

Build Operate Transfer As A Cooperation Of Land Assets Utilization By The National Army Of Indonesia

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1. Abstract

Build Operate Transfer (BOT) agreement is a cooperation generally carried out by the government and private parties as colleagues by utilizing the land of state assets as an object to build infrastructure. The BOT Agreement is an unknown type of agreement in the *Burgerlijk Wetboek* (BW) that grows and evolves due to the complementary needs of government and private parties on the principle of mutual benefit. In essence, BOT agreements are made by the government to build infrastructure to support tasks and functions, but there is not enough available funds in the State Budget, so as to involve private parties participating in national development. This study aims to 1. Find the philosophical value of BOT agreement on infrastructure development within the Indonesian National Army; 2. Find the principles of BOT covenant law; 3. Find the ideal concept of BOT agreement form within the National Army of Indonesia. This research applies normative juridical method with legislation, historical and conceptual approach. The theoretical basis used is the theory of authority. The National Army of Indonesia as the subject of the BOT agreement is under the authority of the Minister of Finance as the Goods Management delegated to the Minister of Defense as the User of the Goods. or the Commander of the Armed Forces as the Proxy of the Users of Goods. After delegation of authority, the Minister of Finance shall continue to supervise and control until the end of the agreement period. The results of this study are: first, utilization of state asset land by the National Army of Indonesia in the form of BOT used to carry out the National Army of Indonesia duties and functions in the field of state defense and security; secondly, the legal principles that need to be developed in the regulation of land use of state assets by the National Army of Indonesia in the field of state defense and security include: the principle of military interests, the principle of unity of command, the principle of strong, integrated and universal defense and security; third, the ideal concept of BOT agreement within the National Army of Indonesia is to build defense industry infrastructure, in order to realize Indonesia's strong, advanced, self-sustaining and competitive defense.

Keywords: *Build Operate Transfer Agreement, State Assets Land, the National Army of Indonesia*

2. Introduction

Indonesia is an agrarian law state, so that the arrangement of earth, water and space is regulated in the 1945 Constitution. Article 33 Paragraph (3) of the 1945 Constitution states that the earth's water and natural resources contained therein are controlled by the state and used for the welfare of the people. On the basis of Article 33 Paragraph (3) of the 1945 Constitution, the state is authorized to regulate, organize allotments, use, inventory and maintenance of land, determine and regulate legal relationships between persons and legal acts with earth, water and space.¹ On the basis of such authority, various kinds of land rights may be granted to persons, legal entities domiciled in Indonesia. Land rights granted to Ministries, Non Departmental Government Agencies including the National Army of Indonesia are granted usage rights for an indefinite period of time during their use for certain purposes.²

¹ Article 2 paragraph (2) the Act Number 5 of 1960 on Basic Rules of Agrarian, Paper of the Republic of Indonesia of 1960 Number 104, Additional Paper of the Republic of Indonesia Number 2043.

² Article 9 point c jo Article 45 paragraph (3) point a Government Regulation Number 40 of 1996 on Business Operation rights,

The use of state land assets within the the National Army of Indonesia is in the form of rent, cooperation of utilization, Build Operate Transfer (BOT).¹ Utilization of state land assets by the National Army of Indonesia in the form of BOT causes many problems, both philosophical, theoretical, juridical, and sociological problems. Philosophically BOT agreements have not been able to provide justice for the community because the regulation has not been able to provide legal certainty. Theoretically, the object of the BOT agreement is a State-Owned Asset that is prohibited to be handed over to other parties as payment for bills to the government and is prohibited from being pawned or used as collateral for a loan.² This provision is not in accordance with Article 1332 BW stating that only tradable goods may be subject to an agreement.³

The regulation of the utilization of state assets by the National Army of Indonesia in the form of BOT is regulatory dualism, namely Regulation of the Minister of Finance No. 78/2014 on Procedures for Implementation of Utilization of State Property (PMK No. 78/2014) and Regulation of the Minister of Finance No. PMK No. 54 / PMK.06 / 2015 on the Arrangement of State-Owned Assets Utilization in the National Army of Indonesia Environment (PMK No.54 / 2915). According to Article 34 paragraph (2) of Government Regulation No. 27/2014 (PP No. 27/2014) connected with Article 103 PMK No. 78/2014 that BGS is implemented by the Goods Manager. While Article 23 of the Regulation of the Minister of Finance No. 54/2015 (PMK No. 54/2015) states that State-Owned Assets within the National Army of Indonesia can only be carried out by BOT as it is not used and / or does not interfere with the execution of the duties and functions of the State Administration by Users of Goods / Powerful User Authority. In the sociological problem, the use of State-Owned Assets in the form of BOT for the construction of Mall, supermarkets, hotels, Sport center, swimming pool does not support the duties and functions of defense government. This is not in accordance with the provisions of Article 34 paragraph (4) PP. 27/2014 which stipulates that within the period of operation BOT results should be used directly for the implementation of duties and functions of the Government of at least 10%. By the existing legal problems, the problems can be formulated as follows:

- a. What is the philosophical value of the BOT agreement on the cooperation of land use of state assets by the National Army of Indonesia?
- b. What legal principles should be accommodated in the regulation of land use of state assets in the form of BOT agreements within *the National Army of Indonesia* environment?
- c. What is the form of BGS agreement on the land use of state assets by *the National Army of Indonesia*?

This study uses several legal theories, namely: 1. The theory of authority; 2. The theory of agreement; 3. The theory of command unity. The purpose of this study are 1) to analyze the legislation ratio on the regulation of land use of state assets by *the National Army of Indonesia* in the form of BOT agreements; 2. to find and analyze the principles of contract law in accordance with the utilization of state assets by *the National Army of Indonesia* in the form of BOT agreements; 3. to find the concept of ideal BOT agreement form to conform with the implementation of *the National Army of Indonesia* duties and functions in the field of state defense.

3. Research Method

The method of this study is normative legal research that will examine and analyze the norms contained in the legislation related to the Utilization of State Assets Land in the form of BOT. This study uses legal historical approach, statute approach, and conceptual approach. The historical approach is used to analyze the history of land tenure by *the National Army of Indonesia* derived from KNIL relics, Japanese Army, purchases with APBN, grant and occupation land of foreign / Chinese exiles. The legislation approach is carried out by reviewing legislation relating to the Utilization of State Assets Land in the form of BOT agreements by *the National Army of Indonesia*. The conceptual approach is intended to build ideas about the meaning, principles relating to the BOT agreement which originally derived from the opinions or views of the experts of the treaty law. The conceptual approach is used to trace the views of legal scholars in order to find legal principles relating to BOT agreements within *the National Army of Indonesia* environment.

Building Operation rights, and utilization rights of land. Paper of the Republic of Indonesia of 1996 Number 58.

¹ Article 6 Minister of Finance Decree Number 54/PMK.06/2015 on Structuring the Utilization of State-Owned Assets in *the National Army of Indonesia*. Report of the Republic of Indonesia of 2015 Number 399.

² Article 49 paragraph (4) and (5) The Act Number 1 of 2004 on the State Treasury. Paper of the Republic of Indonesia of 2014 Number 5, Additional Paper of State Number 4355.

³ R. Subekti, dan R. Tjitjorsudibio, *Kitab Undang-Undang Hukum Perdata, Burgerlijk Wetboek*, Pradnya Paramita, Jakarta, 2013, hlm. 341.

4. Results and Discussion

Based on the background and problems formulated in the introduction, the results of research and discussion can be described as follows:

4.1 The Build Operate Transfer Agreement as the Cooperation of Land Use of State Assets By *the National Army of Indonesia*

The Utilization of State Assets Land by *the National Army of Indonesia* in the form of Build Operate Transfer (BOT) agreement used to build infrastructure in the field of defense and security of the state should be drawn up a design or idea of its regulation in the form of legislation containing the stages of BOT agreement. The stages of BOT agreement from planning, preparation, execution and termination of agreement in accordance with the theory of pattern or model of BOT agreement should be understandable and easy to be implemented in order to have legal certainty, to be useful for *the National Army of Indonesia* interest to build defense industry to realize happiness for all people based on *Pancasila*. BOT Agreement on cooperation of Utilization of State Assets Land by *the National Army of Indonesia* to build infrastructure can support defense force and state security.

1. Legal Ratios of Utilization of State Assets by *the National Army of Indonesia*

The National Army of Indonesia as a state instrument in the field of defense in carrying out its duties should be based on state policies and political decisions. The authority and responsibility of mobilizing *the National Army of Indonesia* forces are in the President with the approval of the House of Representatives. Responsibility for the use of *the National Army of Indonesia* forces lies in *the National Army of Indonesia* Commander.¹ In defense strategy policy as well as administrative support, *the National Army of Indonesia* is under the Department of Defense. Everything related to strategic planning such as state defense management,² budgeting policy, procurement, recruitment, national resource management and defense industry technology development, *the National Army of Indonesia* is under the Department of Defense.

In carrying out its main tasks, *the National Army of Indonesia* needs land to build defense forces such as offices, training sites, residences or places of activity to support state defense activities. The lands used by *the National Army of Indonesia* are state assets as state-owned and controlled property. The land of state assets controlled by *the National Army of Indonesia* comes from the relics of the Royal Dutch Army or the *Koninkrijk Nederland Indische Leger* (KNIL) into state-owned assets under the Act Number 86 of 1958 on the Nationalization of Dutch-Owned Enterprises. The land of the Japanese Army (Dai Nippon) relics became a state-owned asset based on the Letter of the Minister of Home Affairs Number H.20 / 5/7 dated May 9, 1950 on the Settlement of lands formerly taken by the Japanese Occupation Government. Foreign lands and buildings abandoned by their owners after the independent of Indonesia becomes the state asset based on the Regulation of the Minister of Finance No. 188 / PMK.06 / 2008 dated November 20, 2008 concerning the Settlement of foreign / Chinese owned assets.³ To understand the Utilization of State Assets Land by *the National Army of Indonesia* is discussed from the history of control and arrangement, authority, characteristic of land utilization in the form of BOT to build a concept of legal purpose to BOT agreement conducted by *the National Army of Indonesia*. Through the discussion of the legislation ratio, the authority of land use of state assets by *the National Army of Indonesia* in the form of BOT will be found to find the principles and concepts of the law on BOT agreement within *the National Army of Indonesia* in accordance with the duty and function of *the National Army of Indonesia* in the field of defense and state security in order to minimize the potential loss of the state.

2. Characteristics of Utilization of State Assets Land by *the National Army of Indonesia*

Utilization of state asset land is the utilization of unused land for performing ministry / agency duties and functions and / or optimizing State-Owned Assets by not changing ownership status.⁴ The cooperation of land use of state assets is intended to optimize the utilization of State-Owned Assets that is not / not yet used in the implementation of government duties and functions, increasing state revenue and securing BMN, preventing the use of State-Owned Assets which is not based on provisions by other parties. Characteristics of land use of state assets by *the National Army of Indonesia* can be discussed from the main tasks of *the National Army of*

¹ Article 17 and 19 The Act Number 34 of 2004 on *the National Army of Indonesia*. Paper of the Republic of Indonesia of 2004 Number 127 Additional Paper of the Republic of Indonesia Number 4439.

² State defense management is any activity in the strategic and policy level includes planning, implementation, supervision, and state defense control.

³ Nurhajizah, *Penguasaan Tanah Negara oleh Kemhan/the National Army of Indonesia, Jurnal Hukum Militer, Vol. 1, No. 6 Mei 2013*, Pusat Studi Hukum Militer, Jakarta, 2013, hlm. 2-3.

⁴ Article 1 point 9 Minister of Finance Decree Number 78/PMK.06/2014 on the Implementation Method of State Owned Assets Utilization, Report of the Republic of Indonesia of 2014 Number 588.

Indonesia in accordance with the Act Number 34 of 2004 on the Indonesian National Army (the Act Number 34/2004). Article 7 of the Act Number 34/2004 states that the main task of *the National Army of Indonesia* is to uphold the sovereignty of the state, to maintain the unity of *Negara Kesatuan Republik Indonesia* (the Unitary State of the Republic of Indonesia) based on *Pancasila* and the 1945 Constitution, and to protect the entire nation and the whole of Indonesia from the threat and disturbance to the unity of the nation and state. Based on the basic task of *the National Army of Indonesia*, the characteristics of the use of the land of state assets by *the National Army of Indonesia* are adjusted to the main task of *the National Army of Indonesia*, namely to uphold the sovereignty of the state, to maintain the unity of the Republic of Indonesia from various forms of threat and to protect the entire nation. Typical use of land of state assets by *the National Army of Indonesia* is directed at the implementation of basic tasks of *the National Army of Indonesia*, which is divided into two areas, namely defense and state security.

- a. Characteristics of land use of state assets in the field of state defense
 - 1) Enforcement of state's sovereignty; to maintain state power and implement a government that is free from any threats.
 - 2) Maintain the territorial integrity of preserving the unity of the territory of the country with all its contents, both on land, sea and the air.
- b. Characteristics of land use of state assets in the field of state security
 - 1) Protecting the entire nation and the entire blood of Indonesia, which means to protect the soul, body, independence and property of all Indonesian.
 - 2) Maintaining the integrity of the nation and state, it means maintaining the unity and integrity of the nation from various threats such as aggression, territorial offenses, armed rebellion against the legitimate government, sabotage seeking to destroy important installations and national vital objects, espionage, terror, Indonesia's national jurisdiction, communal conflict among community groups that could endanger the safety of the Indonesian nation and state.

As a means of national defense, *the National Army of Indonesia* serves as a deterrent, actor and restorer the state security conditions.¹ In carrying out its function as an antidote, *the National Army of Indonesia* has psychological aspects to be taken into account by opponents to prevent the intention of opponents to come to the territory of the Republic of Indonesia which will threaten sovereignty, territorial integrity and safety of the nation and state. In response to any form of military threat, it is intended that *the National Army of Indonesia* forces are capable of destroying forces that threaten the sovereignty of the state, territorial integrity and national security. As a restorer of security conditions, *the National Army of Indonesia* forces together with other government agencies are able to restore the state security that has been disrupted due to security turmoil caused by war, insurrection, communal conflict, riots, terrorism, and natural disasters.

3. The Form of Utilization of State Assets Land by *the National Army of Indonesia*

Before discussing the forms of utilization of state land assets by *the National Army of Indonesia*, it is necessary to describe the principles of land use of state assets by *the National Army of Indonesia*, including: 1) submitted by the Users of Goods to obtain the approval of the Minister of Finance as the Goods Manager; 2) approval of the Minister of Finance as the basis for the implementation of utilization; 3) approval of the Minister of Finance as the basis for concluding the agreement; 3) the utilization result shall be the state revenue that must be deposited into the public treasury account; and 4) the land of state assets should not be pledged or mortgaged. Based on the principles of exploiting the land of state assets by the National Army of Indonesia, the forms of utilization includes 1) rent; 2) KSP; and 3) Build Operate Transfer (BOT).²

a. Rent.

State-Owned Assets within the National Army of Indonesia can be rented as long as it is not used and / or does not interfere with the implementation of duties and functions of state administration. State-Owned Assets rent within the National Army of Indonesia are exercised on land and / or buildings and other than land and / or buildings. State-Owned Assets Rent is conducted by User of Goods / Proxy of Goods Users with the maximum period of 5 years and can be extended with the approval of the Goods Manager. Specific matters arranged in State-Owned Assets rent within the National Army of Indonesia is a rental rate of 0% (zero percent) if

¹ *Ibid.*, Article 6.

² Article 6 Minister of Finance Decree Number 54/PMK.06/2015 on Structuring the Utilization of State-Owned Assets in *the National Army of Indonesia*. Report of the Republic of Indonesia of 2015 Number 399.

the land is used for Cooperative offices, Schools (from kindergarten to high school), orphanages and nursing homes, religious activities; or libraries and smart homes.¹ State-Owned Asset rate is set to 50% if the land and / or building is utilized for social, humanitarian and / or higher education purposes implemented by the Cooperative and / or Institute located within the National Army of Indonesia environment. Rental rates of up to 0% on the use of land and / or buildings for the benefit of higher education if 50% or more of the students are active the National Army of Indonesia members or sons / daughters of the National Army of Indonesia or the National Army of Indonesia cooperatives or foundations that face financial difficulties as evidenced by audited financial statements by the Public Accountant Office for 2 years.² All State-Owned Assets receipts within the National Army of Indonesia environment are deposited to the account of the State General Treasury.

b. Cooperation

Utilization. State-Owned Assets within the National Army of Indonesia environment can be done by Cooperation of Utilization in which the status of its use is in the Users of Goods as long as it is not used or does not interfere the implementation of duties and functions of state administration. Cooperation of Utilization Subject is User of Goods / Proxy of Goods Users with the State-Owned Asset object in the form of land and / or building. The period of Cooperation of Utilization is 30 years since the agreement is signed and can be extended. KSP results are buildings and facilities that become State-Owned Assets since submitted to the government pursuant to the agreement or upon termination of the agreement. Cooperation of Utilization colleagues are required to pay a fixed contribution and profit sharing that is deposited into the account of the State Treasury.

c. Build Operate Transfer

State-Owned Assets within the National Army of Indonesia environment can implement BOT with State-Owned Enterprises, Regional Owned Enterprises or other legal entities in which the status is in the Users of Goods. BOT shall be taken into consideration insofar as it is not used and / or does not interfere with the execution of duties and functions of governance. BOT is implemented by User of Goods / Proxy of Goods Users. The period of BOT shall be 30 years since the agreement is signed, which is not renewable. After the expiry of the period, BOT colleagues are required to submit BOT object to User of Goods / Proxy of Goods Users as stated in the Official Report of Handover. BOT results become State-Owned Assets since submitted to the Government pursuant to the agreement or upon termination of the agreement. The Partner shall pay an annual contribution of which the quantity is calculated by the BOT Team established by the Goods Manager. The amount of annual contribution is determined based on the multiplication percentage of annual contribution and the fair value of State-Owned Assets. The predetermined amount of annual contributions continues to increase each year, calculated on the basis of the first year's contribution with respect to the estimated inflation rate.

The provisions on the utilization of state asset land in the form of BOT by the National Army of Indonesia are implemented in a condition not used and / or not interfere with the implementation of duties and functions of state defense. BOT colleagues are required to pay contributions which are calculated by the BOT Team established by the Goods Manager. The amount of annual contribution is determined based on the multiplication percentage of annual contribution and the fair value of State-Owned Assets. The predetermined amount of annual contributions continues to increase each year, calculated on the basis of the first year's contribution with respect to the estimated inflation rate. The first annual contribution payment is made at the time the agreement is signed. The payment of the next annual contribution shall be deposited to the general treasury account no later than March 31 of each year until the termination of the agreement. During the use of the BOT project building, the Users of Goods shall directly use BOT results of at least 10% to perform the defense duties and functions specified by the Goods Manager. After the expiry of the BOT period, colleagues shall submit BOT objects to the Goods Users or the Proxy of the Users of Goods as outlined in the Official Report of Handover and become state assets from the time of submission or upon termination of the agreement.

¹ See Article 9 Minister of Finance Decree Number 54/PMK.06/2015 on Structuring the Utilization of State-Owned Assets in *the National Army of Indonesia*. Report of the Republic of Indonesia of 2015 Number 399.

² Article 9 Government Regulation Number 27 of 2014 on State-Owned Assets Management/regional, paper of Republic of Indonesia of 2014 Number 92, additional paper number 5533

The form of utilization of state asset land in order to support the task and function of the National Army of Indonesia in the field of defense is to build and develop an advanced, strong, independent and competitive defense industry to create security and peace for all Indonesian based on *Pancasila*.

4.2 Regulation Principles of Utilization of State Assets Land By the National Army of Indonesia

The principle of the treaty law serves as a philosophical fundamental in the preparation of the treaty texts and as a guide in solving complex problems with an interpretive approach. In general, the principle of the treaty law can be inventoried and consolidated into two parts: first, the principle of law to build the covenant, including the principle of freedom of contract, consensuality, the strength of the covenant bond, goodwill, balance and trust; second, legal principles for determining the substance of the treaty to not contradict the law, public order and morality in accordance with the principles of propriety, morals, customs, compensation, timeliness, coercive circumstances, choice of law and dispute resolution. The principles of the BOT agreement on cooperation on utilization of state assets land by the National Army of Indonesia can be described as follows:

1. General Principles of the Agreement

The term principle comes from the Dutch *principe / beginzel* which means the principle, the truth which is the basic reason of thinking, acting; basic.¹ Bruggink² asserts that the principle of law as a meta-rule relates to the rule of law in the form of behavior. In Bruggink's definition, the principle of law has a dual function, namely as a fundamentalist of the positive legal system and as a critical test of the positive law system.

Principles of the treaty law serve to bring justice, guarantee legal certainty and provide benefits for the parties to draft the treaty. In general the principles of the treaty law derived from Article 1320 *Burgerlijk Wetboek* (BW) that determined an agreement required four conditions, namely first, agree those who bind themselves; second, the ability to make an engagement; third, a certain thing; and fourth, a lawful cause.³ Article 1320 paragraph (1) BW set the principle of consensuality and the principle of equilibrium. Paragraph (2) set the principle of ability to make an agreement. Article 1338 BW,⁴ set the principle of freedom of contract, *pacta sunt servanda*, binding agreements of the parties, and good faith.

In the utilization of state asset land in the form of BOT by the National Army of Indonesia is granted privileges as subject of agreement as regulated in Article 23 of PMK No. 54/2015. In the making of the agreement, the National Army of Indonesia, representing the government, should follow the general principles of the agreement as stipulated in Article 1320 and Article 1338 BW. In addition to these general principles, it is necessary to add the principles of BOT agreement which includes the principles of mutual benefit, complementary, military interests, unity of command, defense and state security. With the principle of command unity, it will be able to reduce potential losses on the utilization of state asset land to build an independent, advanced, strong and competitive state defense industry.

2. The Principles of Build Operate Transfer Agreement

The agreements made by the National Army of Indonesia as government representatives with private parties have different characteristics from those in general. The implications of the mixing of private and public elements are not only about the validity of the formation of the treaty but also on aspects of implementation and enforcement of the law. The existence of an element of public law that causes the rules and principles of law in private agreements is not fully applicable to treaties made by the government.⁵Y. Sogar Simamora said that if in a commercial contract the parties have wide freedom, then in the government contract, the freedom is not fully applicable, because this contract applies a special legal regime.⁶ According to the provisions of Article 112 of PMK No. 78/2014 that the BOT agreement contains at least the following: the basis of the agreement; the identity of the parties to the treaty; BOT object; BOT results; BOT designation; BOT period; the amount of annual contributions and payment mechanisms; the quantity of BOT results used directly for the duties and functions of the User Manager / User; rights and obligations of the parties to which the contract is bound; provisions concerning the end of BOT, sanctions; and dispute resolution. The BOT Agreement is set in the form

¹ Yan Pramadya Puspa, *Kamus Hukum Edisi Lengkap*, Aneka Ilmu, Semarang, 1977, hlm. 684.

² J.J.H. Bruggink, Alih Bahasa Arief Sidharta, *Refleksi Tentang Hukum*, Citra Aditya Bakti, Bandung, 1999, hlm. 120.

³ R. Subekti, dan R. Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata, Burgerlijk Wetboek*, Pradnya Pramita, Jakarta, 2013, hlm. 342.

⁴ Article 1338 *Burgerlijk Wetboek* states that all valid agreements act as regulations for those who make. One agreement cannot be canceled without the agreement of both parties involved or without any rationals.

⁵ Lalu Hadi Adha, *Kontrak Build Operate Transfer Sebagai Perjanjian Kebijakan Pemerintah Dengan Pihak Swasta*, Jurnal Dinamika Hukum, Vol. 11 No. 3 September 2011, hlm. 553.

⁶Y. Sogar Simamora, *Hukum Kontrak, Kontrak Pengadaan Barang dan Jasa Pemerintah di Indonesia*, Laksbang Justisia, Surabaya, 2013, hlm. 5.

of Notarial deed.

As determined by Article 1319 BW that BOT agreements made between the National Army of Indonesia and private parties are also subject to the provisions of BW's Third Book of Engagement. However, cooperation in the form of BOT agreements has a special principle that can be categorized into two, namely the principle of mutual benefit and the principle of complementary.

- a. The principle of mutual benefit derives from English 'mutual benefit principal' meaning the principle of benefit or principle *maslahat*, that is something that bring goodness (salvation); avail and use.¹ The principle of mutual benefit as a rationale that in a cooperation agreement demands good faith, so it benefits all parties. The principle of mutual benefit demands justice so that no party is harmed on the rights and interests. The principle of mutual benefit positively demands the same thing, that is all parties to try to mutually benefit each other. Gains or losses incurred by the agreement. Violations of agreements made between the parties that cause losses that must be borne by the party who loses it without any claim to the other party. The principle of mutual benefit is very appropriate as a rationale in the preparation of the text of the BOT Agreement because there are several benefits that can be obtained from the BOT agreement building project.
 - b. The principle of complementary comes from the English language, namely complementarity principle that is complementary / balanced due to the existence of mutual need between parties in the agreement. The principle of complementarity has 3 main principles, namely: 1) mutual relations between the National Army of Indonesia and the private sector; 2) such reciprocal relationship creates an agreement; 3) transferability. The principle of complementarity will give rise to mutual benefits effects. The principle of complementarity in cooperation with the BOT pattern is a reciprocal relationship between the National Army of Indonesia and the private sector (investors) as colleagues of cooperation. The principle of complementarity in the BOT agreement pattern is seen in the circumstances of each party. The government does not have enough funds (budget) to build the defense industry, but has a very strategic land with exclusive rights. While the investors have budget and experts, but do not have land in a strategic place. These differences of interest can be united in the form of BOT agreements with the principle of complementarity.
3. The Principles of Build Operate Transfer Agreement by the National Army of Indonesia

Utilization of state assets land in the form of BOT agreements by the National Army of Indonesia in addition to guiding general principles of contract law should further following the principles prevailing in the military environment. The principles that need to be added in the BOT agreement to build the defense industry include the principle of military interests, command unity, state defense and state security. This research will emphasize the principle of unity of command in implementing BOT agreement to build defense industry. The principle of unity of command contains the element of authority, responsibility, supervision and control in the chain of command (hierarchy) and command responsibility by the Minister of Finance as the highest command holder. The principles of the BOT agreement within the National Army of Indonesia environment include:

- a. Principles of Military Interests.

The principle of military interest is defined as the need required by soldiers in performing the duties and functions of state defense. The principle of military interest is identical to the use of land as *the National Army of Indonesia* facility in accordance with the basic tasks and functions of state defense such as the construction of offices, residence of soldiers (official houses), places of education and military training. The principle of military interest appears in Article 22 of the Act Number 3 of 2002 on State Defense (the Act Number 3/2002), that (1) the territory of Indonesia can be utilized for the development of defense capability by considering community rights and legislation; (2) the areas used as strategic and permanent military and military exercises are stipulated by Government Regulation.² Article 23 of the Act Number 3/2002 states that (1) in order to improve the capability of state defense, the government conducts research and development of defense industry and technology; (2) in carrying out the task of research and development of industry and technology in the field of defense The Minister encourages and advances the growth of the defense industry.³ Encourage and promote the growth of the defense

¹ *Ibid.*

² Article 22 The Act Number 3 of 2002 on State Defense, Paper of the Republic of Indonesia of 2002 Number 2 Additional Paper of the Republic of Indonesia Number 4168.

³ *Ibid.*, Article 23.

industry including the activities of producing equipment that supports defense, either through promotional activities or the development of science and technology in the country.

To encourage and promote the growth of the defense industry is by utilizing the land of state assets in the form of BOT. The development of the defense industry requires enormous costs. It is time for the National Army of Indonesia to invite private parties to establish the defense industry by utilizing the land of state assets controlled by the National Army of Indonesia in the form of BOT agreements. Defense industries that can be built in the form of aircraft factories, shipbuilding factories, weapons and munitions factories, and military equipment. Within the next 20 to 30 years, the National Army of Indonesia is independent in the field of defense in terms of providing the main tool of the weapons system (*Alutsista*). It means that the needs of the National Army of Indonesia can be held on its own without having to buy from other countries using the budget from the state budget. This is in line with the stipulation of Articles 6 and 7 of the Act Number 16/2012, stating that defense industry institutions including Government, User and defense industry as well as authority and responsibility relationships implemented in an integrated and synergy way to develop and develop an advanced, strong, self-sustaining and competitive defense industry.

b. Unity of Command Principles

The principle of command unity consists of two words, namely unity and command. The word unity means a single nature, while command means control. The principle of command unity means one commandment. The principle of command unity comes from the English unity of command, meaning that the soldier should receive orders from a commander only and is also responsible to only one commander. Giving orders is the task and function of the commander (leader) to move the unit and coordinate subordinates to achieve organizational goals. If orders are commanded by many leaders, then the soldier will find it difficult to distinguish the priority of the commands he must perform. It will also cause confusion on the tasks perform. Principles of command unity can be found in Article 2 Sub-Article f of the Act Number 25 of 2014 on the Law of Military Discipline (Act 25/2014). The principle of command unity within the structure of a military organization is that a commander has a central position and is fully accountable to his union and his subordinates and is responsible for coaching and enforcement of discipline laws.¹

Unity of command is closely related to the division of tasks. In the execution of the tasks can sometimes occur contradictory orders, so it needs a clear flow of authority in giving orders to subordinates who must be responsible. Implementation of the principle of unity of command cannot be separated from the division of tasks, authority and responsibility, and discipline in the implementation. According to Henry Fayol, in carrying out the duties and responsibilities, it needs to be directed towards the target.² In carrying out orders, a subordinate must pay attention to the principle of unity of command so that the task can be run well. Each subordinate only gets orders from one leader so he can do the command well. Commands coming from some commanders to subordinates, will undermine the passage of authority, responsibility and division of labor. According to Henry Fayol, if an employee should be responsible to some superiors there will be chaos especially if different orders, or even opposites can lead to conflicting clues and confusing authority.³

The principle of unity of command is closely related to the chain of command in which the flow of authority is connected from the central leadership to the lowest soldier. The principle of command unity explains who gives the report, and to whom the report is given. The chain of command is closely related to command unity. Giving authority to subordinate units or commanders to obey them. To facilitate coordination, each subordinate commander is given a place within the chain of command at a certain level of authority to fulfill his or her responsibilities. The principle of unity command aims to secure the line of authority so as not to be interrupted. If the command unity is divided then subordinates must be able to overcome the opposition of some leaders.

¹ Explanation of Article 2 letter f The Act Number 25 of 2014 on Military Disciplinary Law, Paper of the Republic of Indonesia of 2014 Number 257. Additional Paper of the Republic of Indonesia Number 5591.

² <http://www.yahfinblog.com>. *Kesatuan Perintah (unity of Command)*. accessed on 18 April 2018.

³ *Ibid.*

The principle of unity command is also associated with command responsibility, meaning the commander took the task and responsibility for the orders he issued. According to P.L.T. Sihombing,¹ the military embraces a single unity of command system in which commanders hierarchically following a chain of command from the highest commander to the lowest (chain of command). Each commander is responsible for everything that takes place in a unitary environment under his command authority including responsibility for the performance of a task entirely called command responsibility. Command responsibility is born from the power and authority of a commander under the law to govern, lead, command, control and supervise everything in the unitary under the authority of his command.

The utilization of state asset land in the form of BOT agreements follow the principle of unity of command, chain of command and command responsibility to reduce state losses. The command holder in the utilization of state asset land within the National Army of Indonesia is the Minister of Finance as the Goods Manager. Prior to the approval of the Minister of Finance, the utilization of state asset land within the National Army of Indonesia cannot be implemented. Based on the provisions of Article 4 paragraph (2) letter i of PP. 27/2014 stated that the Goods Manager is given the authority and responsibility to give approval on the proposed use of state-owned assets that is in the Users of the Goods. The terms of giving approval are synonymous with the word permission which means not prohibiting or permitting approval.²⁹ So the approval of the Minister of Finance is the license for utilization of state asset land in the form of BOT. In the state administration law granting permission is carried out by a decree or determination. Based on the approval of the Minister of Finance as one means to regulate, lead, order, control and supervise the utilization of state asset land in order not to deviate from the applicable law. The utilization permit from the Minister of Finance is an instrument of preventing the arbitrary use of state assets. In the case of implementation of the utilization of state asset land in the form of BOT, the permit is also interpreted as a form of order to perform legal acts against the land of state assets. Land of state assets should be used to carry out defense duties and functions and should not be used for profit. By order of the Minister of Finance to the Minister of Defense to utilize the land of state assets in the form of BOT, then the order is forwarded to the National Army of Indonesia Commander as the Proxy of the Users of Goods. the National Army of Indonesia Commander will issue the Order to the Chief of Staff of the Force as the executor of the utilization of state asset land in the form of BOT. If the BOT object is at the head of the Working Unit, the Chief of Staff of the Force will forward the order to Chief of Commander as the contractor.

The principle of unity of command is the authority of the Minister of Defense to order the implementation of the cooperation process in the form of BOT on the utilization of state asset land within *the National Army of Indonesia*. According to Prajudi Atmosudirjo, authority is distinguished between authority (authority, *gezag*) and authority (competence, *bevoegdheid*). Authority is called formal power: power derived from legislative, executive or administrative powers. This authority is the power of a particular group of people or power over a particular area of government, whereas authority is only about a particular instrument.² Authority is the power to do public legal action, while the right is the power to perform a civil law action. In authority there is the concept of public law which is a core concept in the Constitutional Law as well as the Law of State Administration. In the Constitutional Law, authority (*bevoegdheid*) is described as the rule of law (*rechtsmacht*). In the concept of public law, relating to power. Philipus M. Hadjon, said authority consists of at least three components namely 1. influence; 2. legal basis; and 3. legal conformity.³ According to Soewoto Mulyo Soedarmo, authority can be obtained through the recognition of power (*attributie*), or transfer of power (*overdracht*). Transfer of power can be divided into two kinds namely the provision of power (*mandaatsverlening*) and delegation (*delegatie*).⁴ According to Philipus M. Hadjon, authority can be obtained through three sources, namely attribution, delegation and mandate.⁵ The authority of attribution is usually outlined

¹ P.L.T. Sihombing, *Tanggung Jawab Komando (Command Responsibility)*, Disajikan Sebagai Orasi Ilmiah Pada Wisuda Sarjana STHM TA 2001 Pada Tanggal 2 Oktober 2001, Sekolah Tinggi Hukum Militer, Jakarta 2001, hlm. 4.

² Prajudi Atmosudirjo, *Hukum Administrasi Negara*, Galia Indonesia, Jakarta, 1984, hlm. 29.

³ Philipus M. Hadjon, *Wewenang Pemerintahan (bestuurbevoegdheid)*, Pro Justitia Tahun XVI Nomor 1 Januari 1998, hlm. 90.

⁴ Soewoto Mulyo Soedarmo, *Otonomi Daerah, Suatu Kajian Historik, Teoritik, dan Yuridik Pelimpahan Kekuasaan*, Yuridika, September sampai Desember 1990, hlm. 275.

⁵ Philipus M Hadjon, *Fungsi Normatif Hukum Administrasi Dalam Mewujudkan Pemerintahan yang Bersih*, Pidato Peresmian Jabatan Guru Besar Unair, 10 Oktober 1994.

through the division of state power by the Constitution. The authority of the delegate and the mandate is the authority derived from the transfer. The authority of the delegation is the transfer of authority to make a decision by an organ of government to another party performing authority over its own responsibility. A mandate is an authority granted by a governmental organ to another government for and on its behalf may take a decision.

The military has a culture of relationships which is built on loyalty (on the state) and command system. In each formulation of a policy whether the program or the activities are always accompanied by an implementation. Because policy without implementation means nothing. According to Daniel Mazmanian and Paul Sabatier as quoted by Leo Agustino states, the implementation of policy is the implementation of basic policy decisions, usually in the form of laws, orders, executive decisions or judicial decisions. Normally the decision identifies the problem to be restricted, explicitly states the goals and objectives to be achieved and the various ways to structure or manage the implementation process.¹ Syukur Abdullah defines the implementation of the policy as a series of follow-up after a plan and policy set consisting of decision-making, strategic and operational steps taken to realize a program or policy in order to achieve the target of the program set.² implementation of policy is seen as an organizational tool, procedure, and technique to execute policies to achieve the desired objectives. Implementation, on the other hand, is a complex phenomenon that may be understood as process, output or results. Van Meter and Van Horn³ restrict the implementation of the policy as an action taken by individuals (groups), Government and private directed to achieve the goals set in the previous policy decisions. This includes efforts to turn decisions into operational actions over a period of time as well as to achieve the changes set by policy decisions. The policy implementation stage will not be started before the goals and objectives are set / identified by policy. Implementation of the policy occurs after it is established and the funds are available for the policy.

Webster formulates policy implementation as an important aspect of the entire policy process that generates an output on how much change can be achieved from the programmed objectives and that those changes are easily measurable.⁴ Similarly, the policy that authorizes the National Army of Indonesia to act as the subject of BOT agreement on the utilization of state asset land has been considered through an assessment in infrastructure development in the form of state defense projects that require large amount of budget, so that the National Army of Indonesia is given the authority to hold private parties as colleagues to build industry defense.

c. The Principle of State Defense

The state defense is all the effort to defend the sovereignty of the state, the territorial integrity of the Unitary State of the Republic of Indonesia and the safety of the entire nation from any threat to the unity of the nation and state.⁵ Indonesia's national defense system is universal by involving all citizens, regions and other national resources and is prepared in advance by the Government and is held in a comprehensive, integrated, directed and continuous way to uphold the sovereignty of the state, territorial integrity and the safety of the nation from all threats.⁶ the National Army of Indonesia as the main component in the field of defense is ready to implement the state defense policy, which is supported by reserve and supporting components. In the implementation of state defense, the Indonesian adheres to the principle of defending and maintaining independence, the country's sovereignty and territorial integrity and the safety of the nation from any kind of threats. State defense efforts must be based on awareness of rights and obligations of every Indonesian citizen. State defense of Indonesia is active defensive based on the principles of democracy, human rights, public welfare, the environment, the provisions of national and international law with the principle of peaceful coexistence. To implement these principles, the National Army of Indonesia as the main component in the field of defense requires

¹ Leo Agustino, *Dasar-dasar Kebijakan Publik*, C.V. Alfa Beta, Bandung, 2006, hlm. 139.

² Syukur Abdullah, *Kumpulan Makalah Study Implementasi Latar Belakang Konsep Pendekatan dan Relevansinya Dalam Pembangunan*, Persadi, Jakarta, 1987, hlm. 10.

³ Budi Winarno, *Kebijakan Publik Teori dan Proses*, Media Pressindo, Yogyakarta, 2004, hlm. 102.

⁴ Solichin Abdul Wahab, *Analisis Kebijakan Dari Formulasi Ke Implementasi Kebijaksanaan Negara*, Bumi Aksara, Jakarta, 2004, hlm. 64.

⁵ Article 1 paragraph 1 The Act Number 3 of 2002 on State Defense, Paper of the Republic of Indonesia of 2002 Number 2 Additional Paper of the Republic of Indonesia Number 4168.

⁶ *Ibid.*, article 2.

the land to carry out the tasks and functions of state defense. The principle of land use of state assets by the National Army of Indonesia is identical with the procurement of land used for public purposes. In addition to land, the National Army of Indonesia also requires adequate *Alutsista*. The lands of state assets under the control of the National Army of Indonesia that have not been used to perform the tasks and functions in the field of defense can be utilized and cooperated with third parties in the form of BOT agreements to build infrastructure in the form of defense industry.

d. The Principle of State Security

State security must be distinguished from the public security and order which is the duty of the Indonesian National Police. State security must be understood as a totality of the state's ability to protect the independence, sovereignty and integrity of the nation and state. The concept of state security should be understood as a totality concerning the ability of the state to protect itself from security threats that may emerge from outside or within the country. Security threats can be ideological, political, economic, social, cultural and religious threats. The conception of state security is a device of human and cultural relations by utilizing all natural wealth which includes geography, demography and social, ideological, political, economic, social and cultural conditions as well as a national security and defense aspect called *asta gatra*. To maintain the security of the country, then the Indonesian must strengthen the field of *asta gatra*. The state must have an integrated security system, both ideological, political, economic, social-cultural, and religious in order to create the stability of state defense and security. The stability of strong state defense and security needs to be supported by professional the National Army of Indonesia personnel. According to the responsibilities and principles of professionalism, the National Army of Indonesia functions are: first, as a deterrent against any form of military threats from outside and within the country that threaten sovereignty, territorial integrity and national security; secondly, as an actor against any form of threat; and third, as the restorative state security conditions that are disrupted due to security chaos.¹ Utilization of state assets land in the form of BOT shall pay attention to the security of the state and the welfare of the people. Strategic state assets lands are generally located in crowded places. So the utilization of state asset land within the National Army of Indonesia environment should consider the principle of state security which is equal to public interest. Utilization of state assets lands prioritizes the interests of the nation, state and society to realize the greatest prosperity of the people by utilizing the land of idle state assets for the development of the defense industry.

4.3. Forms of Build Operate Transfer Agreement on the Utilization of State Assets Land by the National Army of Indonesia

Since October 5, 2012, the Act Number 16 of 2012 on Defense Industry (the Act Number 16/2012) has been enacted. Article 6 of the Act Number 16/2012 regulates the institutional defense industry which includes the Government, the Users and the defense industry as well as the relation of authority and responsibilities implemented in an integrated and synergistic way. The establishment of the defense industry requires a large amount of budget to be sourced from the state budget. One of the efforts of effective, efficient and modern defense industry establishment can be done with the cooperation of Utilization of State Assets Land by the National Army of Indonesia in the form of BOT. Within the next twenty or thirty years Indonesia will have an independent, advanced, strong and competitive defense industry.² Based on the main principle of BOT agreement within the National Army of Indonesia, it is necessary to formulate a comprehensive concept of agreement. The preparation of BOT agreement clauses shall be guided by the theories, and principles of treaty law in order to avoid any potential harm.

Several stages of cooperation, ranging from the formulation of legal relations, negotiating, Memorandum of Understanding (MoU) making, drafting agreements, signing agreements, implementation until the termination of the agreement are always supervised in hierarchy from the Minister of Finance, Minister of Defense, Commander of the Armed Forces to the level of Work Unit. In general, the stages of the agreement include: first, agreement phase i.e., negotiation, making the MoU, conducting feasibility studies and further negotiations; second, the agreement stage i.e., to draft the agreement, study and correct the draft by each party, and signing the agreement draft ; and third, the post-agreement phase, the implementation phase of the

¹ Article 6 The Act Number 34 of 2004 on the *National Army of Indonesia*. Paper of the Republic of Indonesia of 2004 Number 127 Additional Paper of the Republic of Indonesia Number 4439

² *Ibid.* Article 7.

agreement and the submission of the project and its facilities as a result of BOT.

The BOT Agreement should be in written form having notarial deed with three stages of activity; first the establishment stage (build) undertaken by the partner after being granted the permit or land handover by the landowner. Second, the usage stage (operate), i.e., the utilization or operation of the project building to gain profit as reimbursement of expenses incurred by the investor for the construction of the project. Third, the transfer stage, where at the termination of the agreement the investor must handover the land, and the building and its facilities to the land owner. Thus, the BOT agreement which is in accordance with the principle of unity of command is the agreement made to fulfill the elements and terms of the validity of the agreement, in compliance with the general principles of the treaty law, carried out in accordance with the stages of the agreement posed hierarchically according to the chain of command. Utilization of state asset land in the form of BOT Agreement in accordance with the principle of command unity within the National Army of Indonesia, shall be conducted by an authorized official acting as the subject of the BOT agreement i.e., User of the Goods or the Proxy of the Goods User.¹ Object of BOT agreement is the State-Owned Assets in the form of land both in the hands of Users of Goods or the Proxy of Goods Users. In the Ministry of Defense and the Armed Forces, the proxy of the Goods User is delegated to the Chief of Staff of the Force as the Assistant Users of the Echelon-1 State Owned Properties and Chief of Commander Assistant Users of Regional State-Owned Properties.²

The form of cooperative on in the utilization of state assets land between the National Army of Indonesia and the private sector is made in written form in front of the notary to make legal certainty and to have a perfect authentication power. Utilization of state asset land in the form of BOT is directed to build infrastructure in the form of defense industry to meet the duty and function of the National Army of Indonesia in the field of defense and state security. The establishment of the defense industry project is done due to limited funds available in the APBN, thus it is necessary to invite private parties to cooperate to build defense industry infrastructure. Cooperation of utilization of state assets land in the form of BOT within the National Army of Indonesia is expected to create a harmonious relationship between the National Army of Indonesia and the colleagues (private). The lands are used to build the defense industry to accelerate national development. The concept of BOT agreement is a means of the purpose of the utilization of land that cannot be self-managed by the National Army of Indonesia own its own.

By applying the concept of BOT agreement based on the principle of unity of command for the development of defense industry project, it will be able to meet the state defense facilities without having to spend the state budget. The financing of defense industry infrastructure development pursuant to BOT agreement emerges from colleagues to build and simultaneously to manage the land and buildings along with the facilities during the agreement period. The BOT Agreement is a legal instrument in simplifying the use of state assets land by the National Army of Indonesia to build facilities and infrastructure of the defense industry. The BOT Agreement is an agreement for the transfer of management and utilization of state assets to colleagues. Based on the BOT agreement, the parties are required to comply with their respective rights and obligations.

In principle, cooperation agreements with the BOT model is where the partner builds the project on the land of state assets but the status of the land rights still on behalf of the Government of the Republic of Indonesia. The partner only exercises physical control over the land assigned to be managed and utilized within a certain period of time as agreed. After the termination of the agreement, the land and its facilities shall be handed over to the National Army of Indonesia in an operational state. In order the partnership between the National Army of Indonesia and the partner (private) can run in accordance with the principle of mutual benefit, it is necessary to formulate the concepts of the agreement comprehensively. The formulation of the agreement is in accordance with the principles and legal theory of BOT Agreement to create a fair cooperative relationship.

The concept of BOT agreement is a cooperation that has the division of tasks, responsibilities, cooperation mechanisms and the regulation of rights and the distribution of obligations among the parties.³ Utilization of state assets land to build, use and transfer the results of BOT projects are the necessary stages to be followed by the parties. The concept of BOT Agreement according to the principle of unity of command for the development of defense industry includes First, the building stage which is carried out from the activity of submitting the application for approval to the Minister of Finance; selection and determination of

¹ Article 23 paragraph (2) Minister of Finance Decree Number 54/PMK.06/2015 on Structuring the Utilization of State-Owned Assets in the *National Army of Indonesia*. Report of the Republic of Indonesia of 2015 Number 399.

² Minister of Defense Letter Number B/1516/09/02/837/DJRANA on Procedures for Obtaining License for the Implementation of the State-Owned Assets Management within the Ministry of Defense and the *National Army of Indonesia*

³ Irawan Soerodjo, *Hukum Perjanjian Dan Pertanahan, Perjanjian Build, Operate And Transfer (BOT) Atas Tanah, Pengaturan, Karakteristik dan Praktik*, LaksBang PRESSindo, Yogyakarta, 2016, hlm. 85.

colleagues; MoU making; submission of project proposal; drafting the BOT agreement; signing of agreement before Notary and transfer of land from the National Army of Indonesia to colleagues. Second, the operational stage in the form of building maintenance agreements; issuance of building use permit; handling of certificate of functionality; the procedure for payment of contributions; the procedure of payment of land and building tax and Income Tax; an *addendum* or an amendment agreement; dispute settlement procedures. Third, the transfer phase. It needs to be agreed upon on the return of land and buildings and all BOT result projects from partner to the National Army of Indonesia in an operational state. The forms of the agreement at the transfer stage include the conduct of the audit, the handover of the building of the BOT results and the Official Report of the BOT project handover.

5. Conclusion

Based on the results of the discussion in this study, the conclusions formulated as follows:

- a. Utilization of state asset land in the form of Build Operate Transfer (BOT) is directed to support the main task of the National Army of Indonesia in the field of state defense and security to realize safe, orderly, peaceful and socially welfare of society based on Pancasila.
- b. In the preparation of the text of the BOT agreement between *the* National Army of Indonesia and colleagues, should follow the general principle of the agreement and the principle of mutual equality and mutual benefit to avoid any harm.
- c. The BOT Agreement shall be in written form which is in accordance with the stages of the BOT agreement requiring hierarchical oversight and control in accordance with the authority so that the agreement can be carried out safely, orderly, regularly, and accountably.

6. Suggestion / Recommendation

Several suggestions based on the above conclusions are:

- a. Reinforce the authority in the form of regulation on the utilization of state asset land to ensure the creation of legal certainty in order to create equitable welfare.
- b. Reinforce the substance and clauses of the agreement made in written form by notarial deed so that it has perfect evidentiary power. In the implementation of the BOT agreement, hierarchical supervision and control need to be done orderly to avoid any harm that may occur.
- c. Utilization of the state assets land by the National Army of Indonesia in the form of BOT should be directed to the development of defense industry to create strong, independent and competitive professional the National Army of Indonesia and state defense system.

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