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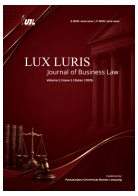

Problems of Proving State Financial Loss in Corruption Offences Involving State-Owned Enterprises (BUMN) in Indonesia

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Abstract

Proving state financial loss is the pivotal and most contested element in corruption prosecutions under Articles 2 and 3 of Law No. 31 of 1999 as amended by Law No. 20 of 2001 (the Anti-Corruption Law), and under their successors, Articles 603 and 604 of the new Criminal Code (Law No. 1 of 2023), particularly when the alleged loss is suffered by a State-Owned Enterprise (Badan Usaha Milik Negara, BUMN). This article examines the legal and evidentiary problems that arise in proving state financial loss in BUMN-related corruption cases. Using a normative juridical method with statutory, case, and conceptual approaches, the study analyses legislation, Constitutional Court decisions, Supreme Court instruments, and scholarly literature, taking into account the 2025 amendments to the BUMN Law (Law No. 1 of 2025 and Law No. 16 of 2025), the new Criminal Code, and the new Criminal Procedure Code (Law No. 20 of 2025), the latter two in force since 2 January 2026. The findings show four clusters of problems. First, there is normative disharmony over whether the assets of a BUMN are state finances or private corporate assets, a disharmony intensified by Article 4B of the BUMN Law, which provides that the profits or losses of a BUMN are those of the BUMN and not of the state. Second, there is institutional ambiguity over which body is authorised to declare the amount of loss, namely the Audit Board (BPK), the Finance and Development Supervisory Agency (BPKP), or investigators' own accountants. Third, there are methodological inconsistencies in calculating loss, including the treatment of total versus net loss, potential loss, unrealised investment loss, and ecological loss. Fourth, the line between a criminal act and a commercial decision protected by the business judgment rule remains blurred. The article concludes that proof of state loss in BUMN cases should be anchored in the actual and certain loss standard set by Constitutional Court Decision No. 25/PUU-XIV/2016, supported by harmonised legislation, standardised audit methodology, adversarial testing of loss calculations under the evidentiary rules of the 2025 Criminal Procedure Code, and a clearer statutory safe harbour for good-faith business decisions.

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INTRODUCTION

Corruption in Indonesia has long been treated as an extraordinary crime that damages not only public budgets but also the legitimacy of public institutions (Lopa, 2001; Atmasasmita, 2004). Since the Reformasi era, the legal architecture for combating it has been built around the Anti-Corruption Law, the establishment of the Corruption Eradication Commission (KPK), the Corruption Court (Pengadilan Tipikor), and Indonesia's ratification of the United Nations Convention against Corruption (UNCAC) through Law No. 7 of 2006 (Butt, 2011; Schütte, 2012).

Among the offences in this architecture, Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law have been the most frequently used in practice. Both provisions share a distinctive element: the act must cause, or in their original wording may cause, a loss to state finances or the state economy. Because the element is shared by the two workhorse provisions, proof of state loss often decides whether a prosecution succeeds or fails, and it determines the size of the sentence and of the restitution ordered under Article 18 of the same law (Hamzah, 2005; Ali, 2013). Since 2 January 2026, the same element appears in Articles 603 and 604 of the new Criminal Code.

The difficulty of proving state loss grows sharply when the alleged victim is a BUMN. State-owned enterprises are dominant actors in the Indonesian economy, operating in energy, banking, insurance, infrastructure, mining, and transport. They are also vehicles through which the state pursues both commercial and public-service objectives, a hybrid character widely noted in the comparative state capitalism literature (Musacchio & Lazzarini, 2014; OECD, 2015). A BUMN organised as a limited liability company (Perseroan Terbatas) is a separate legal entity, yet its capital originates from state funds that have been separated (dipisahkan) from the state budget. This duality creates the central legal puzzle of this article: when a BUMN suffers a business loss, is that loss automatically a loss to the state within the meaning of the Anti-Corruption Law?

Indonesian practice has answered this question inconsistently. Large-scale prosecutions of BUMN directors and related parties, including cases involving insurance and pension-fund investments, energy procurement, aviation, and tin mining, have produced very large loss figures in the trillions of rupiah, yet also heated public and professional debate over how these figures are calculated and whether they genuinely represent loss to the state (Butt & Lindsey, 2018). Directors of BUMN have expressed concern that ordinary commercial risk-taking exposes them to criminal liability, a phenomenon sometimes described as defensive management. At the same time, law enforcement agencies argue that a narrow reading of state loss would allow large-scale looting of state-owned corporations to escape punishment.

The legal landscape has also become more unstable. Constitutional Court Decision No. 25/PUU-XIV/2016 converted the offences in Articles 2 and 3 from formal offences (loss that may occur) into material offences requiring actual loss. Supreme Court Circular Letter (SEMA) No. 4 of 2016 designated the Audit Board as the institution constitutionally authorised to declare state loss. Law No. 1 of 2025, the third amendment to the BUMN Law, then introduced provisions, notably Article 4B, which separate BUMN profits and losses from the state's, and which exclude BUMN organs from the category of state administrators. Law No. 16 of 2025, the fourth amendment, retained the principle that BUMN capital and losses belong to the BUMN while reworking institutional arrangements and the protection of good-faith business decisions. Finally, the new Criminal Code (Law No. 1 of 2023) and the new Criminal Procedure Code (Law No. 20 of 2025) both entered into force on 2 January 2026, relocating the state-loss offences and reshaping the law of evidence. Legal practitioners therefore operate within a framework that is evolving and, in places, internally contradictory. Based on this background, the article addresses the following questions:

1. How is state financial loss normatively constructed as an element of corruption offences, and how has that construction changed through legislation and judicial review?
2. What legal and evidentiary problems arise in proving state financial loss when the alleged loss occurs in a BUMN?
3. What reforms could improve legal certainty and fairness in proving state financial loss in BUMN corruption cases?

The study aims to map the sources of uncertainty in proving state loss in BUMN corruption cases, to evaluate how existing legal instruments interact, and to offer reform recommendations. Its contribution is threefold. Doctrinally, it consolidates scattered statutory provisions and judicial decisions into a single analytical framework. Practically, it identifies concrete points at which investigators, prosecutors, auditors, and judges disagree. Normatively, it proposes principles for a more coherent evidentiary standard that protects state assets without criminalising legitimate business risk.

METHOD

This study employs normative juridical (doctrinal) legal research, which treats law as a system of

norms and examines the coherence and application of those norms (Marzuki, 2017; Soekanto & Mamudji, 2006). Three approaches are used in combination.

The statutory approach examines legislation relevant to state loss and BUMN. This includes the 1945 Constitution (Articles 23E and 23G on the Audit Board); Law No. 31 of 1999 jo. Law No. 20 of 2001 on the Eradication of Corruption; Law No. 1 of 2023 on the Criminal Code (Articles 603 and 604 and their Elucidation); Law No. 17 of 2003 on State Finance; Law No. 1 of 2004 on State Treasury; Law No. 15 of 2004 on the Audit of State Financial Management and Accountability; Law No. 15 of 2006 on the Audit Board; Law No. 19 of 2003 on BUMN as amended, including by Law No. 1 of 2025 and Law No. 16 of 2025; Law No. 40 of 2007 on Limited Liability Companies; Law No. 20 of 2025 on the Criminal Procedure Code (the 2025 KUHAP), together with Law No. 8 of 1981, which it repealed; and Supreme Court Regulation No. 1 of 2020 on Sentencing Guidelines for Articles 2 and 3 of the Anti-Corruption Law.

The case approach analyses judicial decisions and judicial instruments that shape the reading of those statutes, namely Constitutional Court Decision No. 003/PUU-IV/2006 on the material unlawful act; Decision No. 25/PUU-XIV/2016 on actual loss; Decisions No. 48/PUU-XI/2013 and No. 62/PUU-XI/2013 concerning the status of BUMN finances and Audit Board authority; Supreme Court Fatwa No. WKMA/Yud/20/VIII/2006; and SEMA No. 4 of 2016. Illustrative high-profile prosecutions involving BUMN are discussed at a general level, based on publicly reported information, to show how doctrinal issues manifest in practice. The article does not purport to be a case-by-case empirical study, and readers should consult the full court decisions for authoritative factual findings.

The conceptual approach draws on doctrines of evidence, state finance, corporate governance, and the business judgment rule to build an analytical framework for evaluating the legal materials (Hiariej, 2012; Harahap, 2009; OECD, 2015).

Legal materials are classified as primary (legislation and court decisions), secondary (books, journal articles, and scholarly commentary), and tertiary (legal dictionaries and encyclopaedias). They were collected through library research and analysed qualitatively using grammatical, systematic, and teleological interpretation. Systematic interpretation was used to detect conflicts between norms of different hierarchy and subject matter, while teleological interpretation was used to assess whether a given reading serves the purposes of the Anti-Corruption Law, namely recovery of state assets, deterrence, and legal certainty. Because several statutory changes occurred in 2025 and 2026, the analysis reflects the law as understood at the time of writing (November 2026), and the reader is advised to verify subsequent developments, including pending constitutional review of some of the provisions discussed.

RESULTS AND DISCUSSION

The Normative Construction of State Financial Loss

Statutory definitions

The Anti-Corruption Law does not itself provide an operative definition of state financial loss. Its Elucidation explains state finances broadly, as all state wealth in any form, whether separated or not separated, including all rights and obligations arising from the control, management, and accountability of state institutions and from the participation of the state in BUMN, regional enterprises, foundations, legal entities, and companies that include state capital. Article 32 paragraph (1) refers to the situation in which investigators find that one or more elements of corruption are clearly absent although there has been an actual loss to state finances, authorising a civil suit.

The operative definition is found in other legislation. Article 1 point 22 of the State Treasury Law (Law No. 1 of 2004) defines state or regional loss as a shortage of money, securities, and goods which is real and certain in amount, as a result of an unlawful act, whether intentional or negligent. The audit legislation uses similar language. Two implications follow. First, the definition is built around a shortage of assets, an accounting concept that presupposes measurement against a baseline. Second, it requires both reality and certainty of the amount, and a causal relationship with an unlawful act.

The definition emerged from the regime of state treasury accountability, where officials such as treasurers are personally liable to compensate for shortages through administrative procedures. Importing these concepts into criminal law creates a significant conceptual tension. In the treasury

context, the question is whether public funds are missing from an account that the official was responsible for. In a criminal case against a BUMN director, by contrast, the question is whether a complex commercial transaction, such as a joint venture, loan, investment, or procurement contract, produced a net loss, to whom, and by reason of which wrongful act. The treasury definition provides little guidance for that more sophisticated inquiry, leaving it to auditors, experts, and judges to fill the gaps.

From formal to material offences: Decision No. 25/PUU-XIV/2016

Originally, Article 2 paragraph (1) and Article 3 used the phrase "can harm" (dapat merugikan) state finances or the state economy. Prosecutors and many courts read this as creating a formal offence: the offence was complete when the act was capable of causing loss, regardless of whether a loss in fact materialised. Hamzah (2005) defended this approach as necessary to allow early intervention against corrupt practices. Critics argued that it was vague and allowed prosecution for potential loss, leaving the executive with excessive discretion over commercial decisions.

In Decision No. 25/PUU-XIV/2016, the Constitutional Court held the word "can" in both articles to be contrary to the 1945 Constitution and without binding legal force. The offences thus became material offences: they are complete only when an actual loss to state finances or the state economy has occurred. This holding has three effects relevant to BUMN cases. It requires evidence of a loss that has actually materialised, not one merely feared. It raises the evidentiary stakes for the prosecution because the loss is now an element that must be proved to the required standard. And it makes the methodology and legal foundation of the loss calculation central to the trial, because a flawed calculation may negate an essential element.

In practice, however, prosecutors and courts have continued to rely heavily on audit-based calculations framed in the language of real and certain loss, and the decision has not produced a uniform approach to what counts as actual loss in complex commercial transactions.

A related development was Constitutional Court Decision No. 003/PUU-IV/2006, which held the explanation of Article 2 paragraph (1) that recognised the material unlawful nature (sifat melawan hukum materiil) to be unconstitutional, leaving the formal-legality reading. This narrows the unlawful-act element to violations of written law, strengthening the argument that a breach of an internal corporate guideline or of unwritten norms of propriety does not by itself satisfy Article 2. The consequence for BUMN cases is considered in the section on the business judgment rule below.

Codification in the 2023 Criminal Code and the 2025 Criminal Procedure Code

The new Criminal Code (Law No. 1 of 2023), in force since 2 January 2026, relocates the offences formerly found in Articles 2 and 3 of the Anti-Corruption Law to Articles 603 and 604. Both articles now require conduct that causes loss to state finances or the state economy, without the word "can", thereby codifying the material-offence construction of Decision No. 25/PUU-XIV/2016. Each carries imprisonment for life, or for a minimum of two and a maximum of twenty years, together with a fine of category II to VI. The Elucidation to Article 603 further provides that loss to state finances is determined on the basis of the examination of the state financial audit institution, which reinforces the argument for the primacy of the Audit Board in declaring loss; no equivalent elucidation accompanies Article 604, which is stated to be sufficiently clear. The substance of the state-loss element therefore changes in two respects, a firm material construction and an express link to the audit institution, and the transition, together with Law No. 1 of 2026 on the adjustment of criminal provisions, adds a further layer of complexity for cases that straddle the two regimes, in which the provision more favourable to the defendant must be assessed.

The 2025 KUHAP, in force on the same date, changes the evidentiary setting in which the loss element must be proved. Because loss is an element of the offence, it must be established through the forms of evidence listed in Article 235(1), including expert testimony, documents, and electronic evidence, and the evidence must pass the authenticity and lawful-acquisition tests of Article 235(4) and (5). Conviction requires guilt to be proved legally and convincingly (Article 244(1)). Transitional rules in Article 361 determine which procedural regime applies to cases already filed or under examination before 2 January 2026. These provisions matter for state-loss proof because an audit report or loss

calculation is only as strong as its authenticity, its method, and the lawfulness of the way it was obtained, and the court is now expressly empowered to test all three.

The Contested Status of BUMN Assets

The traditional separated-state-wealth view

For two decades, the dominant reading of the law was that BUMN capital remains, in legal essence, state wealth. Article 4 paragraph (1) of the original BUMN Law stated that the capital of a BUMN originates from separated state wealth. Article 2 letter g of the State Finance Law included in the definition of state finances the wealth that is separated in state and regional companies. The Elucidation of the Anti-Corruption Law took the same broad view. The Supreme Court's Fatwa No. WKMA/Yud/20/VIII/2006 took the position that BUMN receivables and assets remain within the state's financial sphere, and Constitutional Court Decisions No. 48/PUU-XI/2013 and No. 62/PUU-XI/2013, which addressed the audit scope of the Audit Board over state finances including BUMN, did not remove BUMN finances from that scope.

On this reading, a loss suffered by a BUMN reduces the value of the state's investment and is therefore a loss to state finances. The consequence for prosecutors is considerable: there is no need to prove a separate loss to the state treasury beyond the BUMN's own loss, and the Audit Board's jurisdiction to audit BUMN is clear.

The corporate-separateness counter-view

The opposing view, advanced by corporate lawyers and some academics, holds that once state capital is separated and invested in a limited liability company, it becomes the property of the company, a legal person distinct from its shareholders (Harahap, 2009). The state's asset is thereafter its shares, not the company's underlying assets. A loss suffered by the company is therefore a loss of the company, affecting the state only indirectly through a decrease in share value and dividends. This view rests on the doctrine of corporate personality and limited liability, and is consistent with international guidance that SOEs should be treated like other companies in their legal form (OECD, 2015).

This debate is not merely academic. If a BUMN's loss is not automatically a state loss, prosecutors must either show that the state's own finances were harmed in some separate way or identify a distinct statutory basis for equating the two. The corporate-separateness view also lends support to the argument that the correct legal response to a director's mismanagement is the corporate-law remedy: the company, or its shareholders, may sue for breach of fiduciary duty under the Limited Liability Company Law, rather than invoking criminal law.

The 2025 BUMN Law amendments and Article 4B

Law No. 1 of 2025, the third amendment to the BUMN Law, as carried forward by Law No. 16 of 2025, the fourth amendment, marks a statutory shift toward the corporate-separateness view. Article 4A provides that capital originating from state participation becomes the wealth of the BUMN. Article 4B provides that the profits or losses suffered by a BUMN are the profits or losses of the BUMN, and its Elucidation states that the capital and wealth of a BUMN belong to the BUMN and that its profits or losses are not profits or losses of the state. Investment gains and losses are treated in the same way (Article 3H(2)). Law No. 1 of 2025 also provided that members of the board of directors, board of commissioners, and supervisory board are not state administrators (penyelenggara negara) and altered the arrangements for audit of BUMN financial statements, while Law No. 16 of 2025 reworked institutional arrangements, including the separation of supervisory and operational functions and the protection of good-faith business decisions.

Supporters presented these changes as a means of removing fear of criminalisation and strengthening professional management. Critics, including anti-corruption advocates, warned that they could weaken the reach of the Anti-Corruption Law and the KPK's authority over BUMN officers, since state-administrator status is a jurisdictional trigger in the KPK Law; a number of judicial review petitions were lodged against the 2025 amendments. The practical consequence for proof of loss is that a loss suffered by a BUMN can no longer be treated as a state financial loss automatically. Prosecutors must establish, on a distinct legal ground and with evidence, that state finances themselves were harmed, and

a court that nonetheless classifies a BUMN loss as a state loss should explain the legal basis on which it does so.

The amendments also sit uneasily with other norms that still adopt a broad conception of state finances: Article 2 letters g and i of the State Finance Law, Article 10 paragraph (1) of the Audit Board Law, the Elucidation of the Anti-Corruption Law, and the Elucidation of Article 603 of the Criminal Code. Reconciling them calls for a choice between lex specialis and lex posterior reasoning, and no authoritative answer has yet emerged. The repeated amendments demonstrate the underlying problem: the legislature has not settled in a harmonised way whether BUMN assets are state assets for criminal-law purposes. Law enforcers face the practical question of how to treat conduct that occurred before, during, and after each change, which raises questions of temporal application and, under the principle of legality, the application of the provision more favourable to the defendant.

Institutional Ambiguity: Who Determines State Loss?

A second set of problems concerns the institution competent to declare the amount of state loss. Several institutions claim a role, and their legal bases differ.

Table 1. Institutions involved in determining state financial loss.

Institution	Legal basis	Typical role in practice	Main criticism
Audit Board (BPK)	1945 Constitution Art. 23E; Law No. 15/2006 Art. 10(1); SEMA No. 4/2016; Elucidation of Art. 603 Criminal Code	Conducts investigative audits; assesses and/or determines the amount of state loss	Capacity constraints; audits may be commissioned late; methodology not always transparent
Finance and Development Supervisory Agency (BPKP)	Presidential regulation on BPKP; investigator requests	Calculates loss at investigators' request; frequently testifies as expert	Internal government auditor; independence questioned; SEMA No. 4/2016 limits its authority to declare loss
Inspectorates and public accounting firms	Internal supervision rules; engagement contracts	Provide audit findings or calculations	Not constitutionally designated to declare state loss
Investigators and prosecutors	Criminal Procedure Code (Law No. 20/2025)	Gather evidence, appoint experts	Risk of outcome-driven calculation
Judges	KUHAP 2025 Arts. 235, 244	Evaluate all evidence, including its authenticity and lawful acquisition, and decide whether loss is proved	Free evaluation of evidence may produce inconsistent standards

Under Article 23E of the Constitution and Article 10 paragraph (1) of Law No. 15 of 2006, the Audit Board is empowered to assess and/or determine the amount of state loss caused by an unlawful act of, among others, the managers of BUMN. SEMA No. 4 of 2016 stated that only the Audit Board has the constitutional authority to declare state financial loss, whereas BPKP, the inspectorate, or other agencies may audit and calculate but are not competent to declare loss. The same instrument adds that judges may nonetheless assess the existence of actual loss based on the evidence presented in court. The Elucidation to Article 603 of the new Criminal Code now points in the same direction by tying the meaning of loss to the examination of the state financial audit institution.

In practice, this division has not eliminated ambiguity, for three reasons. First, the KPK and the Attorney General's Office frequently rely on audits by BPKP or on calculations by experts appointed by investigators, and courts have accepted such evidence in many cases, reasoning that the law of evidence allows loss to be proved through expert testimony and documents irrespective of the issuing

body, a reasoning that continues under Article 235(1) of the 2025 KUHAP. Second, the SEMA is an internal instrument directing judges, not a statute, and does not bind prosecutors. Third, the Audit Board is not always the lead auditor, and its report may be commissioned only after an investigation is well advanced.

These institutional divisions raise at least three evidentiary problems. The first is independence and reliability: where the same agency that supports the investigation calculates the loss, the defence may argue that the calculation is outcome-oriented. The second is disagreement among auditors: different bodies may arrive at different figures for the same transaction, as the figures reported in several large BUMN cases have varied with the method used. The third is procedural fairness: in many cases the defendant sees the audit only late in the process and has limited opportunity to challenge the underlying assumptions with competing expert evidence. A system in which the court receives a single authoritative number from a body not subject to adversarial testing weakens the safeguards that the law of evidence is meant to secure (Harahap, 2005; Hiariej, 2012). The 2025 KUHAP offers a partial remedy, because Article 235(4) and (5) allow the court to examine the authenticity of an audit report and the lawfulness of how it was obtained, and deny it probative force if it fails either test.

The problem is aggravated for BUMN because their financial statements are already audited annually by external public accountants, and many transactions are reviewed by internal audit units, commissioners, and, for listed companies, the financial regulator. When a prosecution later asserts that a transaction caused massive loss despite clean audit opinions on the financial statements, courts must reconcile two conflicting pictures of the same economic reality. There is currently no formal procedure by which an unqualified audit opinion and an investigative audit are compared, and judges rely on their own assessment of the credibility of experts.

Methodological Problems in Calculating Loss

Even where the competent institution is clear, the calculation itself raises difficult questions. Five recurring issues can be identified.

Total loss versus net loss

In procurement and contracting cases, prosecutors often argue that the entire contract value is lost because the contract was procured unlawfully, so that benefits received by the BUMN are disregarded. Defence counsel respond that where the BUMN actually received goods or services of value, only the difference between the price paid and the fair value, the net loss, is a loss in the sense of the statute. The requirement of a real and certain shortage in the State Treasury Law supports the net-loss reading, since a shortage presupposes a comparison between what left the entity and what entered it. Courts have not followed a uniform approach; the result depends on how the court characterises the unlawfulness (a defect in procedure versus fictitious or substandard performance) and on the evidence of value received.

Potential loss, opportunity loss, and unrealised profit

After Decision No. 25/PUU-XIV/2016, loss that is merely potential should no longer suffice. Yet many BUMN disputes concern opportunity costs or foregone revenue, for example a contract concluded at a lower price than could have been obtained or an asset sold below an estimated market value. Whether such differences are actual loss or only expected profit not earned is a matter of accounting and legal characterisation. Strictly, the shortage definition does not capture unearned income, and an opportunity-loss theory runs against the requirement that the loss be certain in amount. Nevertheless, prosecutors frequently invoke lost revenue as loss, and judges have occasionally accepted it where an underpriced transaction can be benchmarked against an independent valuation.

Unrealised investment losses and market-value fluctuations

Cases involving insurance and pension-fund investments in equities and mutual funds illustrate a further difficulty. Investment portfolios fluctuate with the market, and an unrealised decline in value is an accounting loss that may reverse. The Audit Board's investigative audit in the Jiwasraya case, for example, was reported to quantify state loss at approximately 16.8 trillion rupiah, and in the Asabri case at approximately 22.8 trillion rupiah, relying on the difference between funds placed and the value of

assets held or recoverable. These large figures were accepted by the courts in the respective trials, but the methodology, particularly the treatment of unrealised positions and the allocation of loss between unlawful and ordinary market-driven components, has been debated in the scholarly and professional literature. The conceptual point is that a loss measured at a particular date may not coincide with a loss that is real and certain in the sense of the statute, and the attribution of that loss to a specific unlawful act is a distinct causal question. The statutory rule that gains and losses from BUMN investment are those of the BUMN (Article 3H(2) of the BUMN Law) sharpens this question for future cases.

Ecological and economic losses

The expansion of the loss concept to cover environmental damage and macroeconomic effects poses a further challenge. In the tin-mining case involving a BUMN and private smelters, expert evidence on the cost of environmental degradation was reported to contribute a very large portion of the total loss figure. The Anti-Corruption Law refers to state finances and also to the state economy, and some commentators argue that ecological damage falls within the latter. Others contend that environmental harm should be addressed under environmental legislation, which has its own mechanisms for compensation, and that mixing them in a corruption prosecution transforms the state-loss element from an auditable shortage into a contestable valuation exercise. The absence of a statutory methodology for valuing such losses in a criminal setting leaves the figure vulnerable to challenge as speculative.

Causation and attribution

Finally, the element of state loss is not just a number; it must be caused by the defendant's unlawful act. In the BUMN context, losses frequently result from a combination of factors, including market conditions, regulatory changes, concurrent decisions by other organs, and the acts of third parties. Evidence that disentangles these causes is rarely produced in audit reports, which focus on quantifying the deviation from rules. Criminal causation requires that the loss be attributable to the defendant's act, and in collective decisions of a board of directors, attribution to individual directors raises additional questions about participation and mens rea (Muladi & Priyatno, 2010).

Criminal Act or Business Decision? The Business Judgment Rule

The fourth cluster of problems concerns the boundary between a criminal act and a commercial decision that turned out badly. Under Article 97 paragraph (5) of the Limited Liability Company Law, a director is not personally liable for a loss if he or she proves that the loss was not caused by fault or negligence, that the duty was performed in good faith and with prudence in the interest of the company, that there was no conflict of interest, and that steps were taken to prevent the loss (Harahap, 2009). This is the statutory expression of the business judgment rule. Its function is to protect honest but unsuccessful risk-taking while leaving fraud, self-dealing, and bad faith open to sanction, which is consistent with the OECD guidance that directors of SOEs should be shielded from interference in genuine commercial decisions (OECD, 2015).

For BUMN, the 2025 amendments gave the rule express statutory footing. Article 4A paragraph (5) and Article 3Y of the BUMN Law, as amended by Law No. 16 of 2025, protect the Head of the BUMN Regulatory Agency, BUMN organs, and employees from legal liability for losses if they can show that the stipulated conditions were met. The protection is not yet consistent across all organs, and it does not remove criminal liability where fault, conflict of interest, or bad faith is proved. Its interaction with the state-loss element is nonetheless important. If a loss is first a loss of the BUMN (Article 4B), and if the conduct that produced it falls within the business judgment rule, then neither the consequence element nor the unlawful-act element of Articles 603 and 604 of the Criminal Code is easily satisfied, particularly after Decision No. 003/PUU-IV/2006 confined the unlawful act to the violation of written law. Conversely, the rule does not apply where directors enrich themselves or others through fictitious or sham transactions, and in such cases the actual loss to the BUMN, and through it to the state's investment, remains provable through the ordinary evidentiary route.

The practical difficulty is that courts have no settled test for deciding when a commercial decision crosses the line. Three questions can structure the inquiry: whether the decision followed an informed

and documented process; whether it was free of conflict of interest and made in good faith for the company's benefit; and whether the loss resulted from the unlawful element of the decision rather than from the ordinary commercial risk inherent in it. Audit reports that quantify deviation from procedure without addressing these questions do not, by themselves, establish that a criminal act caused the loss.

Reform Proposals

Four reforms follow from the analysis. First, the legislature should harmonise the definition of state finances across the State Finance Law, the Audit Board Law, the BUMN Law, and the anti-corruption provisions of the Criminal Code, stating expressly when a BUMN loss counts as a loss to the state, for example where the state's own funds were diverted, or where a BUMN is used as a conduit to extract public money. Second, an authoritative methodology for calculating loss should be issued, addressing net versus total loss, benchmarking of underpriced transactions, treatment of unrealised positions, and the exclusion of ecological valuation from criminal loss calculation unless a statutory method exists. Third, the adversarial testing of loss calculations should be strengthened: the defendant should receive the audit working papers in good time and be able to appoint a competing expert, and courts should apply Article 235(4) and (5) of the 2025 KUHAP to the authenticity and lawful acquisition of loss calculations, while Audit Board reports should be the default basis for declaring loss in line with the Elucidation of Article 603 of the Criminal Code and SEMA No. 4 of 2016. Fourth, the statutory safe harbour for good-faith business decisions in Articles 3Y and 4A(5) of the BUMN Law should be applied consistently to all organs and aligned with Article 97(5) of the Limited Liability Company Law, with clear transitional rules for conduct predating the 2025 amendments.

CONCLUSION

Proof of state financial loss in BUMN corruption cases is difficult because four sets of uncertainty intersect: whether BUMN assets are state finances, who may declare the amount of loss, how loss is calculated, and where the business judgment rule ends and criminal conduct begins. The legal changes of 2025 and 2026 resolve some of these questions and sharpen others. Article 4B of the BUMN Law shifts the starting presumption from state loss to BUMN loss; Articles 603 and 604 of the Criminal Code confirm the material character of the offence and link loss to the audit institution; and the 2025 KUHAP strengthens judicial scrutiny of the authenticity and lawfulness of evidence. The standard that best reconciles these developments with the aims of the anti-corruption regime is the actual and certain loss standard of Constitutional Court Decision No. 25/PUU-XIV/2016, proved through methodologically transparent and adversarially tested audit evidence, and combined with a clear safe harbour for good-faith business decisions. Such a standard protects state assets from genuine looting without exposing honest managers to criminal liability for ordinary commercial risk. Further research could examine how the courts apply these provisions in the first judgments rendered under the 2025 amendments and the new Codes.

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