Empowerment of Infrastructure Guarantee on Public Private Partnership (PPP) Projects in Indonesia: Implementation of the Balance Principle on the Effectiveness of the IIGF Guarantee Agreement

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Abstract
Infrastructure Guarantee is one of the government's much-needed support programs for PPP projects in Indonesia, with the goal of increasing creditworthiness, bankability, and investor trust. Until now, the usage of Infrastructure Guarantees has had its upsides as well as downsides, including complaints from private proponents about the lengthy evaluation process, payment of excessive fees, and the lack of scope of risk that the Indonesia Infrastructure Guarantee Fund Institute (IIGF) as guarantor can bear. In order to achieve an equal position between the Government Contracting Agency (GCA) and the Private Sector Entities (PSE) in the fulfilment of the PPP project in Indonesia, this study will examine the efficiency of the IIGF Guarantee Agreement using the principle of balance. The method of writing used in this paper is normative juridical method, which will be linked to the use of Guarantee Agreement in practice. The conclusion that can be drawn is that IIGF has provided a Guarantee Agreement in accordance with the balance principle, where the principle can also be seen in the risk allocation that has been agreed upon by the parties, apart from the arrangement of the Guarantee Agreement clauses. If an unbalanced position is later discovered, the parties can suggest action to restore balance so that the PPP project can be guaranteed until the concession time is completed.
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1. Introduction

Infrastructure in Indonesia has gone through various stages of growth, with the acceleration of infrastructure development becoming one of the government's top priority for achieving public welfare fulfilment. The oscillations in the implementation of infrastructure development in Indonesia may be seen in the early years of the Asian financial crisis, from 1998 to 2004, when Indonesia underwent a consolidation process. The Asian Financial Crisis has resulted in various fundamental changes, including the global economy, political system, decentralization, government institutions, and the creation of new infrastructure rules (Bastary Pandji Indra 2011).

The government has also improved regulations related to the Public Private Partnership (PPP) scheme by issuing Presidential Regulation Number 38 of 2015 concerning Government Cooperation with Business Entities (PR 38/2015), which revoked the previous regulation as a form of optimization, for the improvement of infrastructure provisions. and evaluation results that have been monitored by the government on the implementation of Indonesia's infrastructure project practices at that time.

The PPP scheme, also known as *Kerjasama Pemerintah dengan Badan Usaha* (KPBU), as mandated in Article 1 number (6) PR 38/2015 is a form of real government cooperation with business entities (both in the form of State-Owned Enterprises/Regional-Owned Enterprises, business entity in the form of LLC, foreign parties, or cooperatives) in the infrastructural development for the public interest on the basis of risk mitigation between the parties in accordance with the specifications set by the PR 38/2015.

The Ministry of Finance (MoF) has begun to promote the implementation of PPPs in Indonesia by providing a variety of services, one of which is Infrastructure Guarantee. Infrastructure Guarantee is the provision of financial guarantees for the GCA's financial obligations, specifically in the form of an obligation to pay financial compensation to the PSE for the occurrence of infrastructure risks which are the GCA's responsibility. Infrastructure Guarantee is carried out in accordance with the principles of state financial risk control and management in order to maintain the State Budget (APBN) or fiscal sustainability. Indonesia Infrastructure Guarantee Fund Institute (IIGF) acts as the government's representative in organizing the

Infrastructure Guarantee. The Infrastructure Guarantee's major goal is to increase the creditworthiness and bankability of PPP projects in the infrastructure sector, both solicited and unsolicited, as a benchmark for project success. When reviewing the meaning of the guarantee itself, Article 1 number (1) of Law Number 1 of 2016 concerning Guarantees (Law 1/2016) states:

"A guarantee is an activity in which the Guarantor provides guarantees to the Guarantee Recipient for the fulfilment of the guaranteed financial obligations."

In addition to providing Infrastructure Guarantee services, IIGF evaluates proposed preliminary studies and feasibility studies submitted by the potential private proponents, with the goal of determining which risks will be carried by the GCA who will be given a guarantee, and which risks will be borne by the private sector in accordance with the PPP Project's scope. The idea of risk allocation is to put risk in its box so that it can be adequately mitigated by the parties later on. The maturity of risk allocation is critical because it is expected that if the parties correctly allocate risk during the procurement of a PPP project, the related project would have the highest opportunity of long-term sustainability.

A smart risk allocation is also believed to provide the private sector confidence in returning their funds with an acceptable return. Because the PSE's background is always profit-oriented or profit-making, a solid risk allocation can be used to evaluate what incentives and perks the parties will receive. A solid risk allocation, on the other hand, can make the State Budget (both APBN/APBD) safer for the government because the exposure of PPP projects will be more observable and manageable. As stated in Article 17 paragraph (1) of PR 38/2015, infrastructure guarantees on PPP projects are optional, which means it is up to the parties to determine whether the project to be completed requires government guarantees under IIGF's Infrastructure Guarantee. Furthermore, it is known in the context of guarantee in Article 1820 of the Civil Code, which stipulates that a guarantee is an agreement in which a third party agrees to complete the debtor's obligation in the event that the party is unable to meet his duties (Article 1820 Civil Code). As a result, the Guarantee Agreement is permissible as long as the third party's liability is restricted only to compensate the guarantee holder when the insured party fails to meet the assured responsibilities as stated in the related agreement. The Guarantee Agreement is defined as a form of guarantee rather than an indemnity since the guarantee is a commitment issued by the guarantor to the creditor to pay out the debtor's debts if the debtor defaults on his responsibilities. Hence, the guarantor's liability in this circumstance is secondary (Ade Hari Siswanto & Steven Sofian 2013).

As a *das sollen*, the infrastructure development goals in the 2020-2024 National Medium-Term Development Plan (RPJMN 2020-2024) are to acknowledge an advanced and prosperous Indonesian society by accelerating infrastructure development in various fields so that it can influence the development of a strong economic structure and improve the quality of human resources and public services (public welfare). However, based on *das sein*, there are still PPP projects, both solicited and unsolicited, that have been unable to place their reliance in the Infrastructure Guarantee. Some of the reasons include a complex process, a lengthy evaluation, a guarantee for risks that are not sufficiently borne by the IIGF, and confusion over when a guarantee can be submitted if the project has entered the planning stage, all of which cause the project to be late from the scheduled commercial operation date.

The balance principle is fundamental to the IIGF Guarantee Agreement. The determining element under the principle of balance is the equality of the parties involved in establishing the agreement, rather than the equality of the outcomes in the agreement itself (Kartini Mujadi 2010). The application of the good balance principle can be reflected in the risk allocation agreed upon by the parties, therefore it's also worth paying attention the clauses of the Guarantee Agreement that are compatible with the main PPP Agreement. Since infrastructure guarantee is an essential element for a PPP project so that it is not threatened with stalling or impeding its implementation at the project realization stage, an Infrastructure Guarantee is an aspect that deserves attention for its effectiveness with the application of the principle of balance, namely an equal position between parties in fulfilling the rights and obligations of what has been agreed.

2. Indonesia's Practice of Using IIGF Guarantee Agreements in PPP Projects Scheme

2.1. IIGF Rights and Obligations in Guarantee Agreement

When determining the clauses and procedures for providing facilities in the Guarantee Agreement, IIGF has the right to state that the Guarantee Agreement and the main agreement (the PPP Agreement), have joint clauses so that they can be processed simultaneously in arbitration, avoiding multiple dispute resolution processes at the same time. Furthermore, IIGF is entitled to a fee, which is divided into two forms: upfront fees and recurring fees, as mandated by Article 32 of the Minister of Finance Regulation Number 260/PMK.011/2010 concerning Guidelines for Implementing Infrastructure Guarantee in Government-Business Cooperation Projects (MoFR 260/2010). The upfront fee was paid to IIGF at an early stage, during the signing of the Guarantee Agreement, and it can be paid in full or on a per-term basis. A recurring fee must also be paid by the PSE to IIGF on an annual basis, the amount of which is determined according on the risk coverage provided by IIGF in the Guarantee Agreement (Riza Prayudhia 2022).

Another right that IIGF has is to be informed of all amendments to the PPP Agreement, which serves as the primary agreement, in order to ensure that it remains consistent with the scope of the Guarantee Agreement. If there is a factual disparity between the Guarantee Agreement and the PPP Agreement, for instance, IIGF has the right to examine whether the discrepancy would have a significant impact, and then IIGF will consider whether it still has adequate capital or not. If the investigation reveals that IIGF's capability for providing the Infrastructure Guarantee facility is insufficient, IIGF has the right to refuse to issue further guarantees than those already provided. However, it is important to note that in this situation, IIGF does not oppose the proposed substantive amendments to the PPP Agreement, such as expanding the risk scope (Riza Prayudhia 2022).

In terms of the IIGF's obligations as guarantor in the Guarantee Agreement, which is given to cover the GCA's financial commitments if they are later unable to be met, they will of course entail accountability to the PSE as the guarantee-holder. The IIGF's general obligation is to offer Infrastructure Guarantee and to naturally monitor the progress of the PPP project and PPP Agreement implementation processes to avoid hazards that are not visible in the Guarantee Agreement.

The cost of project dismissal is one of the financial liabilities of the GCA that is normally guaranteed in advance by the IIGF. Termination payments are regarded big and must be paid within a set period of time so that they cannot use the term system. This is a duty for IIGF to guarantee because they are different from normal monthly payments. Other parties, both PSE and lenders, are concerned about the ability of the GCA to repay, as this will have a significant impact on loan repayments. As a consequence, when compared to other types of financial obligations, the cost of project termination/purchase is prioritized to be guaranteed.

Payment will no longer be made once a termination has occurred since the GCA's responsibilities are utterly unable to be met, thus payment for termination fee obligations is prioritized so that the termination will be effective. It should be reiterated that the payment of project termination fee obligations does not imply that other GCA liabilities that existed prior to termination will be removed or abolished. To get a sense of the total picture, imagine the concept of a bank loan, where if the debtor is unable to make payments, the loan will be immediately canceled so that the interest charged does not continue to rise (Riza Prayudhia 2022).

The parties might decide on the termination fee guaranteed to IIGF based on the project acquisition price. Termination costs, which the GCA is obligated to pay in this scenario, can also take the shape of Availability Payments, as a result of a contract breach, for example. Therefore, in actuality, the termination price is the same as the termination fee due to the GCA's default. However, the PPP Agreement should be evaluated to see if it governs unique matters like the termination charge formula, which is normally connected to the terms of the termination fee if there are various calculations and payment procedures (Article 1.1 Draft of IIGF Guarantee Agreement).

2.2. IIGF Guaranteed Financial Liability Limit Based on Capital Adequacy (Gearing Ratio)

The amount of capital owned by the IIGF must be considered first when determining the limit of financial obligations guaranteed by IIGF in a Guarantee Agreement based on a gearing ratio. As of 2021, IIGF has a paid-up capital of Rp. 9.57 trillion and an authorized capital of Rp. 20 trillion. The amount of guarantees that can be given by the company can be multiplied by the paid-in capital by IIGF in determining a gearing ratio, where the current computation utilizes a multiple of 10 and the result is Rp. 95.7 Trillion (Riza Prayudhia 2022). IIGF will first conduct analysis and calculations to ensure that all of the capital can be properly allocated, and then, if a proposal for an Infrastructure Guarantee is made by the GCA, IIGF will conduct analysis and calculations with the most important thing to note being the liquid calculation of the funds provided (which in this case the paid-up capital is Rp. 9.57 T). IIGF must handle these liquid funds in such a way that they can cover the whole range of office operations, work operations, including PPP project guarantees. Therefore, the IIGF has managed to get around by creating a treasury division, in which IIGF has managed the paid-up capital by investing its funds in investment containers that are expected to generate pofits, as specified by Article 19 paragraph (4) of PR 78/2010. The cash will be used for operational purposes after they have made a profit. IIGF will only use the paid-up capital funds if it receives a claim from the PSE as the guarantee recipient, despite the fact that no private party has yet filed a claim for Infrastructure Guarantee on PPP projects that have been guaranteed.

The guarantee cap (the highest amount of guarantee offered by IIGF) is defined by the IIGF's financial capability and its exposure to other IIGF-guaranteed projects. The guarantee cap is also determined based on a financial study of each project that is guaranteed on an individual basis, taking into account a bankable amount. If IIGF makes the guarantee payment, the maximum amount of guarantee on the Infrastructure Guarantee facility is reduced; however, if IIGF receives a regress payment from the GCA, then IIGF is given the option of being able to choose to increase the maximum amount of the guarantee (Article 1.1 Draft of IIGF Guarantee Agreement). The IIGF's standard for providing Infrastructure Guarantee facilities is that it is required to undertake an assessment prior to determine whether the PPP project is suitable for facilities. Given that IIGF only has Rp 95.7 T in capital adequacy for all projects, IIGF must allocate funds wisely to prioritized PPP projects. As a result, IIGF must recalculate the amount deducted from capital adequacy as well as the amount of financial capacity used.

IIGF will calculate the amount of guarantee that will be provided for each project. If there is a risk that the IIGF's capital capacity may be depleted as a result of its use to guarantee the connected PPP transaction, If the capital of the infrastructure guarantee business entity is insufficient, MoF might give a joint guarantee with the infrastructure guarantee business entity, as stated in Article 25 of PR 78/2010:

> *"In order to implement the provisions of Article 24, but the infrastructure guarantee business entity's capital is not sufficient, the Minister of Finance can provide a joint guarantee with the infrastructure guarantee business entity".*

The IIGF is given the flexibility to propose joint guarantees with the MoF in whole or in part, so that the guarantee funds will be provided by IIGF and assisted by MoF, with IIGF continuing to supervise and administer the PPP project's implementation. In particular, for projects to be guaranteed, the IIGF will consider the duration of the concession period for the related PPP project development, the project's long-term viability, the project's facility results, and variety of other aspects. As a result, the capital adequacy or gearing ratio idea is that guarantee funding is not the same as insurance, wherein the guarantee fees paid by the PSE to the IIGF will be reused to generate profits from the capital adequacy investment made.

In addition to the joint guarantee, the IIGF can optimize Infrastructure Guarantee in collaboration with multilateral financing institutions (such as MIGA and ADB), which is known as a counter guarantee, with the approval of the MoF. A counter guarantee can only be approved if the results of the Guarantee Proposal evaluation are in accordance with the terms and conditions for the provision of a counter guarantee and show that the exposure resulting from the provision of guarantees with relevant multilateral financial institutions does not jeopardize the State Budget's long-term viability (fiscal sustainability.

3. Compliance with the Implementation of the Principle of Balance in the IIGF Guarantee Agreement

The legality of the principle of agreement implementation must be substantiated by legal rules. The principle of law is the assessor and tester of a fundamental subject in a legal system. If legislators seeks to add a new legal norm to the lawful system, legal principles will heavily impact and define the path of the addition (Herlien Budiono 2005). The principle represents a system of diverse contractual law principles and provisions that are commonly employed by regulatory rules in each country or should have been adapted to particular requirements for national and international commercial transactions involving foreign investors. The existence of an agreement is inextricably linked to the values that it contains. As a form of embodiment of the agreement, the parties must follow the legal principles of the agreement in carrying out legal activities in accordance with their respective rights and obligations. However, it has been discovered that numerous agreements signed by the parties merely prioritize the interests of one or more parties without regard for the stipulations of the norms included in the agreement law principles (in this case regulated in the Civil Code). Contract law is a branch of civil law (private law), and its application is based on self-imposed obligations. If the parties fail to fulfill their responsibilities under the agreement, the result of the performance discrepancy will be solely the responsibility of the parties to the agreement. (P.S. Atiyah 1983).

The application of the principles of good faith, honest dealings, and justice is the principle of balance. The balance in legal principles is the impact of the emergence of large disparities between community groups, therefore a regulatory mechanism is needed to be ale to protect parties that are in a disadvantageous situation (Sutan Remy Sjahdeni 1993). The benchmark for applying the principle of balance to the agreement optimally may be well examined using three aspects: (i) each individual actor's actions; (ii) the agreement's substance; and (iii) the agreement's execution from what has been agreed (Herlien Budiono 2005).

Failure to achieve a balance not only reaffirms these facts and circumstances, but it also has an impact on the legal basis of the agreement in question. The imbalance might occur as a result of the parties' behavior as consequence of the substance content and implementation of the agreement (Subekti 2010). In practice, the form of an imbalance can be seen in the substance of the standard agreement that follows the take-it-or-leave-it contract concept, with an exoneration clause in most cases. IIGF essentially offered the guarantee agreement in the form of a basic agreement template, which included broad clauses including guarantees, guarantee claims, payment of claims, fees for services, default and termination, and dispute resolution. Although IIGF has provided a copy of basic agreement, the substance of the clauses can be adjusted again according to GCA and PSE's wishes and interests, particularly regarding risk allocation and payment of guarantee claims at the PPP project planning stage, so it cannot be called a standard-conventional agreement. A risk matrix will be used to represent the distribution of risk allocation between the parties, using the following description:

Allocation	Similarities	Differences
GCA	- **Location risk** (related to land acquisition and land status) - **Political risk** (changes to laws and regulations, permits, GCA defaults, etc.) - **Operational risk** (quantity, quality and continuity of input) - **Financial risk** (delay in government support and VGF disbursement) - **Revenue risk** (project feasibility and default on tariff adjustments) - **Network connectivity risk** (competitor facilities and connectivity)	- **Revenue risk** (related to demand risk on BOT for Drinking Water, Solid Waste, Electricity, and Mine Mouth)
PSE	- **Location risk** (related to soil conditions) - **Design, construction & test operation risk** (default contractors and sub-contractors) - **Operation risk** (quantity and quality of output) - **Political risk** (changes to laws and regulations including general taxes) - **Revenue risk** - **Financial risk** - **Sponsorship risk** (PSE default)	- **Revenue risk** (related to demand risk at Airport and Port on BOT projects)
Both Parties	- ***Force majeure* risk** - **Interface** risk (the difference in the quality of work between the public & private sectors)	- **Revenue risk** (related to demand risk in BOT and O&M in the Toll Road, Railway, and Airport sectors)

Table 1. Risk Matrix in every Infrastructure Sector
Source: Allocation Risk References (IIGF 2022)

The allocation of risk in order to achieve good mitigation can also be said to be a reflection of the principle of balance, in that the parties carry the same risk according to their different abilities for the long-term sustainability of infrastructure projects so that the public benefits are felt. The essence of the difference in the formulation of the Guarantee Agreement, which is regulated in Article 1820 of the Civil Code, is not in the content of the parties' accomplishments, but rather in one formal element, namely the guarantor or borg who provides guarantees for the implementation of third parties' accomplishments as guarantee recipients. So, the Guarantee Agreement has its own implications depending on the guarantee mechanism, such as the form of achievements that can change and the substance is a single entity that depends on the extent of guarantee defined by the parties in the main (primary) agreement.

IIGF's liability to pay the guaranteed amount under a PSE's guarantee claim is limited to the lesser of the guaranteed amount the IIGF must pay in respect of the guarantee claim or the value of the maximum guarantee amount calculated on the date of the IIGF's liability determination. Article 3.2 of the standardized form of the IIGF Guarantee Agreement, stated that:

> *"...IIGF will not be obliged to pay an amount requested under a Guarantee Claim if the amount of payment by IIGF has reached the Maximum IIGF Guarantee Amount. If the result of the sum will exceed the Maximum Guarantee Amount after the payment is made, IIGF will only pay the remaining Maximum Guarantee Amount only".*

The concession of waiver rights is likewise governed by the IIGF Guarantee Agreement. Any legal action or omission that may impact and/or release IIGF in carrying out its responsibilities to make payments for guarantee claims made by PSE will have no bearing on IIGF's obligations as a *borg*. Non-compliance or non-fulfilment of obligations in a document, or inability to fully realize the value of the guarantee; and/or bankruptcy proceedings are examples of actions, omissions, or other issues stated in Article 3.5 of IIGF Guarantee Agreement Standardization.

Waiver rights are often limited in corporate guarantee agreements, with the goal of preventing the IIGF as guarantor from citing various reasons or legal conditions as a defense to avoid fulfilling its guarantee obligations. The stipulation of a clause regarding the waiver of the right to defend is a genuine manifestation of the principle of balance, where the IIGF has manifested itself and acknowledged that it has set aside legally available barriers in order to provide certainty for lenders and/or the PSE that the IIGF will continue to implement guarantee obligations, regardless of any existing legal concerns.

If GCA and PSE intend to amend the substance of the main agreement (PPP Agreement), this will, of course, have an impact on the fulfillment of the Guarantee Agreement as well as an accessoir agreement that is a key component. If the proposed amendment to the PPP Agreement affects the guaranteed amount, the maximum amount of IIGF guarantee, termination costs borne, or the validity period of the Guarantee Agreement, then GSE must obtain prior written approval from IIGF for the plan before ratifying the new agreement's substance (Article 3.8 IIGF Guarantee Agreement). The IIGF must analyze and assess the plan to modify the scope of risk in advance to determine whether the shift in the scope of risk would exceed the maximum amount of guarantee that the IIGF can give based on capital adequacy or gearing ratio calculations.

In case that the IIGF's assessment determines that the scope of the plan to change the scope of risk exceeds the specific IIGF's capability/ability to the project in question, the IIGF has the option to refuse to provide a guarantee and only pay a guarantee claim for the scope agreed upon at the time of signing. The rejection of the IIGF will very definitely have other implications particularly for the private sector, Whereas if IIGF does not bear the new risk coverage, the private proponent may suffer losses if the new risk coverage provided to the GCA is not reached, potentially resulting in the PPP project getting blocked. These issues will result in a power imbalance between the private sector and the IIGF. While the most essential priority for the private sector is the assurance that the costs it incurs will result in a return on investment and a viable profit-sharing arrangement.

An agreement between the parties to an engagement that includes the rights and obligations of the parties in an equal position. Because, in order to prioritize the principle of balance and equality, both the GCA and the PSE, as well as third parties if necessary, conduct discussion or negotiation stages during the process. A proposed modification to the scope of risk allocation will be debated in advance against the variables that are triggering the plan Approval for changes in the scope of risk can also be adjusted throughout the negotiating process so that it has two options: being approved for guarantees against changes in the scope of risk as a whole; or modification of the guarantee against changes in the scope of risk partially or not at all (Yonathan Setianto Hadi 2022).

Changes in the scope of risk can, of course, can be proposed by the PSE and/or the GCA, as long as the Guarantee Agreement clause does not contain restrictions that limit or prohibit the parties from submitting changes to the risk scope (locked in the agreement). Renegotiation (*heronderhandelen*), which allows for the participation of judges (leading to a win-win solution), adjustments to the clauses of the agreement, and termination of the agreement, which can be in the form of null and void and can be cancelled, are all examples of ways for the parties to achieve an equal position. As a result, the major key to the effective application of this principle of balance, which will enable acknowledgment of the equal position of the parties in an agreement, is the fulfilment of the rights and obligations agreed between the parties in the Guarantee Agreement.

4. Conclusion

The application of the principle of balance in the provisions of the Guarantee Agreement is based on the process and mechanism for the proportional exchange of rights and obligations throughout the entire contractual relationship process, from the pre-contractual phase, namely the planning stage, including the proposed Infrastructure Guarantee request, to the formation and implementation of the Guarantee Agreement. The divide in this scenario does not have to be exact (a 50:50 split), but it must be in accordance with each party's tasks and responsibilities.

The implementation of the balance principle can also be seen in the risk allocation established by the GCA and PSE based on the risk matrix as described in the Guarantee Agreement. This is important in order to efficiently assign duty to each partner so that the PPP project may be handled effectively. Furthermore, the IIGF's alternatives in the event of a proposed modification in the scope of risk are a concrete embodiment of the principle of balance's implementation. PSE and GCA can still request that their rights be guaranteed as long as they do not exceed the scope of the PPP project in question, and the IIGF has the authority to reject, accept, or accept some of the proposed changes to the scope of risk as long as the maximum amount of guarantee has been determined by the IIGF at the time of signing. The use of the principle of balance in terms of attracting foreign investors has been proved to actively participate in infrastructure development in Indonesia, particularly through procurement under the PPP project plan.

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