers within PPP project context. o Establish registration system for fiduciary transfers of proprietary rights. o Relax restrictions on Governmental and State Bank guarantees related to Target Sector PPP projects. o Encourage establishment of bond insurance firm(s).

A. DASAR HUKUM BAGI PARTISIPASI SWASTA

1. Proyek-proyek PSP		
Kejanggalan-kejanggalan, Kekurangan-kekurangan dan/atau kekosongan hukum	**Masalah-masalah yang timbul**	**Saran-saran**
o Keppres 16/94 tidak mengatur kontrak-kontrak jasa bagi tujuan "operasional/ eksploitasi" dalam cakupannya. o Tiap-tiap BUMD disyaratkan oleh Keppres 16/94 untuk menerbitkan peraturan-peraturan mengenai pengadaannya masing-masing.	o Beberapa ketidak pastian mengenai ruang lingkup berlakunya Keppres 16/94. o Terdapat potensi untuk terjadinya ketidak-seragaman di antara BUMD-BUMD.	o Team EKKU atau Keppres 6/95 harus berperan dalam memberikan penjelasan ruang lingkup Keppres 16/94. o Mempersiapkan rangkaian model peraturan-peraturan pengadaan untuk kontrak-kontrak jasa.
2. Proyek-proyek PPP		
Kejanggalan-kejanggalan, Kekurangan-kekurangan dan/atau kekosongan hukum	**Masalah-masalah yang timbul**	**Saran-saran**
o IPU menyebutkan (dan nampaknya membatasi) proyek-proyek peng-usahaan air dan usaha pengelolaan sampah yang terbuka bagi penanaman modal didasarkan pada macam proyek dan lokasi geografis, namun tanpa suatu dasar hukum yang jelas.	o IPU adalah pengulangan dari kebijaksanaan pembatasan yang tampak dalam DSP sebelumnya. o Pembatasan-pembatasan tersebut dapat menghilangkan pertimbang-an-pertimbangan mengenai Pro-yek-proyek PPP.	o Memperjelas status hukum dari IPU. o Menghilangkan semua pembatasan mengenai macam-macam proyek dan lokasi geografis. o Mengundangkan peraturan mengenai usaha pengelolaan sampah.

o Tidak ada dasar hukum yang pasti bagi peran swasta dalam usaha pengelolaan sampah.		

B. DASAR HUKUM BAGI PARTISIPASI PEMERINTAH

1. Pemerintah Daerah		
Kejanggalan-kejanggalan, Kekurangan-kekurangan dan/atau kevakuman hukum	**Masalah-masalah yang timbul**	**Saran-saran**
o Penjelasan resmi dari Peraturan Menteri Dalam Negeri No. 3/1986 membatasi partisipasi Pemerintah Daerah dalam beberapa bentuk kontrak yang tidak leluasa, baik untuk proyek-proyek PSP atau PPP. o Petunjuk tersebut nampaknya merupakan suatu yang disyaratkan dan terdapat kekurangan serta ketidakjelasan dalam beberapa hal.	o Kekurangan-kekurangan tersebut menimbulkan kekakuan dalam mencari alternatif struktur-stuktur kerjasama yang secara komersial feasible (laik).	o Membatalkan atau merubah ketentuan-ketentuan Peraturan Menteri Dalam Negeri No. 3/86 yang membatasi Pemerintah Daerah melakukan kerjasama hanya dalam beberapa bentuk kerjasama tertentu. o Memberlakukan pendekatan yang lebih fleksibel sebagaimana diatur dalam Peraturan Menteri Dalam Negeri No. 4/90 mengenai kerjasama antara BUMD-BUMD dengan pihak ketiga.

2. BUMD-BUMD		
Kejanggalan-kejanggalan, Kekurangan-kekurangan dan/atau kekosongan hukum	**Masalah-masalah yang timbul**	**Saran-saran**
o Undang-undang No. 5/1962, dalam ketentuan-ketentuannya, membatasi kerjasama BUMD dengan pihak swasta dalam proyek-proyek PPP. o Status hukum dari Undang-undang No. 5/1962 tidak jelas. o Berkaitan dengan proyek-proyek PSP, berdasar Keppres 16/1994 terdapat kekosongan mengenai penjelasan dan model peraturan-peraturan pengadaan BUMD.	o Ketidak-jelasan status Undang-undang No. 5/1962 menimbulkan ketidak-pastian dan ketiadaan kepercayaan. o Ketidak-pastian mengenai ruang lingkup Keppres 16/1994. o Terdapat kemungkinan yang cukup besar bagi terjadinya ketidak-seragaman di antara BUMD-BUMD.	o Mengganti Undang-undang No. 5/1962 sebagaimana diamanatkan Undang-undang No. 6/1969 dengan peraturan perundang-undangan baru mengenai Perusahaan Daerah. o EKKU atau Tim Keppres 6/1995 harus memperjelas ruang lingkup Keppres 16/1994. o EKKU atau Tim Keppres 6/1995 harus menerbitkan model peraturan-peraturan pengadaan bagi BUMD-BUMD.

C. PROSEDUR DAN PROTOKOL PERSETUJUAN DAN PELAKSANAAN PROYEK

Kejanggalan-kejanggalan, Kekurangan-kekurangan dan/atau kekosongan hukum	**Masalah-masalah yang timbul**	**Saran-saran**
o Instruksi Menteri Dalam Negeri No. 9/1995 tidak membahas mengenai peran BAPPENAS, Menteri Pekerjaan Umum dan Menteri Keuangan.	o Prosedur dan protokol persetujuan dan pelaksanaan proyek yang tidak jelas.	o Pemerintah Indonesia harus membentuk suatu kesepakatan bersama antar departemen mengenai prosedur dan protokol yang cocok untuk persetujuan dan pelaksanaan proyek.
o Tidak ada peraturan-peraturan pelaksanaan mengenai kerjasama BUMN dan Pemerintah Daerah dengan pihak swasta.	o Ketidak-jelasan seperti ruang lingkup kewenangan Menteri Dalam Negeri, Menteri Pekerjaan Umum dan badan-badan Pemerintah lainnya.	o Undang-undang, keputusan atau peraturan yang sesuai yang mengatur mengenai prosedur harus ditetapkan.
o Sedikitnya petunjuk mengenai peran masing-masing departemen-departemen Pemerintah.	o Pendekatan ad hoc terhadap koordinasi antar departemen.	

D. AKSES INFORMASI HUKUM SECARA TEPAT WAKTU

Kejanggalan-kejanggalan, Kekurangan-kekurangan dan/atau kekosongan hukum	Masalah-masalah yang timbul	Saran-saran
o Banyak peraturan-peraturan hukum yang mengikat tidak dipublikasikan secara resmi. o Sedikit sekali putusan-putusan pengadilan yang dipublikasikan. o Sirkulasi sangat terbatas dan sangat lambat.	o Ketidak-pastian mengenai dasar hukum yang dapat diterapkan menimbulkan ketiadaan jaminan kepercayaan. o Riset-riset yang memakan waktu meningkatkan biaya dan menimbulkan keterlambatan-keterlambatan.	o Mensyaratkan kewajiban publikasi semua undang-undang dan peraturan sebelum mulai tanggal berlakunya. o Memperluas distribusi secara umum dan mempertimbangkan pendirian tempat-tempat penjualan publikasi-publikasi pemerintah yang lengkap. o Menciptakan komputerisasi pusat-pusat data yang menggunakan CD-Rom dan teknologi on-line (terpadu). o Mempublikasikan dan mendistribusi-kan putusan-putusan pengadilan. o Mempertimbangkan untuk men-sub-kontrakkan tugas-tugas tertentu kepada pihak swasta.

E. KEADAAN HUKUM DAN PERATURAN SECARA KESELURUHAN

Kejanggalan-kejanggalan, Kekurangan-kekurangan dan/atau kekosongan hukum	Masalah-masalah yang timbul	Saran-saran
o Keputusan Menteri Keuangan No. 248/95 adalah suatu langkah positif, tetapi perlakuan pajak terhadap proyek-proyek PPP membutuhkan penjelasan yang lebih luas.	o Faktor-faktor tersebut secara bersama-sama melemahkan keyakinan para investor, pemberi pinjaman, kontraktor-kontraktor, dan pihak-pihak swasta lainnya.	o Menyelesaikan permasalahan-permasalahan pajak untuk proyek PPP, termasuk PPN, pajak untuk konstruksi, pembebasan pajak impor dan tarif pajak penghasilan atas pembayaran biaya technical assistance, royalti dan bunga yang terhutang ke luar negeri.
o Halangan-halangan berupa pengenaan tarif dan non-tarif atas impor terus berlanjut dan meningkatkan biaya-biaya pengadaan dari luar negeri.		o Melanjutkan perubahan dan pengurangan atas hambatan-hambatan tarif dan non-tarif.
o Sistem peradilan tetap tidak mampu untuk mengatasi perkara komersial yang kompleks.		o Melaksanakan perubahan yudisiil termasuk pembentukan Pengadilan Komersial, program-program training yang intensif, penerbitan putusan-putusan yudisiil dan pembentukan arbitrasi yang efektif atau forum alternatif penyelesaian sengketa.
o Pelaksanaan upaya hukum seringkali terbukti tidak terlaksana.		
o Kitab Undang-undang Hukum Perdata dan Kitab Undang-undang Hukum Dagang telah ketinggalan jaman.		o Mempermudah pelaksanaan upaya-upaya hukum dengan mengundangkan kitab undang-undang hukum acara perdata, sistem penyitaan sebelum putusan, sistem banding dan meningkatkan peranan Kantor Lelang Negara.

		o Mengundangkan perubahan dan pembaharuan Kitab Undang-Undang Hukum Perdata dan Kitab Undang-Undang Hukum Dagang.

F. BERLAKUNYA STRUKTUR INVESTASI PPP

Kejanggalan-kejanggalan, Kekurangan-kekurangan dan/atau kekosongan hukum	**Masalah-masalah yang timbul**	**Saran-saran**
o Tidak ada peraturan atau perundang-undangan yang berlaku secara khusus untuk proyek PPP dalam Bidang-bidang Sasaran. (Target Sectors)	o Kurangnya kepastian dan jaminan bahwa seluruh aspek dari struktur investasi PPP, termasuk pengaturan pembiayaan, adalah sah secara hukum, mengikat dan dapat dilaksanakan.	o Menetapkan Undang-undang, Peraturan atau Keputusan Bersama tentang Proyek PPP.

G. HAK-HAK ATAS TANAH DAN HAK-HAK ATAS AIR

Kejanggalan-kejanggalan, Kekurangan-kekurangan dan/atau kekosongan hukum	Masalah-masalah yang timbul	Saran-saran
o Perolehan tanah oleh pihak swasta terlalu memakan waktu dan biaya yang berlebihan.	o Jangka waktu hak atas tanah yang terbatas menghambat kemampuan untuk mendapatkan pembiayaan jangka panjang.	o Beberapa penjelasan dapat dicantumkan dalam perundang-undangan tentang PPP, misalnya hak-hak dan/atau prosedur khusus perolehan tanah.
o Jangka waktu hak atas tanah (misalnya HGB) yang terbatas		
o *Easements* tidak dikenal dalam perundang-undangan Indonesia.	o Pengaturan hak-hak atas tanah untuk proyek-proyek PPP tertentu (misalnya penyediaan air) dapat menimbulkan ketidakjelasan dan tidak sah.	o Harus mempertimbangkan pengesahan secara hukum atas easements atau hak atas tanah lainnya yang serupa.
o Sistem hak-hak atas air tidak lengkap dan tidak terpadu.	o Tidak adanya sistem yang resmi mengenai hak-hak atas air menciptakan ketidakpastian tentang alokasi banyaknya air yang tersedia dan mengakibatkan penentuan harga yang tidak wajar bagi konsumen.	o Mengeluarkan petunjuk pelaksanaan dari Peraturan Menteri PU No. 49/90 yang menyebutkan, antara lain: - sifat hak yang diberikan - bentuk instrumen - jangka waktu pemberian hak - modifikasi, pembaharuan dan pengakhiran pemberian hak; dan - kemampuan hak-hak untuk dialihkan. .

H. AKSES TERHADAP SUMBER-SUMBER PEMBIAYAAN YANG MEMADAI

Kejanggalan-kejanggalan, Kekurangan-kekurangan dan/atau kekosongan hukum	Masalah-masalah yang timbul	Saran-saran
o Disebabkan oleh konsep "keter-kaitan", pembiayaan dari luar negeri untuk semua proyek PPP harus disetujui oleh Team PKLN.	o Karena kebutuhan modal yang besar, pembatasan atas akses terhadap sumber-sumber modal merupakan rintangan untuk proyek-proyek PPP.	o Proyek-proyek prasarana untuk kesejahteraan rakyat harus diutamakan oleh Team PKLN.
o Pinjaman dari Bank-Bank Pemerintah tidak tersedia untuk proyek-proyek PPP dengan penanaman modal asing.	o Pembatasan yang tidak fleksibel dan tidak realistis atas alternatif pembiayaan dapat berakibat fatal untuk proyek PPP.	o Surat Menteri Keuangan S-1603/90 harus diubah untuk memberi akses kepada proyek-proyek prasarana yang dibiayai modal asing untuk mendapatkan dana dari Bank Pemerintah.
o Penerbitan obligasi (revenue bonds) oleh Pemerintah atau BUMD terhambat oleh kebutuhan mengenai persetujuan tarif, gadai atas aset Pemerintah, dan bantuan kredit yang mungkin dibutuhkan dari pihak ketiga.		o Langkah-langkah yang terkoordinasi harus diambil untuk melaksanakan program pengaturan pengeluaran obligasi secepat mungkin.

I. PENERIMAAN PROYEK YANG MEMADAI DAN PASTI (TARIF)

Kejanggalan-kejanggalan, Kekurangan-kekurangan dan/atau kekosongan hukum	Masalah-masalah yang timbul	Saran-saran
o Jangka waktu berlakunya tarif yang relatif pendek (3 tahun), pada proyek-proyek PPP penyediaan air.	o Kurangnya kepastian mengenai arus kas proyek di masa datang mengecilkan minat pihak swasta. o Tarif jangka pendek mungkin berlawanan dengan perjanjian obligasi (revenue bond).	o Memperbaiki prosedur penetapan tarif agar sesuai dengan kebutuhan pembiayaan jangka panjang. o Mempertimbangkan untuk menyesuaikan tarif mendatang dengan indikator ekonomi, misalnya Indeks Harga Konsumen. o Mengkoordinasikan upaya-upaya antara pihak pemerintah dan pihak swasta untuk menentukan kebijakan tarif yang layak.

J. JAMINAN DAN BANTUAN KREDIT

Kejanggalan-kejanggalan, Kekurangan-kekurangan dan/atau kekosongan hukum	Masalah-masalah yang timbul	Saran-saran
o *Cessie* atau penyerahan secara fidusia (*fiduciary assignments*) di Indonesia, selain untuk piutang (account receivable), tidak memiliki dasar hukum yang pasti.	o Masalah-masalah mengenai jaminan dan bantuan kredit mengecilkan minat penanam modal dan pemberi pinjaman.	o Menetapkan dasar hukum yang kuat untuk perjanjian cessie.
o Masalah-masalah khusus yang ditimbulkan dari cessie atas penerimaan proyek dan ijin-ijin Pemerintah.		o Mengatasi masalah pembebanan penerimaan dan pemindahan ijin dalam rangka proyek PPP.
o Tidak ada sistem pendaftaran untuk pencatatan cessie atas hak-hak milik (*proprietary rights*).		o Menetapkan sistem registrasi untuk cessie atas hak-hak milik (*proprietary rights*).
o Jaminan Pemerintah atas kredit luar negeri, umumnya dilarang berdasarkan kebijaksanaan yang berlaku.		o Melonggarkan pembatasan-pembatasan jaminan Pemerintah dan Bank Pemerintah untuk proyek PPP Bidang Sasaran.
o Tidak ada perusahaan asuransi obligasi, juga tidak ada kemungkinan akan pembentuk-annya, tanpa dukungan aktif dari Pemerintah.		o Mendukung pendirian perusahaan-perusahaan asuransi obligasi.

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THE PURSE PROJECT

In December 1991 the U.S. and Indonesian governments signed an agreement to encourage private investment in the provision of public water supply, wastewater treatment and solid waste management services in urban areas throughout the archipelago. In recognizing that its capacity to finance the needed projects is severly strained, and that insufficient urban infrastructure will adversely affect public health and welfare and inhibit future economic growth, the Government has been looking increasingly to the private sector to participate in the provision of these essential services.

PURSE is working with USAID/Indonesia's Office of Private Enterprise Development and several agencies of the Government of Indonesia through a combination of technical assistance and capacity building interventions to:

- develop policy consensus and a legal framework that clarifies current rules and formulates new or revised regulations pertaining to private investment in all aspects of municipal infrastructure development and/or provision of urban services,
- demonstrate the technical and contractual feasibility of various forms of Public-Private Partnerships through demonstration projects, and
- transfer knowledge and expertise to public sector officials in relevant technical, financial and managerial aspects of environmental infrastructure.

For more information on the PURSE Project, please contact Chemonics International or the PURSE Project at the addresses listed above.