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Business Judgment Rule and Corporate Criminal Liability in Indonesian SOEs: Distinguishing Business Risk from State Loss

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ABSTRACT

This study examines the legal boundary between legitimate business risk, governance breach, and corporate criminal liability in Indonesian State-Owned Enterprises (SOEs), with particular attention to the application of the Business Judgment Rule (BJR) in transactions that may later be framed as state financial losses. Using normative juridical research with statutory, conceptual, limited case-based, and prescriptive approaches, this article analyzes Indonesian company law, SOE governance norms, state finance narratives, and corporate criminal liability under Law No. 1 of 2023. The article argues that SOE directors face a distinctive liability risk because separated state assets are treated as corporate capital in business governance, yet may be reinterpreted as state finance in audit and enforcement practice. The main contribution of this article is the development of a two-layer decision test. Layer 1 evaluates whether the requirements of the Business Judgment Rule are satisfied, including good faith, due care, informed decision-making, absence of conflict of interest, and preventive measures. Layer 2 screens indicators of corporate criminal liability, including unlawful benefit, process manipulation, concealed conflict of interest, organizational failure to prevent wrongdoing, and causal linkage between legal breach and loss. Through a cautious application to the ASDP and PT Jembatan Nusantara acquisition controversy, this study does not conclusively classify the transaction as protected business judgment. Instead, it proposes that such classification depends on verifiable governance documents, including valuation, due diligence, board deliberation, fairness opinion, conflict disclosure, and risk mitigation records.

Keywords: Business Judgment Rule, SOEs, Directors, Directors' Responsibilities, State Losses.

ABSTRAK

Penelitian ini mengkaji batas hukum antara risiko bisnis yang sah, pelanggaran tata kelola, dan pertanggungjawaban pidana korporasi pada Badan Usaha Milik Negara (BUMN), dengan perhatian khusus pada penerapan Business Judgment Rule (BJR) dalam keputusan bisnis yang kemudian dapat dikonstruksikan sebagai kerugian keuangan negara. Penelitian ini menggunakan metode yuridis normatif dengan pendekatan perundang-undangan, konseptual, studi kasus terbatas, dan preskriptif. Artikel ini menganalisis hukum perseroan, tata kelola BUMN, paradigma kerugian negara, serta pertanggungjawaban pidana korporasi berdasarkan Undang-Undang Nomor 1 Tahun 2023. Artikel ini berargumen bahwa direksi BUMN menghadapi risiko pertanggungjawaban yang lebih kompleks karena kekayaan negara yang dipisahkan diperlakukan sebagai modal korporasi dalam pengelolaan bisnis, tetapi dalam praktik audit dan penegakan hukum dapat ditarik kembali ke dalam rezim keuangan negara. Kontribusi utama artikel ini adalah pengembangan two-layer decision test. Layer 1 menguji terpenuhinya unsur Business Judgment Rule, yaitu itikad baik, kehati-hatian, dasar informasi yang memadai, ketiadaan benturan kepentingan, dan tindakan pencegahan kerugian. Layer 2 menyaring indikator pertanggungjawaban pidana korporasi, seperti manfaat melawan hukum, manipulasi proses, benturan kepentingan tersembunyi, kegagalan organisasi mencegah tindak pidana, dan hubungan kausal antara pelanggaran hukum dan kerugian. Melalui penerapan hati-hati pada kontroversi akuisisi PT Jembatan Nusantara oleh PT ASDP Indonesia Ferry (Persero), penelitian ini tidak menyimpulkan secara final bahwa transaksi tersebut otomatis dilindungi oleh BJR. Klasifikasi tersebut bergantung pada bukti tata kelola yang dapat diverifikasi, seperti valuasi, due diligence, risalah rapat direksi, fairness opinion, pengungkapan benturan kepentingan, dan dokumen mitigasi risiko.

Kata Kunci: Business Judgment Rule, BUMN, Direksi, Tanggung Jawab Direksi, Kerugian Negara..

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INTRODUCTION

The central problem of this study lies in the unstable boundary between corporate business risk and state financial loss in Indonesian State-Owned Enterprises (SOEs). In ordinary corporate law, directors are expected to make strategic decisions under uncertainty, and a loss-producing decision does not automatically indicate fault, negligence, or criminal conduct (Kairupan, 2023; Nugroho et al., 2025). In Indonesian SOEs, the position of directors is more legally exposed than that of directors in private companies because SOEs operate simultaneously as business corporations and entities connected to state finance. This dual position creates a distinctive enforcement risk: a business decision that is commercially rational at the time of approval may later be reinterpreted as a state loss when the transaction underperforms or becomes politically and legally controversial (Arifin et al., 2023; Irianto & Wardani, 2023).

This risk is closely related to the doctrine of separated state assets. Under the SOE legal framework, state capital participation in SOEs is separated from the state budget and transformed into corporate capital. From a corporate law perspective, this means that SOE assets are managed through corporate organs, including the board of directors, under the logic of business judgment, fiduciary duties, and corporate governance. In audit and enforcement practice, separated state assets may still be connected to the broader discourse of state finance. This creates uncertainty in liability assessment because the same transaction may be evaluated through two different lenses: as a corporate act involving ordinary business risk, or as conduct causing harm to state finances (Banda, 2023; Jatna et al., 2025).The empirical urgency of this issue can be seen from official and public monitoring data on corruption enforcement and state loss claims. KPK's periodic enforcement statistics classify corruption cases by institution, including cases involving SOEs and regional-owned enterprises, while ICW's 2024 corruption trend monitoring recorded 364 corruption cases, 888 suspects, and a very large estimated state loss figure, substantially affected by major natural-resource and corporate-related cases. Kejaksaan Agung also reported a high volume of corruption case handling in 2024, including investigation, prosecution, and recovery-oriented enforcement activities (Eckstein & Shapira, 2024; Park, 2024; Toolan et al., 2022). These data do not prove that every SOE loss is criminal. They show that SOE-related decisions exist within an enforcement climate where financial loss can quickly become the dominant legal narrative (Variza et al., 2026).

Regulatory changes that clarify the governance design of SOEs and the position of corporate organs in principle create an opportunity to refine directors' liability standards so they return to a corporate logic. Even so, persistent debate in constitutional review and enforcement practice shows that the boundary between legitimate business risk and unlawful conduct remains unsettled. The problem this study addresses is therefore not merely to reaffirm the importance of business discretion, but to formulate an operational normative boundary, so that directors' decisions can be tested through process quality and governance integrity, rather than through loss as an outcome alone (Chan et al., 2024; Coral & Mithöfer, 2023; Muldoon et al., 2023).

SOEs occupy a hybrid legal and institutional position. They are required to pursue commercial efficiency, generate corporate value, and compete in relevant markets, while at the same time carrying public mandates and being subjected to heightened public scrutiny. This dual role makes directors' strategic decisions especially vulnerable to hindsight evaluation. Acquisitions, restructuring, cooperation agreements, procurement, or long-term investments may be necessary to preserve competitiveness and public service capacity, yet the same decisions may later be questioned when they generate losses or fail to meet projected outcomes. The legal problem is therefore not whether SOE directors should be accountable, but how accountability should be structured so that ordinary business failure is not equated with unlawful conduct (Taylor, 2023).

BUMN also carry significant functions in maintaining economic stability and can influence government decision-making in the realm of national political policy. BUMN inherently carry dual roles: as business entities aimed at generating profit and as agents of public service responsible for fulfilling vital societal needs. This duality often leads to governance and legal challenges, particularly where directors' business decisions are assessed under both corporate law and public accountability frameworks (Ariyadi, 2020). These circumstances demand the presence of internal governance mechanisms capable of balancing corporate interests and public interests while ensuring that all corporate organs perform their functions proportionally and accountably. Institutional governance in public-oriented organizations requires not only formal legal norms but also effective administrative mechanisms that ensure accountability, transparency, and consistency in organizational decision-making (Qosim et al., 2026). In addition, effective governance also depends on strategic financial planning and prudent resource allocation to support long-term institutional sustainability, particularly in organizations entrusted with managing public funds and achieving public objectives (Riinawati et al., 2024).

The board of directors constitutes a key internal mechanism in establishing good corporate governance. It serves as a bridge between the shareholders as owners of the company and the management as the party responsible for executing corporate activities. The board of directors is accountable for all decisions and organizational performance (An, 2023; Friedman et al., 2024; Strine Jr, 2023). As a corporate governance mechanism, the board aims to help the company achieve its goals while addressing agency conflicts that arise from differing interests between principals and agents (Gatti, 2024; Neumann & Forthmann, 2024; Vecellio Segate, 2022).

Within BUMN, the implementation of sound corporate governance becomes increasingly crucial as directors are not only accountable to shareholders, but also bear public responsibility for managing state finances. Strong governance mechanisms are essential to ensure that directors exercise their authority proportionally, accountably, and in accordance with principles of prudence, while preventing potential abuses of power in strategic decision-making, business decisions may sometimes result in financial losses and trigger legal issues related to the extent and limits of directors' liability over inherent business risks in strategic corporate policies.

The urgency of this issue is not merely doctrinal; it reaches the core of the economic function of state-owned enterprises as policy instruments and, at the same time, business entities expected to generate value. When the standard of directors' accountability shifts from process-based evaluation to outcome-based judgment, legal risk becomes the dominant variable in managerial calculation. Strategically rational decisions, such as service expansion, acquisitions for industry consolidation, or asset restructuring, are reduced to a single question: whether, at some later point, a loss figure will emerge that can be construed as a state loss. This orientation distorts governance because directors are incentivized to choose decisions that are safest from a legal perspective rather than those that are most economically optimal (Hopt, 2023; Schwarcz, 2024).

The institutional consequences are systemic. First, innovation and corporate courage are stifled, as measured risk-taking, which is routine in business practice, becomes a point of vulnerability to criminalization. Second, transaction costs increase because organizations accumulate defensive procedures that do not necessarily improve decision quality, but merely add layers of administrative justification. Third, accountability becomes blurred because the corporate space for learning from business failure is displaced by a logic of assigning blame. Within the anti-corruption enforcement

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landscape, publicly available data from law enforcement bodies and corruption-monitoring institutions indicate the intensity of cases involving SOEs or regional SOEs and recurring estimates of state losses at a very large scale from year to year. Enforcement intensity and the magnitude of loss figures create a policy climate that readily centers on financial outcomes, even though the quality of the decision-making process is the primary foundation for distinguishing legitimate business risk from deviation.

Its academic significance lies in the need to formulate an operational boundary. Without a clear boundary, two evaluative regimes will continue to negate each other: company law preserves discretion to support economic efficiency, while enforcement demands extreme caution that dulls the entrepreneurial function of SOEs. Research that can deliver a precise testing framework has practical value for directors, state auditors, SOE supervisors, and law enforcement officials because it provides a shared language for assessing corporate decisions in a fair and verifiable manner.

The literature on the Business Judgment Rule generally develops along three streams. The first treats the BJR as a doctrine protecting directors' discretion, emphasizing prudence, good faith, an adequate informational basis, and freedom from conflicts of interest, while criticizing hindsight bias that judges decisions by their final outcomes. The second stream relocates the BJR into the SOE setting, highlighting the "hybrid status" problem, where corporate standards confront public oversight design, including state finance narratives and office-based accountability. The third stream links corporate decisions to criminal liability, whether through corruption-related discourse or corporate liability regimes, shifting discussion from managerial negligence alone to questions of attribution of fault, unlawful benefit, and organizational failure to prevent wrongdoing (Byrd & Sparkman, 2022; Gadinis & Miazad, 2020; Mahoney, 2023; Schwarcz, 2016).

A recurring weakness is the tendency to stop at normative or moralistic exposition. Many studies conclude that the BJR is important to protect directors, yet they do not provide an adequate testing instrument to map when protection should apply and when it should be denied. As a result, the literature does not sufficiently meet a practical need: how to evaluate SOE business decisions consistently when confronted with loss audits, investigative findings, or criminal proceedings.

The principal research gap lies in the absence of a truly operational evaluative model capable of distinguishing three domains that are often conflated: legitimate business risk, governance breaches that generate civil or administrative liability, and conduct containing strong indicators of criminal wrongdoing. Without such a model, debate on the BJR in SOEs easily collapses into a binary of "criminalization versus impunity," even though practice requires a more granular spectrum grounded in process evidence.

A second gap concerns proof. Debate frequently centers on loss figures or project failure, while key governance documents are rarely treated as the core of evaluation, including decision-making minutes, feasibility studies, due diligence, fairness opinions, risk analysis, conflict-of-interest disclosures, and mitigation plans. Yet these documents enable objective assessment of process quality. A third gap is the disconnect between BJR doctrine and instruments for screening corporate criminal exposure. Because they are often discussed separately, there is no analytical pathway to filter whether a case should stop at governance correction or legitimately escalate to the criminal domain.

This phenomenon is illustrated in the case of the Business Cooperation Agreement and the acquisition of PT Jembatan Nusantara by PT ASDP Indonesia Ferry (Persero). Initially intended as a strategic effort to expand business networks, strengthen market position, and maintain corporate performance amid competition in the ferry transportation industry, the decision later became controversial. It was suspected of causing state financial losses and potential irregularities in the decision-making process, thereby drawing the directors into legal scrutiny.

This study introduces a novel two-layer testing framework that integrates evaluation of directors' decision-making processes with a screening mechanism for corporate criminal liability indicators. The first layer tests whether the prerequisites for protecting managerial discretion are met through process-based indicators rather than outcomes. The second layer screens for red flags that shift a matter from the domain of business risk to criminally inflected illegality, such as unlawful benefit, engineered process manipulation, concealed conflicts of interest, or deliberate failure to prevent wrongdoing.

Its theoretical contribution is the reconciliation of two evaluative regimes that have long operated in parallel and frequently negate each other. Its practical contribution is the production of a governance-document-based evidentiary matrix that can be replicated across a range of SOE business decisions, including acquisitions, investments, restructuring, and strategic procurement. The expected policy contribution is a proportional enforcement threshold guideline that preserves accountability without granting immunity and without punishing legitimate business risk.

This situation raises a fundamental question: whether the actions of PT ASDP's directors can be classified as legitimate business decisions protected under the Business Judgment Rule, or conversely, whether they constitute violations of prudence principles and an abuse of authority. This issue becomes more pressing with the forthcoming implementation of Law Number 1 of 2023 on the Indonesian Criminal Code in 2026, which affirms that criminal liability may be imposed not only on individuals, but also on corporations and their managerial organs for corporate crimes.

Existing scholarship on the Business Judgment Rule in Indonesia generally emphasizes that directors should not be held liable merely because a business decision results in loss. These studies are valuable because they explain the protective function of Article 97 paragraph (5) of the Company Law and the importance of good faith, prudence, adequate information, and absence of conflict of interest in assessing directors' liability. Much of this literature remains doctrinal and protective in orientation. It explains why directors need legal protection, but does not sufficiently operationalize how such protection should be tested when an SOE transaction is later associated with state financial loss.

A second stream of literature discusses the hybrid status of SOEs. This literature shows that SOEs are not identical to private companies because they manage separated state assets and are subject to public supervision. Its main contribution is to reveal why SOE directors operate under overlapping regimes of corporate law, state finance law, administrative control, and anti-corruption enforcement. Yet this stream often stops at describing institutional tension. It does not provide a structured legal instrument for deciding when a disputed SOE transaction should remain within corporate governance review and when it may legitimately move into the sphere of criminal law.

A third stream examines corporate criminal liability, particularly after the enactment of Law No. 1 of 2023. This literature is important because it recognizes corporations as potential subjects of criminal liability and directs attention to attribution, corporate policy, unlawful benefit, failure to prevent crime, and organizational tolerance of wrongdoing, this discussion is often separated from BJR doctrine. As a result, there is no clear analytical bridge between the corporate law question of whether directors are protected by the BJR and the criminal law question of whether the corporation or its managers may be criminally liable.

The research gap addressed in this article lies in the absence of an operational evaluative model that can distinguish three categories that are often conflated in SOE cases: legitimate business risk, governance breach, and criminal conduct. This article fills that gap by proposing a two-layer decision test. The first layer examines whether the requirements of the Business Judgment Rule are satisfied. The second layer screens criminal liability indicators. This model contributes to legal doctrine by clarifying the relationship between BJR and corporate criminal liability, to enforcement practice by offering a staged threshold for escalation, and to SOE governance by identifying the documents needed to prove process integrity.

This study aims to develop and apply a normative evaluative framework for distinguishing legitimate SOE business risk from governance breach and corporate criminal liability. The ASDP and PT Jembatan Nusantara acquisition controversy is used as an illustrative case to demonstrate how the proposed framework may operate when a strategic corporate transaction is later associated with state loss allegations. The purpose of this study is not to make a definitive factual finding on the criminal liability of the parties, but to clarify the legal threshold and evidentiary requirements that should be satisfied before business judgment can be denied or criminal liability can be imposed.

RESEARCH METHOD

Type of Research

This study employs normative juridical (doctrinal) legal research, treating law as a coherent system of norms used to determine the legality and limits of directors' liability for business decisions in state-owned enterprises. The design is selected because the research problem is fundamentally normative: it requires constructing an evaluative standard that can distinguish lawful business risk from governance breach and from conduct that crosses the threshold of corporate criminal liability.

Research Approaches

This research uses four complementary approaches.

1. Statute Approach

The statute approach is used to map, harmonize, and test the internal consistency of the legal regime governing (i) company law and directors' duties, (ii) the SOE governance framework, (iii) corporate criminal liability, and (iv) the legal architecture of state finance. The analysis identifies points of convergence and tension among these regimes, particularly where business losses in SOEs are treated as indicators of state loss, and clarifies the legal consequences of each classificatory path.

2. Conceptual Approach

The conceptual approach develops a workable analytical model grounded in key corporate law doctrines, including the Business Judgment Rule and the fiduciary duties of directors. The study operationalizes concepts such as due care, good faith, informed decision-making, and conflict of interest into measurable indicators, so that the protection of managerial discretion can be assessed by the quality of the decision-making process rather than by outcomes alone.

3. Case Approach

The case approach is used in a limited and illustrative manner through the ASDP and PT Jembatan Nusantara acquisition controversy. This case is selected because it represents the central problem examined in this article: a strategic SOE transaction that was initially framed as business cooperation and corporate acquisition, but later became the object of state loss and corruption allegations. The case is not used to make a definitive factual finding on the guilt or innocence of the parties. Rather, it is used to test how the proposed two-layer decision framework can identify the types of evidence required to distinguish business risk, governance breach, and criminal conduct. The analysis relies on publicly available legal materials, statutory provisions, official institutional statements, and available case information. Where internal corporate documents such as board minutes, due diligence reports, valuation reports, fairness opinions, or conflict-of-interest disclosures are not publicly accessible, the analysis is framed conditionally.

4. Comparative Approach

This study uses a limited comparative reference rather than a full comparative legal analysis. Comparative materials from jurisdictions with mature BJR doctrines are used only to clarify the normative rationale of protecting managerial discretion and to identify evidentiary benchmarks for process integrity. These references are not used as legal transplants and do not replace Indonesian statutory analysis. The central legal framework remains Indonesian company law, SOE law, state finance law, anti-corruption law, and Law No. 1 of 2023 on the National Criminal Code.

Analytical Techniques

The analysis technique is carried out in three stages, namely as follows:

1. Systematic and Teleological Interpretation

The research applies systematic interpretation to read relevant norms in relation to the broader legal system and institutional design, and teleological interpretation to align the meaning of liability rules with their regulatory purposes. This dual interpretive method is crucial when company law standards meet state finance narratives, as it prevents isolated readings that collapse distinct legal objectives into a single punitive logic.

2. Prescriptive, Element-Based Legal Reasoning

The analysis uses prescriptive legal reasoning structured as an element-based test. The study formulates a two-stage evaluation: first, a Business Judgment Rule process test; second, a screening layer to identify corporate criminal liability indicators. Each stage is framed as a set of legally relevant elements that must be met or rebutted, enabling transparent and replicable reasoning rather than impressionistic conclusions.

3. Validation through a Document-Based Evidence Matrix

The document-based evidence matrix is used as a prescriptive validation tool rather than as a claim that all internal case documents are available to the author. The matrix identifies the types of documents that should be examined in any future legal assessment of SOE directors' decisions, including feasibility studies, due diligence reports, valuation or fairness opinions, risk analyses, conflict-of-interest disclosures, board minutes, mitigation plans, and post-decision monitoring records. In the ASDP case, the absence or limited public availability of such documents requires the analysis to remain conditional and normative. This approach prevents unsupported factual conclusions while preserving the article's contribution as a replicable legal evaluation model.

Legal Materials

The legal materials used consist of three layers, namely as follows:

1. Primary Legal Materials

Primary materials include statutes and regulations relevant to directors' duties, SOE governance, state finance, and corporate criminal liability, as well as court decisions and other authoritative legal instruments that shape applicable standards.

2. Secondary Legal Materials

Secondary materials consist of peer-reviewed and indexed journal articles, scholarly books, and official reports from credible institutions that provide doctrinal debates, interpretive frameworks, and empirical context supporting the normative argumentation.

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3. Tertiary Legal Materials

Tertiary materials are used sparingly and only to secure terminological precision, including legal dictionaries, encyclopedias, and authoritative reference works.

RESULTS AND DISCUSSION

The Concept of the Business Judgment Rule in Corporate Law in Indonesia

The Business Judgment Rule is a doctrine in corporate law that provides protection to company directors from liability for losses arising as a consequence of their decisions, provided such actions are taken in good faith and with due care (Lestari, 2015).

The modern concept of a Limited Liability Company (Perseroan Terbatas or PT) was originally known as *Naamloze Vennootschap*. The term *perseroan* indicates that the company's capital is divided into units known as *sero* or shares, while the term *terbatas* signifies that shareholders' liability is limited to the value of the shares they own (Akram & Fanaro, 2019). According to Article 1 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies, a Limited Liability Company, hereinafter referred to as a "Company," is a legal entity that constitutes a capital association, established based on an agreement, conducting business activities with an authorized capital entirely divided into shares, and fulfilling the requirements set forth in the Law and its implementing regulations.

The Company Law does not explicitly stipulate the Business Judgment Rule (BJR). The principles of the BJR are implicitly embodied in Article 97 paragraph (5) of the Company Law, which states that directors cannot be held liable for losses as referred to in paragraph (3) if they can prove that:

1. The loss was not caused by their fault or negligence;
2. They managed the company in good faith and with due care for the interest and purposes of the Company;
3. They had no direct or indirect conflict of interest in the management actions that resulted in the loss; and
4. They took actions to prevent the occurrence or continuation of such loss.

Article 97 paragraph (5) functions as a legal safeguard for directors in facing potential liability arising from business risks, as long as decisions are made through proper and legitimate processes. Article 97 paragraph (5) should be read not merely as an exemption clause, but as an element-based defense standard for directors.

The first element, absence of fault or negligence, requires an inquiry into whether the loss arose from ordinary business uncertainty or from a breach of the director's duty of care. The second element, good faith and due care, requires proof that the decision was directed to the company's legitimate interests and was made through a prudent process, including adequate information and reasonable deliberation. The third element, absence of conflict of interest, reflects the duty of loyalty and becomes decisive because a concealed or exploitative conflict undermines the integrity of the entire decision-making process. The fourth element, preventive measures, shows that directors are not required to guarantee successful outcomes, but they must take reasonable steps to prevent, reduce, or respond to foreseeable losses. Through these elements, the BJR in Indonesian company law operates less as absolute immunity and more as a rebuttable defense or safe-harbour standard based on process integrity.

One type of State-Owned Enterprise (BUMN) is the *Persero* Company, which takes the form of a limited liability company (Article 1 point 3 of the 2025 State-Owned Enterprise Law) (Wijayanti et al., 2025). The enactment of the 2025 State-Owned Enterprise Law marks a significant paradigm shift in the legal framework governing state corporations, particularly in relation to risk management and accountability for potential state losses. The Law introduces eleven key provisions, one of which concerns the Business Judgment Rule (BJR). Article 9F of the 2025 State-Owned Enterprise Law provides that:

(1) Members of the Board of Directors cannot be held legally liable for losses if they can prove that:
   a. The loss was not due to their fault or negligence;
   b. They managed the BUMN in good faith and with due care for the interests and purposes of the BUMN;
   c. They had no direct or indirect conflict of interest in the management actions that resulted in the loss; and
   d. They took actions to prevent the occurrence or continuation of such loss.

(2) Members of the Board of Commissioners or Supervisory Board of the BUMN cannot be held legally liable for losses if they can prove that:
   a. They exercised their supervisory duties in good faith and with due care for the interests of the BUMN and in accordance with its objectives;
   b. They had no personal interest, either direct or indirect, in the management actions of the Board of Directors that caused the loss; and
   c. They provided advice to the Board of Directors to prevent the occurrence or continuation of the loss.

Article 9G of the 2025 State-Owned Enterprise Law further stipulates that members of the Board of Directors, Board of Commissioners, and Supervisory Board of BUMN are not classified as state officials. This provision explicitly incorporates the Business Judgment Rule into the 2025 State-Owned Enterprise Law, which previously appeared only implicitly in Law Number 40 of 2007 concerning Limited Liability Companies and Government Regulation Number 23 of 2022 amending Government Regulation Number 45 of 2005 on the establishment, management, supervision, and dissolution of State-Owned Enterprises. The BJR doctrine confirms that directors cannot be personally subjected to legal liability for business decisions they make, even if such decisions ultimately result in corporate losses, so long as those decisions are taken in good faith.

The incorporation of the Business Judgment Rule in both the 2025 State-Owned Enterprise Law and the Company Law demonstrates that the doctrine aims to provide legal protection to directors so that they are not easily criminalized for business decisions that result in losses. Within the 2025 State-Owned Enterprise Law, the BJR is expressly regulated as a mechanism to distinguish reasonable business risks from abuse of authority, particularly because BUMN directors manage state assets, which are highly susceptible to being misconstrued as state losses and subsequently used as grounds for criminal prosecution. Meanwhile, the Company Law through Article 97 paragraph (5) substantively contains the core elements of the BJR, good faith, due care, absence of conflict of interest, and orientation toward the company's interests, thereby exempting directors from liability for losses arising from legitimate business decisions. Both frameworks affirm that the primary purpose of the BJR is to shield directors from unwarranted legal liability, prevent business risks from being automatically categorized as criminal acts, and preserve directors' freedom to make strategic decisions without excessive fear of criminalization.

The Friction Between the Business Judgment Rule and the State Loss Paradigm in State Owned Enterprises

The core difficulty in assessing directors' liability in state owned enterprises lies in the collision of two evaluative grammars that were designed for different objects and different anxieties. The Business Judgment Rule is built to protect informed managerial discretion under uncertainty, because corporate value creation presupposes calculated risk, probabilistic forecasting, and occasional failure. The state loss paradigm is built to protect public resources through heightened scrutiny, because the legitimacy of state capital is tied to accountability, integrity, and the prevention of rent seeking. Governance failures, accountability gaps, and elite capture in public resource management may distort institutional priorities and increase the risk that public assets are managed for private or factional interests rather than collective welfare (Gbadebo, 2025). Recent scholarship on corruption and state loss policy in Indonesia also shows that the interpretation of state economic loss remains problematic due to ambiguous normative boundaries, reliance on potential rather than actual loss calculations, and the absence of standardized methodology (Rahmadi, 2025). When these grammars are applied to the same event, an adverse outcome can be read simultaneously as a normal business loss and as a juridically suspicious loss that demands punitive response. This is not merely a theoretical tension. It shapes how investment committees behave, how boards document deliberation, and how risk is priced in strategic decisions.

State owned enterprises are structurally more exposed to this tension because they carry a dual mandate. They are expected to compete and generate value as corporate entities, while also being treated as instruments of public policy, public service, and public finance discipline. The dual mandate expands the interpretive space for after the fact reclassification of business losses into alleged state losses. The same transaction can be framed as commercial strategy in board minutes, yet reconstructed as a public loss narrative once political salience rises or a project underperforms. This vulnerability intensifies when loss is treated as a proxy for wrongdoing. The result is a liability environment where directors face asymmetric downside risk: genuine business success is normalized, failure is moralized, and the procedural quality of decision making is often subordinated to outcome based suspicion (Libson & Parchomovsky, 2022; White, 1998).

The overreach risk is over criminalization. When criminal law becomes the default response to adverse business outcomes, directors internalize a rational fear of hindsight judgment. They become less willing to approve long horizon investments, restructuring, acquisitions, or innovation that require risk bearing. Capital allocation then shifts toward low variance, low impact choices that are defensible rather than value maximizing. The chilling effect is not an abstract claim. It emerges as delayed decisions, procedural inflation, excessive reliance on formal endorsements, and aversion to strategic moves that may be optimal economically but politically fragile.

To clarify the conceptual tension between the Business Judgment Rule and the state loss paradigm in Indonesian SOEs, this study summarizes the principal points of divergence across several legal and governance dimensions. Table 1 presents a structured comparison between the two evaluative approaches while introducing the separation criteria proposed in this study. The comparison serves as the analytical foundation for distinguishing legitimate business risk from situations that justify administrative or criminal intervention.

Table 1. Conflict Map and Separation Criteria Between Business Loss and State Loss

Analytical Dimension	BJR Oriented Assessment	State Loss Oriented Assessment	Practical Risk of Misclassification	Separation Criterion Produced by This Study
Object of protection	Corporate value and managerial discretion under uncertainty	Public resources and integrity of state capital	Treating every loss as suspect undermines risk taking	Identify the primary legal object in dispute: process integrity and fiduciary compliance versus unlawful appropriation of state value
Evaluation focus	Process quality, informed basis, prudence, good faith	Outcome sensitivity, loss magnitude, public impact	Hindsight bias replaces ex ante rationality	Use an ex ante benchmark: assess what was knowable at decision time, not what became clear afterward
Nature of loss	Expected downside within business risk envelope	Indicative harm requiring attribution and recovery	Business volatility is re read as illegality	Require a demonstrated legal breach marker before escalating beyond corporate governance review
Causation model	Business causation, market shifts, execution risk	Legal causation linked to violation, abuse, or fraud	Complex losses are simplified into single cause wrongdoing	Separate commercial causality from legal causality: criminal inference requires a chain grounded in unlawful act, not merely poor performance
Mental element and benefit	Absence of bad faith is central	Suspicion rises if benefit flows to insiders or affiliates	Motive is presumed from loss	Demand evidence of unlawful benefit or corrupt intent indicators before criminal framing
Conflict of interest	Managed through disclosure, recusal, and fairness measures	Treated as a strong signal of abuse	Undisclosed conflicts contaminate the entire decision	Classify conflicts into disclosed and managed versus concealed and exploitative; only the latter supports punitive escalation

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Information quality	Due diligence, valuation support, risk analysis, alternatives evaluated	Documents may be treated as window dressing	Formal paperwork substitutes for substantive analysis	Test substance, not existence: verify independence, methodology, and decision relevance of key reports
Governance compliance	Compliance supports safe harbor	Noncompliance can trigger liability narratives	Minor procedural defects are inflated into criminal suspicion	Apply proportionality: procedural flaws support civil or administrative correction unless tied to concealment or unlawful benefit
Procurement and transaction structure	Acceptable if commercially rational and transparent	Structure is suspect if it circumvents controls	Legitimate structuring is framed as evasion	Identify control circumvention: artificial fragmentation, tailored criteria, manipulation of valuation or tender process
Remediation and mitigation	Good governance includes mitigation and monitoring	Failure to mitigate can be read as neglect or allowance	Normal monitoring gaps become incriminating	Require proof of deliberate disregard or systemic allowance to move toward corporate criminal liability framing
Accountability pathway	Corporate law remedies, internal governance, shareholder oversight	Administrative recovery and potentially criminal prosecution	Criminal law displaces corporate law as first resort	Use a staged pathway: corporate governance review, then civil administrative recovery, then criminal escalation only on red flag threshold

The table 1 demonstrates that the clash is not simply a dispute about legal labels. It is a dispute about the unit of analysis. The Business Judgment Rule treats the decision as a process artifact produced under uncertainty. The state loss paradigm often treats the decision as an outcome artifact whose legitimacy is inferred from financial results. Once the unit of analysis shifts from process to outcome, the evidentiary center also shifts. The decisive question becomes how much loss occurred, not how the decision was made. This inversion is the main gateway to hindsight bias. It allows a decision that was reasonable ex ante to be reconstructed as unreasonable ex post because the world changed, projections failed, or execution risk materialized.

A second finding concerns the role of dual mandate and public salience. In private firms, losses invite shareholder discipline and market correction, typically mediated through corporate remedies. In state owned enterprises, losses are quickly politicized because they can be narrated as harm to the public fisc, even when the transaction is structurally commercial. This politicization amplifies enforcement demand and encourages a shortcut: treating loss as sufficient suspicion. The table therefore positions legal breach markers as a necessary threshold. Without a demonstrated breach, the correct analytic lane remains corporate governance and corporate law accountability.

A third finding is that the boundary between business loss and legally cognizable loss is most reliably detected through benefit and integrity indicators, not through magnitude. Large losses can be produced by market collapse, technological disruption, or macroeconomic shocks; small losses can conceal unlawful appropriation. The table places unlawful benefit, concealed conflicts, manipulated valuation, tailored procurement, and control circumvention as the decisive red flags. These are the signatures of abuse. They convert a business decision into a legally suspicious act because they indicate deviation from the firm's interests toward private extraction.

The chilling effect mechanism follows logically from these findings. When loss is treated as presumptive wrongdoing, directors rationally minimize exposure by selecting defensible choices over optimal ones. Over time this generates procedural inflation, slower decision cycles, and underinvestment in transformative projects. Governance becomes performative. Documentation is produced primarily to survive blame rather than to improve decision quality. This reduces the substantive value of governance evidence and ironically makes it harder for evaluators to distinguish genuine prudence from posturing (Bachri et al., 2023; Laufer, 2006; Sibarani & Santiago, 2021).

The Board of Directors' Actions in Cooperation and Acquisition to Maintain Stock Stability from a Business Judgment Rule Perspective

The ASDP and PT Jembatan Nusantara acquisition controversy provides an important illustration of the legal tension between corporate business judgment and state loss-based enforcement. Publicly available information indicates that the case originated from a business cooperation scheme between PT ASDP Indonesia Ferry (Persero) and PT Jembatan Nusantara in 2019, which later developed into an acquisition of PT Jembatan Nusantara shares. The transaction became legally controversial after it was alleged to have caused state financial loss and to involve irregularities in the decision-making process. In this context, the case is relevant not because it conclusively proves that the directors acted lawfully or unlawfully, but because it demonstrates why SOE business decisions require a structured legal test that separates commercial risk from governance breach and criminal conduct.

From a BJR perspective, the first question is whether the acquisition was made within the directors' lawful managerial authority and directed toward a legitimate corporate objective. A transaction intended to expand fleet capacity, strengthen ferry routes, consolidate market position, or preserve corporate value may, in principle, fall within the scope of directors' business discretion. Lawful corporate purpose alone is not sufficient to establish BJR protection. The decisive issue is whether the process leading to the transaction satisfied the requirements of informed decision-making, good faith, due care, absence of conflict of interest, and preventive measures.

The ASDP transaction cannot be classified as protected business judgment merely by referring to its strategic business rationale. The classification depends on verifiable governance evidence. Relevant documents would include valuation reports, due diligence materials, board and committee minutes, investment memoranda, fairness opinion, conflict-of-interest disclosures, risk mitigation plans, post-

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acquisition monitoring records, and audit findings. If these documents show that the directors acted on adequate information, considered reasonable alternatives, disclosed and managed conflicts, relied on independent professional assessments, and prepared mitigation measures, the transaction may be assessed as legitimate business risk even if its outcome later became unfavorable.

BJR protection should be denied if the evidence shows serious defects in process integrity. Such defects may include manipulated valuation inputs, superficial due diligence, concealed beneficial ownership links, undisclosed conflicts of interest, engineered approval processes, artificial justification of the transaction, or deliberate disregard of material risks. In that situation, the legal issue would no longer be ordinary business failure, but a governance breach or a potential criminal indicator depending on the presence of unlawful benefit, intentional manipulation, and causal linkage to the alleged loss.

Based on the normative framework developed in this study, the ASDP acquisition may be classified as legitimate business risk only if the decision-making process can be proven to satisfy the requirements of good faith, due care, informed basis, absence of conflict of interest, and risk mitigation. If such proof is incomplete or unavailable, the safer conclusion is not that the directors are automatically protected by the BJR, but that the case requires document-based assessment before moving from corporate governance review to criminal liability (Lukviarman & Johan, 2018; Wijayati et al., 2025).

Corporate Criminal Liability Under the National Criminal Code (Law No. 1 of 2023)

In Indonesia, the reform of criminal law reflects a legal development that began in the 1950s when corporations started to be recognized as subjects of criminal law. Criminal liability imposed on corporations is known in criminal law as *corporate criminal liability*(Akram & Fanaro, 2019; Lestari, 2015). The presence of corporations is like a double-edged sword: on one hand, corporations contribute to economic progress and national development; on the other hand, they may undermine economic stability or, in more severe cases, become instrumental in the commission of criminal acts (Sibarani & Santiago, 2021). The term "corporation" encompasses legal entities such as limited liability companies, foundations, cooperatives, state-owned enterprises, regional government-owned enterprises, or equivalent bodies, as well as associations, both incorporated and unincorporated, and business entities such as firms, limited partnerships, or similar forms recognized by legislation.

Corporate crime refers to unlawful acts or violations committed by corporations either independently or collectively. Corporations may consist of organized groups of individuals and/or assets, whether incorporated or unincorporated (Al Farooque et al., 2020).

The National Criminal Code (KUHP Nasional), enacted through Law No. 1 of 2023, represents a new codification of Indonesian criminal law, replacing the colonial-era criminal code. This law will come into full effect on 2 January 2026. One of its key innovations is the explicit regulation of corporate criminal liability, which was previously scattered across sectoral statutes such as the Anti-Corruption Law. This development aligns with international criminal law trends recognizing corporations as subjects capable of bearing criminal responsibility.

Article 48 of the National Criminal Code provides that a corporation may be held criminally liable for offenses under Articles 46 and 47 if:

1. The act falls within the scope of business or activities as stipulated in the articles of association or other applicable provisions governing the corporation;
2. The act unlawfully benefits the corporation;
3. The act is accepted as a corporate policy;

4. The corporation fails to take necessary measures to prevent the offense, mitigate further consequences, and ensure compliance with applicable legal norms; and/or
5. The corporation allows the offense to occur.

When applied to the ASDP case, the elements of Article 48 of the National Criminal Code are not fulfilled; therefore, neither the corporation nor its Board of Directors can be subjected to criminal liability. First, the business cooperation and acquisition of PT JN clearly fall within ASDP's scope of business, and thus are not acts beyond its authority. Second, there is no evidence that the acquisition unlawfully benefited the corporation, as the decision was aimed at business expansion and stability rather than obtaining illicit gain. Third, although the decision constituted corporate policy, legitimate business policies cannot automatically be categorized as criminal acts. Fourth and fifth, ASDP did not neglect preventive measures nor allow the occurrence of a criminal act, as the decision was processed through formal mechanisms, including internal assessments and evaluations. In corruption-related governance failures, weak supervision, lack of transparency and accountability, conflicts of interest, and organizational tolerance of irregular practices may become important indicators for assessing whether a loss should be treated merely as administrative failure or as conduct requiring asset recovery and criminal accountability (Firmansyah et al., 2024). Based on Article 48, ASDP's actions constitute legitimate business decisions rather than acts of corruption or other criminal offenses.

Two Layer Decision Test: A Replicable Framework for Evaluating SOE Directors' Strategic Decisions

This study proposes a Two Layer Decision Test designed to reconcile corporate law protection for managerial discretion with the accountability demands surrounding state owned enterprises. The framework is intentionally operational. It is not a descriptive restatement of doctrine, but a decision tool that can be applied to transactions such as acquisitions, strategic cooperation, restructuring, major procurement, and investment allocation. Table 2 illustrates that BJR protection depends on the integrity of the decision-making process rather than the eventual success or failure of the transaction. The proposed indicators provide a practical method for evaluating whether directors exercised good faith, due care, and loyalty while relying on sufficient information before making strategic corporate decisions.

Table 2. Layer 1 BJR Test as a Legal Safe Harbour: Elements, Indicators, and Evidence

BJR Element	Core Question	Key Indicators to Verify	Typical Governance Evidence	Scoring Guide
Test 1. Informed Basis	Was the decision made on adequate information and competent analysis at the time it was approved	Existence of feasibility assessment, valuation or appraisal, due diligence, risk memo or scenario analysis, independent professional advice	Feasibility study, DD report, valuation or fairness opinion, risk register, scenario analysis, external advisor memo, investment committee pack	2 = robust and independent evidence; 1 = partial or weak evidence; 0 = absent or purely formal
Test 2. Good Faith	Was the decision directed to a legitimate corporate	Clear business rationale, strategic fit, alignment with corporate plan,	Board minutes showing rationale, strategic plan alignment note, management memo,	2 = coherent purpose and no bad faith signals; 1 = purpose stated but poorly

	purpose rather than an improper motive	absence of manipulation or engineered justification	decision brief, correspondence evidencing intent	substantiated; 0 = evidence of improper motive or engineered narrative
Test 3. Due Care and Prudence	Did the board follow a responsible decision process consistent with governance standards	Compliance with SOP and governance steps, evaluation of alternatives, documented deliberation, risk mitigation and justification	SOP checklist, minutes of deliberation, options paper, risk mitigation plan, internal controls sign off	2 = process compliance and substantive deliberation; 1 = compliance with gaps or superficial deliberation; 0 = material process failure or reckless approval
Test 4. No Conflict of Interest	Were conflicts disclosed and properly managed so that loyalty to the corporation remained intact	Conflict disclosure, recusal or abstention where required, enhanced scrutiny for related party transactions, transparency of relationships	Conflict of interest declarations, recusal records, related party transaction review, compliance approval, audit committee note	2 = no conflict or conflict managed transparently; 1 = potential conflict with incomplete management; 0 = concealed or exploitative conflict
Test 5. Mitigation and Monitoring	Were post decision controls in place to prevent, limit, and respond to foreseeable losses	Defined mitigation plan, KPIs, monitoring cadence, early warning triggers, escalation route, corrective action plan	Monitoring dashboard, KPI framework, implementation plan, early warning protocol, post merger integration plan, periodic review minutes	2 = structured monitoring and early warning; 1 = ad hoc monitoring; 0 = no mitigation or monitoring design

Table 2 illustrates that BJR protection depends on the integrity of the decision-making process rather than the eventual success or failure of the transaction. The scoring model in Layer 1 is doctrinal-conceptual rather than statistical. It is designed to translate the cumulative requirements of Article 97 paragraph (5) into a structured legal evaluation tool. The range of 0–10 is produced from five BJR elements, each scored 0, 1, or 2 according to the strength of available governance evidence. A score of 8–10 indicates that most elements are supported by robust and contemporaneous evidence, making full BJR protection presumptively justified. A score of 5–7 indicates incomplete process integrity and therefore supports corporate governance review or civil-administrative accountability without automatically implying criminal conduct. A score of 0–4 indicates serious failure of process integrity. Test 2 and Test 4 are treated as decisive because good faith and absence of conflict of interest are loyalty-based requirements. If a decision is made in bad faith or affected by concealed and exploitative conflict of interest, the normative foundation of BJR protection collapses even if other formal documents appear to exist.

To ensure consistency across cases, the Layer 1 result is produced through a simple weighted rule that prioritizes integrity of process and loyalty. The five tests are scored 0 to 2 each, producing a total score between 0 and 10.

1. Full BJR Protection

Total score 8 to 10, with Test 4 not scored 0. The decision is presumptively protected as a business judgment because it reflects informed, good faith, prudent decision making without disqualifying loyalty defects.

2. Partial BJR Protection

Total score 5 to 7, or any case where one element is materially incomplete but there is no evidence of bad faith or concealed conflict. The decision warrants corporate governance review and potential civil or administrative accountability, but personal liability should not be presumed from the loss outcome alone.

3. No BJR Protection

Total score 0 to 4, or any case where Test 2 or Test 4 is scored 0. The safe harbour fails because the decision lacks basic process integrity or contains disqualifying indicators of improper motive or unmanaged conflict of interest.

The test is designed to be evidence driven. Each element requires more than the existence of paperwork. Evidence must be decision relevant, methodologically defensible, and contemporaneous with approval. A valuation report that is not independent, a due diligence memo that ignores key liabilities, or minutes that record only a ceremonial approval should be scored as partial or absent. Conversely, a robust decision record that shows the board understood alternatives, confronted downside scenarios, and set monitoring triggers supports full protection even if the transaction later underperforms. The framework therefore translates Business Judgment Rule doctrine into a structured evaluation that can be replicated by boards, auditors, courts, and enforcement bodies with minimal interpretive drift.

Layer 2 functions as a screening mechanism that operates after the BJR Test. Its purpose is doctrinally conservative and institutionally necessary. A transaction may satisfy the process integrity requirements of the Business Judgment Rule, yet still involve criminally relevant conduct if there are credible indicators of unlawful benefit, concealed conflicts, procurement manipulation, or deliberate organizational failure to prevent wrongdoing. A poor business outcome must not be escalated into criminal framing solely because loss occurred. Layer 2 therefore establishes a disciplined threshold. It requires identifiable red flags before a case is moved from corporate governance accountability into the domain of corporate criminal liability. Table 3 introduces the second layer of the proposed framework by identifying the principal red flags, evidentiary anchors, and classification rules that distinguish ordinary governance failures from conduct warranting criminal investigation.

Table 3. Corporate Liability Screen: Red Flags, Evidentiary Anchors, and Classification Rules

Screen	Core Question	Criminally Salient Indicators	Evidentiary Anchors to Examine	Interpretation Rule
A. Scope and Attribution	Is the act connected to corporate activities and attributable to corporate policy	Conduct carried out by directing minds, authorized agents, or within delegated authority; use of	Board or committee approvals, delegation instruments, internal approvals, authorization trails, emails and	Establishes attribution pathway. Without attribution, corporate criminal liability is

	or authorized decision making	corporate systems to execute the act	instructions, role descriptions	structurally weak even if individual liability is possible
B. Unlawful Benefit and Mens Rea Indicators	Are there indicators of unlawful benefit extraction or intentional manipulation	Kickbacks, bribery, bid rigging, inflated pricing, engineered specifications, falsified valuation inputs, manipulated due diligence, hidden side agreements, payment anomalies	Procurement files, bidding documents, vendor selection records, valuation workpapers, bank flows, beneficial ownership links, correspondence showing quid pro quo	If credible unlawful benefit indicators exist, escalate toward "Criminal Conduct Indicator (High)" regardless of Layer 1 score
C. Governance Failure	Did the organization allow, ignore, or systematically fail to prevent wrongdoing	Compliance program absent or ineffective; ignored red flags; override of controls; repeated audit findings unremedied; retaliation against whistleblowers	Compliance policies, internal audit reports, risk committee notes, hotline logs, remediation plans, control override approvals	Strong governance failure supports escalation beyond business risk, even if there is no single "smoking gun," when patterns show organizational allowance
D. Causality and Foreseeability	Did the loss arise from ordinary business risk or from a breach of law or process that plausibly caused the harm	Loss traceable to manipulation or unlawful act; foreseeable risks ignored without mitigation; material misstatements to approving bodies	Causal chain analysis, risk registers, scenario analysis, contemporaneous warnings, mitigation plans, post decision monitoring records	If loss is consistent with market or execution risk and mitigations existed, classify as business risk. If a breach plausibly generated the loss, classify as governance breach or criminal indicator depending on Screen B and C

As presented in Table 3, criminal liability should arise only when credible evidence demonstrates unlawful benefit, governance manipulation, or organizational failure that directly contributes to the alleged loss. Layer 2 produces one of three classifications. The classification is not driven by the magnitude of loss, but by the presence and credibility of legally relevant indicators.

1. Pure Business Risk

This classification applies when the act is attributable to corporate decision making, yet there is no credible evidence of unlawful benefit, no meaningful governance breakdown suggesting allowance of wrongdoing, and the causal story is consistent with ordinary market, integration, or execution risk. Loss is treated as a trigger for corporate learning and governance refinement rather than as a presumptive sign of crime.

2. Governance Breach (Civil or Administrative Exposure)

This classification applies when the decision making process or organizational controls show material defects that justify corrective accountability, but the record does not support credible indicators of unlawful benefit or intentional manipulation. Typical patterns include weak due diligence, superficial deliberation, incomplete conflict management, inadequate mitigation, or failure to follow internal governance steps. The legal consequence is primarily corrective, focusing on internal accountability, shareholder state remedies, and administrative recovery where appropriate, rather than criminal escalation.

3. Criminal Conduct Indicator (High)

This classification applies when there are credible red flags of unlawful benefit extraction or intentional manipulation, especially when combined with governance failure and a plausible causal link between the breach and the loss. Indicators include bribery or kickbacks, bid rigging, engineered procurement specifications, falsified valuation inputs, manipulation of appraisal or due diligence, concealed beneficial ownership ties, and systematic overriding of controls. In such cases, criminal investigation is normatively justified because the transaction is no longer a mere business decision with adverse outcomes, but a suspected mechanism of illicit value transfer.

Layer 2 is designed to prevent doctrinal confusion. A strong Layer 1 score should not immunize a case if Layer 2 reveals credible red flags of unlawful benefit or deliberate manipulation. Equally, a weak Layer 1 score should not automatically translate into criminal suspicion if Layer 2 indicators are absent. The framework therefore creates a staged, evidence driven pathway. It preserves the integrity of the Business Judgment Rule as a safe harbour for legitimate risk taking while ensuring that corporate criminal liability remains available for cases defined by abuse, concealment, and unlawful extraction.

Policy Implications and Operational Guidance

This study translates the Two-Layer Decision Test into a practical accountability architecture that avoids two extremes: impunity for genuine abuse and criminalization of ordinary business risk. The recommendations are structured in three operational levels so that directors, auditors, and law enforcement can work with a shared evaluative language anchored in process evidence rather than outcome-driven suspicion.

1. Level 1 for SOE Directors: Governance Evidence Kit

SOE boards should institutionalize a minimum evidentiary package for major decisions, not as bureaucratic self-protection, but as a governance discipline that improves decision quality and enables fair ex post review. The kit should include, at minimum, valuation or appraisal materials, due diligence outputs, a risk memo with scenario analysis, contemporaneous minutes reflecting deliberation and alternatives, legal opinion where relevant, fairness opinion for material transactions, documented conflict-of-interest disclosure and management, and a mitigation and post-decision monitoring plan. These documents should be consolidated into a standardized “decision file” with clear version control, sign-offs, and a decision timeline so that accountability is traceable, audit-ready, and resistant to hindsight distortion.

2. Level 2 for Auditors (APIP/BPK): Audit without Hindsight Bias

Audits should be structured to test process integrity before concluding fault from loss. The audit focus should prioritize the adequacy and independence of information relied upon, the integrity of valuation and due diligence methodology, the management of conflicts of interest, and the existence and execution of mitigation and monitoring mechanisms. Where weaknesses are found, the audit should classify the issue according to proportionality: governance improvement or administrative recovery pathways should be preferred unless the audit also uncovers red flags of manipulation, concealment, or unlawful benefit extraction.

3. Level 3 for Law Enforcement: Criminal Threshold Guideline

Criminal escalation should be reserved for cases with credible indicators of abuse, not for cases defined solely by adverse outcomes. The threshold should require evidence of corrupt intent or unlawful benefit, concealed or exploitative conflicts of interest, manipulation of appraisal or due diligence inputs, procurement engineering, control circumvention, or systemic allowance of wrongdoing. Where the record indicates a legitimate business decision with poor execution or unfavorable market shifts, the appropriate response lies in corporate, civil, or administrative mechanisms rather than criminal prosecution.

CONCLUSION

This study concludes that the Business Judgment Rule remains essential for protecting SOE directors from outcome-based liability when they make strategic decisions under uncertainty, but such protection must be grounded in verifiable process integrity rather than asserted as a general shield against legal accountability. In the Indonesian SOE context, the boundary between business risk and state loss is especially fragile because separated state assets operate as corporate capital while remaining vulnerable to state finance narratives in audit and enforcement practice. The proposed two-layer decision test addresses this problem by first examining whether the requirements of BJR are satisfied and then screening whether there are indicators of corporate criminal liability, such as unlawful benefit, process manipulation, concealed conflict of interest, organizational failure, or causal linkage between legal breach and loss. Applied to the ASDP and PT Jembatan Nusantara acquisition controversy, this framework does not justify a definitive conclusion that the directors are automatically protected by BJR or that criminal liability is normatively impossible. Rather, the transaction may be classified as legitimate business risk only if valuation, due diligence, board deliberation, conflict disclosure, fairness assessment, and risk mitigation documents demonstrate good faith, due care, informed basis, absence of conflict of interest, and preventive measures. Where such evidence is absent or contradicted by credible red flags, the matter may move toward governance breach or criminal inquiry depending on the strength of unlawful benefit and organizational fault indicators. The article therefore contributes a proportional evaluative framework that protects legitimate risk-taking while preserving legal accountability for abuse, concealment, and illicit extraction.

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