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The Shareholder Settlement Program: A Pragmatic Resolution to confront a Systemic Banking Crises in view of the Dysfunctional Legal System and Tradition of the Republic of Indonesia

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CHAPTER IV

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THE SHAREHOLDER SETTLEMENT AGREEMENT: CONTRACT AS PROMISE

A. THE CONTRACTS

1. The Entry Parameter

The Shareholder Settlement Program should primarily be viewed as an opportunity for the IBRA banks' shareholders to settle through an out-of-court mechanism their wrongdoings that had caused losses to their banks, as alleged by the government. On the other hand, the Program must also be regarded as a way out for the government to recover the state funds that had been injected into the banking system and/or to minimize the costs that had been incurred from the banking crisis, rather than to confront the legal hurdles it would meet in the dysfunctional legal and judicial system. The assumption at the time must have been that the cost of solving matters through litigation was economically less desirable compared to the out-of-court nature of the Program. Certainly, it was a *quid pro quo* situation.

Based on a series of discussions and meetings between the government's task force and the banks' shareholders between 1998-2000, as mentioned in the preceding Chapter, there was a mutual conventionality that the banks' shareholders were willing to compensate the government for the losses suffered by their banks and/or the state funds that had been injected into the banking system, while the government was prepared to ignore the legal ramifications that were associated with the alleged causes of such burdens. They also agreed that the settlement would be fashioned in the format of a "civil-law contract", which would elaborate the respective parties' rights and obligations. As far as the Shareholder Settlement Program was concerned, the civil-law contract was the only media in which the out-of-court method of dispute settlement was to be carried out.

Nevertheless, both the banks' shareholders and the government, i.e. IBRA, needed to go through a series of negotiations on many technical and administrative aspects of the settlement, and to do so they first had to come up with a common ground work. Naturally, the banks' shareholders would do anything to limit their exposure to compensate the government, and to a degree they had the upper hand because they owned the banks, they controlled the banks' managements, and they had access to the relevant documents and information. Meanwhile, IBRA had almost nothing except thousands of documents related to the IBRA banks provided by Bank Indonesia and the legal authority to undertake the necessary actions regarding the banks' conditions and futures. IBRA could not completely rely on these documents, because not only were they incomplete but most of the documents were the result of imprudent banking practices and the handicapped banking supervision that made them neither accurate nor reliable.

a) The First Parameter

As far as the IBRA banks were concerned, IBRA was first to determine whether or not it was

compulsory for an IBRA bank to engage in the Shareholder Settlement Program in which the banks' shareholders would be given a chance to sign settlement agreements with IBRA. As aforementioned, there were two types of IBRA banks, namely IBRA-nursed banks (take-over banks and recap-banks) and IBRA frozen banks.

Although an IBRA bank could be required to participate in the Program, the willingness of the bank's shareholders to sign a settlement agreement was purely direct and voluntary, but there were circumstances where the settlement of the obligation of the bank's shareholders needed to be done differently and in a specific way. There were basically three main determining parameters whether or not an IBRA bank had to take part in the Program, namely (1) the bank's financial condition; (2) the bank's compliance level of prudential banking regulations; and (3) the bank's shareholding composition.[414]

To satisfy the first parameter, it was certainly important to accurately assess the banks' financial condition for reasons not only to determine their end legal status, but also to calculate the losses the banks had suffered, and the amount of state funds that needed to be disbursed for these banks. In turn, it would allow IBRA to estimate the amount of state funds that could potentially be recovered. The banks' financial condition could be assessed through legal and financial due diligence conducted by a reputable auditor based on acceptable universal standards and references.

b) The Second Parameter

The second parameter was even more important in the Shareholder Settlement Program as it represented the underlying reasoning behind the need to undertake the "burden-sharing-scheme" between the government and the IBRA banks' owners. If there was no violation of banking prudential regulations, there was no reason to demand that the ultimate controlling party of the IBRA banks also had to be held responsible for the losses/burdens incurred from the systemic banking crisis.

In this context, only those IBRA banks where there were strong indications that they had violated banking prudential regulations and/or were involved in irregular banking practices would be required to partake in the Program. These premises did not have to be legally proven as in a court proceeding, but they needed more than mere accusations that the said wrongdoings and/or irregular practices had indeed taken place.[415] Seemingly, it was pretty hard to determine whether the banking practices at that time were straightforwardly in violation of the prevailing banking prudential rules or were rather irregular banking practices or innocent undertakings that were victimized by the on-going crisis. Meanwhile there was no doubt that almost all the IBRA banks' insiders, whether directors, commissioners, or shareholders, had benefited from the banks

414 The first and third parameters were to be used by the legal and financial consultants in undertaking due diligence, and the second parameter was probably the most relevant yardstick in the inception, the implementation, and the completion of the Shareholder Settlement Program. However, it should be noted that the application of these parameters was not particularly straightforward in the case of the recapitalized banks. The settlement of the affiliated loans by the banks' controlling shareholders through the Program was also meant to clean the banks' books before they were recapitalized by the government/IBRA, regardless of whether there had been violations of prudential banking regulations and/or irregular banking practices. In fact, most of the recapitalized banks' affiliated loans were arbitrarily treated as if they were bad loans, thus uncollectible, and had to be taken out of the banks' books. In light of the first parameter, all IBRA banks were banks with a *Capital Adequacy Ratio* (CAR) of 4 percent or less, of which banks with a CAR between 4 percent and minus 25 percent would be classified as category "B" banks and banks with a CAR of less than 25 percent were category "C" banks. Category "B" banks comprised of banks that were eligible to participate in IBRA or the government's recapitalization program, depending on the result of an analysis as to the banks' business prospects. Meanwhile, category "C" banks consisted of banks that were given the opportunity to increase their CAR at the least up to minus 25 percent within a certain period of time, and if they failed to do so they would be put under receivership and later be liquidated. Depending on the parameters, only category "B" and "C" banks would be required to partake in the Program. Another important element in this parameter was the fact that one way or another these banks had received state funds, whether in the form of the central bank's liquidity supports, the payment of banks' obligations by the government guarantee scheme, or other monetary advances to keep them in operation.

415 During the peak of the financial crisis in 1997-1998, many IBRA banks' affiliated debtors were unable to meet their debt-service obligations on time. All the same, many Indonesian corporations that had one way or another received banks' loans were hard hit by the economic meltdown and high interest rates, which made them generally unable to service their debts to the banks. As a result, the banks were unable to recover their assets and to obtain profits, and eventually they failed to meet their obligations to the depositor and other third party creditors. They suffered huge losses, and inevitably became insolvent. Was this irregular practice?

in a way that might undermine the significance of a bank as a fiduciary institution. Was it business as usual?

c) The Third Parameter

The third parameter was important to understand the nature of the decision making mechanism in each IBRA bank as well as to determine who was ultimately accountable to compensate the government in light of the Shareholder Settlement Program. As is commonly understood, banking business is the most regulated industry among financial institutions.[416] In practice, however, there were many instances to the contrary. The corporate affairs of the banking business were less regulated by the banking regulation if only because corporate laws were supposedly enabling legal principles and norms.

The banks' controlling shareholders usually controlled the majority of the board of directors and commissioners, which in turn provided them with enormous influence in the operations of the management. In many cases they decided which loan application by a bank debtor should be granted, and they also determined the treatment of non-performing loans. This would allow them to channel huge amounts of banks' credits to their affiliated group companies, whether directly or indirectly, regardless of the commercial merit of the project for which the loans were applied. Rampant as these practices were during this time, it comes to no surprise that the practice of good corporate governance in IBRA banks was far from satisfactory.[417]

d) Conclusion on Parameters

The aforementioned parameters were to be evaluated diligently and thoroughly in order to obtain a picture of the nearest to actual condition before IBRA could start effective negotiations with the banks' shareholders. Based on the said due diligence, 49 out of 65 IBRA banks[418] were indicated to have violated banking prudential regulations and/or were involved in irregular banking practices that one way or another had benefited the banks' shareholders, and for that reason were required to partake in the Shareholder Settlement Program.[419] The result of the due diligence, however, was mostly indicative in nature, but was considered sufficient for IBRA to start negotiations with the banks' shareholders.

The negotiations covered many issues, including the accuracy of the findings, the amount to be settled by the banks' shareholders, the value of the settlement assets, the lists of collaterals, the terms of payment, and many other items that needed to be stipulated in the settlement agreements. The negotiation process was time and energy consuming, and depended on the willingness of the banks' shareholders to cooperate and the flexibility in the corridor that was provided

416 There is a series of rules regarding how to operate a bank. For example there are rules on inter-banking transactions, rules on lending to affiliates or to the same group of obligors, rules regarding mobilizing funds from society, rules on risk management, and many other rules to ensure that banking activities are not abused and do not become the alter ego of only a few people in the industry.

417 The professionals who worked for the banks were unfortunately just acting upon what they had been dictated to do, because they were worried that they might be laid off if they acted otherwise. The banking sector was a lucrative place to build up a career and bank owners were practically kings and queens, if not gods and goddesses. There were not too many professionals able to refuse what the kings and queens ordered them to do. All in all, the composition of the IBRA banks' shareholdings and management had determined the nature of the decision making processes and many times induced practices of substandard banking that in turn caused the banks to become imprudent. Someone had somehow to be held accountable, and, apparently, in most cases it would be the IBRA banks' controlling shareholders.

418 As previously explained, based on the due diligence that was conducted in March 1998 there were 72 banks with a *Capital Adequacy Ratio* of 4 percent or less. These banks were certainly not healthy from the banking industry point of view, and must either be recapitalized or liquidated. This excluded the 16 banks that were liquidated in November 1997. 7 out of these 72 banks did come under the government recapitalization program, but were never actually nursed by IBRA. In total, 65 banks were handled directly by IBRA.

419 Nevertheless, the banks' shareholders did not just accept the results of the due diligence, and instead they submitted their own evidence to the contrary. Sometimes they could point out inconsistencies in the due diligence, although most of the time they could not. This battle of evidences came as no surprise due to the fact that the due diligence could hardly provide any conclusive opinion regarding the findings, because the relevant documents were incomplete and also because they involved many sophisticated financial transactions.

by the government. In addition, it was also influenced by external factors such as socio-political and security reasoning.[420] As became evident, in 1998 the negotiations between the government's task force and various major IBRA banks' shareholders lasted only a couple of months, and the settlement agreements that were signed by the contracting parties needed to be adjusted a couple of times. Everything and everybody seemed to be in a big rush.

In 1999-2000, the negotiations between IBRA and the banks' shareholders took place for more than a year before the settlement agreements were signed, as it involved a great number of IBRA banks' shareholders, overwhelming paper work, and a larger variety of interests and attitudes. On top of that, the relation between IBRA, the IBRA banks' shareholders who had signed the settlement agreements and the government during this period was at its lowest level ever, which caused a high level of uncertainty in the future prospect and survival of the Shareholder Settlement Program. The main reason for them to finally sign the settlement agreements was because the IMF had threatened to suspend the next loan disbursement if the government failed to make them cooperate. This would have been a black campaign against the government and the banks' owners/business conglomerates.[421]

Based on the results of the negotiations and the aforesaid parameters, there were basically two categories of IBRA banks in the Shareholder Settlement Program:

A. The first group comprised of 16 IBRA banks that were not required to participate in the Program because no violation of prudential banking regulations and/or irregular banking practices had been found;[422]
B. The second group consisted of 49 IBRA banks that were required to partake in the Program based on findings that the banks had violated banking prudential regulations and/or had been involved in irregular banking practices that benefited the banks' shareholders. This group of banks was further divided into the following three categories:
    i) 44 shareholders from 32 IBRA banks were considered to be cooperative, at least at the initial stage, as they agreed to sign settlement agreements with IBRA. Seven of the banks' shareholders fulfilled their obligations in cash;
    ii) The shareholders of 7 IBRA banks were considered to be un-cooperative as they refused to sign settlement agreements with IBRA; and
    iii) There were 4 IBRA banks of which not one of the shareholders signed settlement agreements with IBRA, in part because of ongoing legal disputes and in part due to unclear reasons.

    The parameters were the most important entry point into "the new legal bond" between

420 For instance, during Habibie's administration IBRA had no experience whatsoever in administering and executing the banks' shareholder settlements and depended very much on the advices from and undertakings by external advisors, while the political and national security conditions were pretty dynamic and had generated high pressure upon the banks' shareholders to cooperate with the government. Not a day went by without street demonstrations, following the ethnic riots and the killing of student demonstrators in mid-1998, and big business conglomerates and their alleged corrupted wealth was one of the most popular topics of discussions.

421 The signing of a settlement agreement by the IBRA banks' shareholders was one of the conditions in the IMF-supported program that had to be fulfilled by the government before loan disbursement, and it had certainly put IBRA in a determinant and yet awkward position. Meanwhile, the negotiation process between the banks' shareholders and IBRA at the time was not yet concluded, and inevitably IBRA was pushed to use every available method and means to make the banks' shareholders sign the settlement agreements. Evidently, in some cases IBRA's officials had given promises beyond what was necessary or even somewhat in contradiction with the essence of the settlement agreements, while in other cases they threatened the banks' shareholders with legal actions if they remained un-cooperative. This in turn caused a couple of problematic situations at a later stage. Nevertheless, this phenomenon was an exception to the general condition.

422 It is interesting to note that one of the banks in this group, i.e. *PT Bank Unibank*, was not required to partake in the Shareholder Settlement Program simply because there was no controlling shareholder, and not because there was no violation of banking prudential regulations and/or irregular practices. The latter issue was inconclusive, because no legal and financial due diligence had ever been conducted in regard to this bank. Based on the prevailing Bank Indonesia regulation, a shareholder would be assumed to have controlling influence on the bank if he owned 25 percent or more of the bank's shareholding. When the operation of the bank was frozen by Bank Indonesia, it had more than 20 shareholders in the form of shell companies established in various tax haven countries such as the British Virgin Islands and the Cayman Islands, where each of the companies owned less than 5 percent of the bank's shareholding. To make matters more interesting, this composition of the bank's shareholding was created and approved by Bank Indonesia just a few months before the bank was frozen and put under IBRA's supervision. So much for Bank Indonesia's effective banking supervisory function. Nevertheless, the former controlling shareholder undertook to settle the bank's affiliated loans and losses in a different manner from the Shareholder Settlement Program, which generated much controversy.

IBRA banks' shareholders and the government, i.e. the shareholder settlement agreements, which would become the ultimate ground work for the aforesaid contractual burden-sharing-scheme *vis-à-vis* the need to cope with the costs incurred from the banking crisis.[423]

2. The Basic Profiles

There were three types of shareholder settlement agreement, namely the *Master Settlement and Acquisition Agreement* (MSAA), the Master Refinancing and Notes Issuance Agreement (MRNIA), and the Acknowledgement of Indebtedness or Akta Pengakuan Utang (APU). Understanding the characteristics of each type of the agreements is crucial in obtaining a better picture of the level of magnitude and difficulty IBRA confronted in administrating the Shareholder Settlement Program.

a) The Master Settlement and Acquisition Agreement ("MSAA")

The Master Settlement and Acquisition Agreement or the MSAA was basically a civil-law contract between former controlling shareholders of IBRA take-over banks or IBRA frozen banks and the Government of the Republic of Indonesia, represented by the Minister of Finance and the Chairman of IBRA, to settle the obligations of the banks' shareholders by means of an asset settlement method to the amount equal to the agreed upon obligations. Both the banks' shareholders and the government had reached an agreement on the amount to be settled by the shareholders and the value of the settlement assets. In other words, MSAA was designed to be the real asset settlement method of payment.[424]

Depending on the number and the size of the settlement assets, the banks' shareholders and IBRA agreed to establish a holding company for each of the settlement agreements with the main and only purpose to pool, manage, and dispose of the settlement assets.[425] The assets were to be valued by reputable international financial advisors using the discounted cash flow method of valuation based on data and information mainly provided by the banks' shareholders or other available sources in the market. No thorough financial or legal due diligence had been carried out in regard to the settlement assets, because the government and the IMF had allocated only one month to undertake such asset valuation before the signing of each of the settlement agree-

423 When the banks' shareholders signed the settlement agreement with IBRA, they obliged themselves to a set of obligations that they had to fulfill. Meanwhile, they were also given a set of rights and protection from the government if they managed to fulfill their contractual obligations satisfactorily. On the other hand, the government and IBRA were also themselves bound to a set of obligations that must be fulfilled accordingly. The low level of contractual enforceability in Indonesia was often the main cause of many legal disputes, regardless of the nature of the contracting parties, while the judiciary was unable to provide an effective dispute resolution tribunal. These conditions were all not economically desirable, let alone socially acceptable.

424 Apparently, part of the settlement amount had to be paid in cash. There was no common formula on the matter, because most of the time the amount to be paid in cash was the result of negotiations between the government's task force and the banks' shareholders. Later on, this became a source of dispute between IBRA and several of the banks' shareholders, as the shareholders believed that they had been charged unfairly higher than other shareholders. The argument sounded reasonable, but was in fact baseless. Each of the banks' shareholders was given the same opportunity to negotiate the terms of conditions before they signed the settlement agreements and they were fully aware of all the facts surrounding the process. Nothing was allowed to be kept secret from them during that time, and yet they ultimately agreed to bind themselves to different contractual obligations. On the average, the upfront cash payment was less than 0.3 percent of the total obligation.

As aforementioned, the amount to be settled by the shareholders of IBRA take-over banks was different from that of IBRA frozen banks. *See* Government Announcement in November 1998. *See also* Joint Decree of the Minister of Finance and the Governor of Bank Indonesia. As far as IBRA nursed/take-over banks were concerned, the settlement amount was equal to the total amount of the banks' affiliated loans. In this case, it was decided that the banks were to be kept in operation and all of the banks' losses would be absorbed by the government's injecting recapitalization funds and converting all of the government's claims into the bank's equity. Depending on the actual circumstances, the government's claims would be in the form of central bank's liquidity support, monetary advances that had been injected into the banks in order to keep them operating, and other associated interest as may be imposed. In regard to IBRA frozen banks, the amount to be settled by the banks' shareholders was equal to the banks' total obligation to third parties minus the banks' net asset value. Unlike the settlement amount of IBRA nursed/take-over banks, the settlement amount to be settled by shareholders of IBRA frozen banks was intended to cover also all the state funds that had been injected into the banks, including the central bank liquidity supports.

425 Initially, the intention was that the holding companies were to be owned both by IBRA and the banks' shareholders, where IBRA would hold the absolute majority of the shares issued. However, later on all of the shares were owned by the banks' shareholders. It was unclear as to the reasoning behind this last minute change. Many explained, unofficially, that the decision was made by the Chairman of IBRA in consultation with the Minister of Finance as to prevent the holding companies to be categorized as state-owned enterprises. Being state-owned enterprises, there were a series of bureaucratic rules that must be complied by the holding companies, which might hamper the smooth operation and assets disposal of the said companies.

ments.[426]

The banks' shareholders were obliged to transfer all of the settlement assets to the holding companies and to perfect such transfer in accordance with the prevailing laws and regulations. This was probably one of the trickiest parts of the settlement agreement, as it would determine whether or not a settlement agreement could be considered as "closing". In reality, the settlement assets were mostly in the form of shares of companies the transfer of which involved many legal undertakings, various corporate actions, and numerous legal-administrative proceedings, which had made the task even more daunting and time consuming.[427]

It should be noted that there were at the least two loan restructuring schemes involved in these transactions. At the first level, the banks' affiliated loans were transferred to IBRA, and the banks' shareholders personally took over the affiliated groups' obligations as derived from the loans. Next in line, the holding companies issued promissory notes to IBRA to the amount equal to the agreed value of the settlement assets. As a result, there was a new creditor as well as new debtors in regard to the same loans. In the end, IBRA would continue to be the creditor and the holding companies became the new debtors, replacing the banks' shareholders with totally new loan arrangements.

Under the MSAA, the obligation of the holding companies to repay the promissory note was limited to the actual proceeds obtained from the disposal of the settlement assets over a period of four years, regardless whether the proceeds were sufficient to repay the whole amount of the promissory note. After all, the MSAA was supposed to be an asset settlement method of payment, and the aforesaid obligations were considered to have been fulfilled by the issuance of promissory notes by the holding companies.[428]

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426 The valuation of the settlement assets was to be based on normalized economic and political conditions, which was a considerably optimistic assumption that inevitably would have enormous consequences in the end result of the asset valuation as well as in the government's decision to allow the execution of the asset settlement method of payment.

427 Based on the prevailing laws and regulations, the transfer of the shares of a company must take into account the company's article of association as well as existing contractual undertakings between the company and any third parties. Generally, the transfer of shares needed to be approved by a shareholders' meeting, and the customary rule of thumb was that before such transfer, the shares must first be offered to other shareholders of the company in recognition of the applicable rights of first refusal. In addition, the transfer of shares often must obtain consent of the company's creditors or other third parties who had claims against the company. In practices, it was not easy to do all that. To make matter worse, in many instances the banks' shareholder only owned a minority of the total number of shares issued, which made the transfer of such shares even more difficult. Immediately after the establishment of the holding companies and the transfer of the settlement assets to these holding companies by the banks' shareholders, each of the holding companies was to issue a promissory note to IBRA to the amount equal to the value of the settlement assets as agreed. The said promissory note was basically an acknowledgement of indebtedness by which the holding companies owed to IBRA a certain amount of money that must be paid within a four year period beginning with the signing of the settlement agreement, which would be serviced primarily by the proceeds obtained from the disposal of the settlement assets. If the number and size of settlement assets to be surrendered under an MSAA were less than significant, IBRA would manage and later dispose of the settlement assets itself without a holding company.

428 The issuance of promissory notes by the holding companies to IBRA, and the fact that these holding companies were owned by the banks' shareholders, undoubtedly confused the basic principle and actual implementation of the asset settlement method of payment. Under the scheme, the value of the promissory notes was basically unchanged, while the value of the settlement assets fluctuated depending on many factors. Most of the time the proceeds obtained from the disposal of the settlement assets was much lower than the initial value of the assets as agreed by IBRA and the banks' shareholders, and therefore the promissory notes would never be repaid in full. At a later stage, the gap between the settlement value and the disposal value raised concerns about the effectiveness of the scheme, and generated polemics among the public as to whether the banks' shareholders had completed their obligations to the state. This became more complicated due to the fact that in many instances the issuance of promissory notes by the holding companies took place before all the settlement assets were legally transferred or perfected.

The obligations of the banks' shareholders would be considered complete if the banks' shareholder had transferred all the settlement assets to the holding companies and the holding companies had issued promissory notes to IBRA. If the existence of a holding company was not required, the obligation would be considered completed when all the settlement assets had been transferred to IBRA. In reality, there were many instances where the transfer of the settlement assets had not been done the way they were required to be and the holding companies were issuing too many promissory notes too soon. In this case, the closing of the MSAA should have been conditional upon the perfection of such asset transfer. Once an MSAA was considered as closing, the only recourse that IBRA had against the banks' shareholders was primarily based on the *indemnification* clause, according to which the banks shareholders agreed to reimburse, indemnify, and hold IBRA harmless from and against any and all claims relating to or arising out of or in connection with or incidental to any breach of representation or warranty as stipulated in the settlement agreement. This was a very broad obligation on the part of the banks shareholders, but in practice it was relevant mainly to any breach of "representation or warranty" regarding data and information as provided by the shareholders that were used as the basis to determine the value of the settlement assets as contracted between IBRA and the banks' shareholders. Other representation and warranty were relevant only to the undertakings conducted before the closing date, and the aforesaid indemnification clause was the only contractual clause that survived such a closing date. The government and the IMF gave IBRA a very short time to appraise the settlement assets, in particular to meet the date line as was set forth in the IMF-supported program, and inevitably IBRA and its financial advisors had to rely primarily on the data and the asset value as prepared by the banks' shareholders. This was certainly not a very smart way to undertake such an important task. Meanwhile, not only the aforesaid indemnification clause was inadequate to overcome the lacking as instituted during the valuation of the settlement assets, but it was also unbelievably difficult to implement.

Table 17

No.	Bank	Controlling Shareholder	Signing Date	Settlement Value (million Rp)
1	Bank Central Asia	Soedono Salim Group	September 21, 1998	52,726,575
2	Bank Dagang Nasional Indonesia	Syamsul Nursalim	September 21, 1998	28,408,000
3	Bank Umum Nasional	Muhammad Hasan	November 6, 1998	6,189,882
4	Bank Surya	Sudwikatmono	September 29, 1998	1,886,400
5	Bank Risjad Salim International	Ibrahim Risjad	June 4, 1999	664,107
			Total	**89,874,964**

In total, five MSAAs were signed by five controlling shareholders of two IBRA take-over banks and three IBRA frozen banks with a total settlement value of Rp. 89,874,964 million, roughly representing 68 percent of the total government's contractual claim under the Shareholder Settlement Program. There were three holding companies established with the purpose to pool, manage, and to dispose of a total of 161 companies surrendered by the banks' shareholders as settlement assets.[429]

b) The Master Refinancing and Note Issuance Agreement ("MRNIA")

Similar in principle to the MSAA, the *Master Refinancing and Note Issuance* or the MRNIA was a civil-law contract between the former controlling shareholders of IBRA take-over banks or IBRA frozen banks and the Government of the Republic of Indonesia, represented by the Minister of Finance and the Chairman of IBRA, to settle the obligations of the banks' shareholders by means of the asset settlement method of payment. Unlike the MSAA, however, the government and the banks' shareholders were unable to reach an agreement as to the value of the settlement assets.[430] For this reason, the banks' shareholders were required to issue personal guarantees for the benefit of IBRA in light of the deficits that might be incurred from the difference between the agreed obligation and the proceeds from the disposal of the settlement assets, and hence the MRNIA had become more of a refinancing arrangement than an asset settlement method of payment.

Due to the fundamental peculiarity of the MRNIA, the government and the banks' shareholders agreed to establish a holding company for each MRNIA. Similar to the MSAA, the holding companies were also designed to pool, manage, and dispose of the settlement assets, which proceeds would be used to repay the obligations. Likewise, the holding companies would issue promissory notes to the amount equal to the agreed settlement amount.[431] Meanwhile each of the banks' shareholders had issued personal guarantees to assure that the holding companies would repay the total amount of the promissory notes issued, which in turn would put their personal as-

429 These companies were PT Holdiko Perkasa (Salim Group), PT Tunas Sepadan Investama (Syamsul Nursalim), and PT Kiani Wirudha (Muhammad Hasan). The MSAAs for Bank Surya and Bank Risjad Salim International did not require the establishment of holding companies, because the banks' shareholders only surrendered 10 companies as settlement assets. These assets were directly transferred to IBRA to be managed and later disposed of.

430 Apparently, the government was of the opinion that the value of settlement assets to be used by the banks' shareholders as payment was inadequate to meet the aforesaid obligations, and therefore each of the banks' shareholders was required to issue a personal guarantee. In other words, both the banks' shareholders and the government had reached an agreement on the amount to be settled by the shareholders, but not on the value of the settlement assets. Consequently, when the disposal value of the settlement assets was less than the settlement value as initially agreed upon, the banks' shareholders were required to absorb the disparities. Moreover, if all of the settlement assets had been disposed of and the proceeds were still inadequate to fulfill their obligations, the banks shareholders were obliged to repay the differences. In light of the effort to optimize the recovery of the state funds, the MRNIA would have been a better settlement scheme than the MSAA, because it more or less guaranteed the full repayment of the obligations at the end of the day. Nevertheless, it turned out to be quite the reverse.

431 These companies were PT Bentala Kartika Abadi (Usman Admadjaja), PT Arya Mustika Mulia Abadi (Kaharudin Ongko), PT Cakrawala Gita Pratama (Samadikun Hartono), and PT Hoswarya Persada (Ho Kiarto & Ho Kianto).

sets in general pledge for the benefit of IBRA.

Although based on the MRNIA, the banks' shareholder obligations regarding the affiliated loans had been fulfilled by the issuance of promissory notes by the respective holding companies, but each of the shareholders attached themselves to a new obligation as a guarantor under the loan agreement between IBRA and the said companies. Unfortunately, the enforcement of personal guarantee in Indonesia has been as burdensome and uncertain as the enforcement of many types of security interest, and without sufficient resources and sophisticated competency to conduct asset tracing and forensic investigations, such personal guarantees would be less meaningful.

Table 18

No.	Bank	Controlling Shareholder	Signing Date	Settlement Value (million Rp)
1	Bank Danamon	Usman Admadjaja	November 6, 1998	12,532,749
2	Bank Umum Nasional	Kaharudin Ongko	December 18, 1998	8,347,882
3	Bank Modern	Samadikun Hartono	December 18, 1998	2,663,873
4	Bank Hokindo	Ho Kiarto & Ho Kianto	April 23, 1999	297,571
			Total	**23,842,075**

In total, there were four MRNIAs covering one IBRA take-over bank and three IBRA frozen banks, and there were five banks' controlling shareholders who signed the agreements. Through these MRNIAs, the government had a total claim of Rp. 23,842,075 million. Unlike the MSAA, the preparatory undertakings leading to the issuance of promissory notes by the holding companies were not done as diligently as they ought to have been done and had not taken place smoothly. As a result, not only was it difficult for the holding companies and eventually for IBRA to control the operation of the settlement companies, but it was also difficult to dispose of them.[432]

c) Akta Pengakuan Utang ("APU")

The *Akta Pengakuan Utang* or APU was the last generation of shareholder settlement agreement, by which the controlling shareholders of the IBRA banks agreed to pay IBRA in cash a certain amount of indebtedness over a period of four years, and simultaneously agreed to provide collateral at a minimum value of 150 percent of the total debt. Basically, it was a loan agreement between the government, represented by IBRA, and the IBRA banks' shareholders, although the banks' shareholders had never received any loan directly from the government. The structural design of APU was introduced in 2000 and was a direct reaction towards the structural design of the MSAA and MRNIA, which were at the time considered to be inadequate to protect the interests of the government in optimizing the recovery of the state funds.

Unlike the MSAA and the MRNIA, no loan restructuring schemes were considered necessary under APU, no holding companies were required to be established, and hence no issuance of promissory notes by holding companies was needed. The banks' shareholders were not required to take over the obligations of their group companies, which would basically remain IBRA claims against the said group companies and became one of the sources of payment for the new legal bonds between IBRA and the banks shareholders. In other words, both the banks'

432 Part of the problems were in fact orchestrated by the banks' shareholders themselves, who feared the potential exposures that they must absorb as personal guarantors to the holding companies at the end of the day, because it had been anticipated that the disposal value of the settlement assets would be much lower than the initial value as agreed upon between IBRA and the banks' shareholders. As a matter of fact, the progress of the disposal program of the settlement assets under the MRNIA before 2003 had been very disappointing. Although on paper the MRNIA was conceptually better than the MSAA in terms of the potential recovery of the state funds, the execution of the MRNIA was more indeterminate and the actual contribution from the asset disposal was far less than satisfactory.

shareholders and the group companies became IBRA debtors, and any payment by either party would reduce the obligations of the other party accordingly. The scheme was designed on the basis of a *co-debtor conception*, although in a modified form.[433] As far as IBRA take-over banks were concerned, the amount of obligations to be settled by the bank's controlling shareholders was basically equivalent to the amount of obligations that their group companies owed to the banks. Meanwhile, the formula used to determine the amount of the obligations to be settled by the shareholders of IBRA frozen banks was known as the loss allocation concept.[434]

As shown in Table 19, in total there were thirty APUs signed by thirty two controlling shareholders of twenty-six IBRA banks, of which two were IBRA take-over banks. Unlike the MSAA and the MRNIA, the number of settlement agreements under the APU scheme far exceeded those of the MSAA and the MRNIA combined, but the total government's claim thereof was only 16 percent of the total government claims under the MSAA and the MRNIA. As was evident, the administration of APU was much more burdensome, though less complicated in nature, than those of MSAA and the MRNIA. It was an ideal design of shareholder settlement agreement, and there had been high expectations that it would work better than the MSAA and the MRNIA.

Nevertheless, before mid 2002 the implementation of APU seemed to have gone nowhere and the level of compliance was very poor. There were two reasons for this. *First*, there had been a high level of policy inconsistency and legal uncertainty in the inception, the implementation, and the completion of the Shareholder Settlement Program as a whole, which also affected APU adversely. *Second*, the imposition of interests and penalties as well as the requirement of cash payments were in fact unreasonably difficult to meet. The amount of settlement value had accumulated to a level that was way beyond the actual compensation that the banks' shareholders must share, and the macroeconomic conditions at the time were not conducive to allow for the full payment in cash.

433 See in general Chapter 8, Book III, Articles 1278-1295 of the Indonesian Civil Code.

434 Unlike the total loss concept that was used primarily for the MSAA and the MRNIA, the loss allocation concept allowed for the allocation of IBRA banks' losses between the government and the banks' shareholders, taking into account the benefits that the banks' shareholders or their group companies had received from the banks ("group benefit"). The term "group benefit" did not only cover the banks' affiliated loans *per se*, but also included negotiable instruments issued by affiliated parties and endorsed by the bank, reciprocal loans for the interest of affiliated parties, and any other form of transactions conducted by the banks for the benefit of affiliated parties, whether on balance sheet or off balance sheet. To be exact, the amount of obligation to be settled by the banks' shareholders was determined by calculating the total group benefit + [(group benefit/total bank's assets) x total bank's losses].

In September 2003, along with the increased confidence in the implementation of the Shareholder Settlement Program, the government introduced a new formula for calculating the obligations that needed to be settled. It was known as the proportional concept. Based on this formula, the amount of obligation to be settled by the bank's shareholders was calculated as follows: [total state funds that had been injected into a bank – realized or estimated value of the bank's assets] x % of shareholding. The terminology of "state funds" covered any kind of government monies that had been injected into the bank, including and not limited to central bank liquidity supports, payments of the bank's obligation under the government guarantee scheme, and other advances to keep the bank operating. Meanwhile, the value of the bank's assets was determined according to the actual proceeds as obtained from the disposal of the bank's assets as well as the estimated unrealized value of the bank's assets at a maximum of 25 percent of the total bank's assets.

This formula was introduced to broaden the participation of the IBRA banks' shareholders who had not signed the MSAA or the MRNIA or the first batch of APU, thus increasing the probability of state funds recovery. Based on this formula, it was irrelevant whether a bank's shareholder was controlling or not, as every shareholder of the remaining IBRA banks was offered the opportunity to share the obligation as had been determined by IBRA in proportion with each of their shareholdings in the bank. Regardless, the new formula was unable to interest many of the remaining IBRA banks' shareholders to participate. There was only one bank shareholder who managed to complete the settlement agreement as signed. There were two IBRA bank shareholders who signed settlement agreements with IBRA based on the said formula. Both were shareholders from respectively Bank Pelita and Bank Istismarat. The first was Hasjim S. Djojohadikusumo (total obligation: Rp. 119,063 million) and the second was Agus Anwar (total obligation: Rp. 577,811 million). Unlike Agus Anwar, Hasjim S. Djojohadikusumo was able to complete his obligations in full.

Table 19

No.	Bank	Controlling Shareholder	Signing Date	Settlement Value (million Rp)
1	Budi Internasional	Hendra Liem	September 28, 2000	17,632
2	Danahutama	Thee Nin King	October 2, 2000	18,632
3	Yakin Makmur	Siti H. Rukmana	September 29, 2000	213,291
4	Baja Internasional *	Thee Nin Khong	September 29, 2000	45,139
		Andi Hartawan Sarjito	September 28, 2000	24,808
5	Bumi Raya Utama	Suparno Adijanto	September 28, 2000	50,490
6	Sanho	Ganda Eka Handria	October 6, 2000	20,099
7	Mashill Utama	Philip S. Wijaya	October 5, 2000	67,854
8	Indotrade	Mulianto Tanaga	October 4, 2000	47,682
9	Tamara *	Iwan Suhardiman	November 15, 2000	53,009
		Omar Putihrai	November 15, 2000	300,889
		Lidya Muchtar	November 15, 2000	308,051
10	Papan Sejahtera *	Honggo Wendratmo	October 30, 2000	149,150
		Njoo Kok Kiong	October 30, 2000	149,150
		Hasjim S. Djojohadikusumo	October 30, 2000	216,983
11	Hastin Internasional	The Tje Min	October 6, 2000	196,492
12	Sewu Internasional	Husodo Angkosubroto	October 12, 2000	258,845
13	Bank Nusa Nasional	Nirwan D. Bakrie	November 15, 2000	5,106,509
14	Lautan Berlian	Ulung Bursa	October 6, 2000	876,908
15	BIRA	Atang Latief	October 16, 2000	447,449
16	Namura Internusa *	Yasonta Group (2 persons) **	October 16, 2000	205,143
		Maduma Group (2 persons) **	October 11, 2000	158,933
17	Putra Multikarsa	Marimutu Sinivasan	October 30, 2000	1,317,595
18	Putra Surya Perkasa	Trijono Gondokusumo	October 6, 2000	3,031,112
19	Umum Servitia	David Nusa Wijaya & Tarunodjojo **	October 17, 2000	3,336,444
20	Metropolitan	Santoso Sumali	October 12, 2000	46,556
21	Aken	I Made Sudiarta & I Gde Darmawan **	October 10, 2000	680,891
22	Intan	Fadel Muhammad	October 9, 2000	88,155
23	Tata Internasional	Hengky Wijaya	October 5, 2000	462,991
24	Bahari	Santoso Sumali	October 12, 2000	295,050
25	Pelita ****	Hasjim S. Djojohadikusumo	October 13, 2003	114,111
		Agus Anwar	November 21, 2003	443,443
26	Istismarat ****	Hasjim S. Djojohadikusomo	October 13, 2003	4,952
		Agus Anwar	November 21, 2003	134,368
			Total * **	**19,027,928**

Notes:
* : For each bank there was more than one settlement agreement. The amount of obligation for each of the settlement agreements was calculated primarily on the basis of the amount of group benefits received by each signatory.
** : For each settlement agreement there were more than one signatory who were severally and jointly liable.
*** : Original principal settlement amount.
**** : For each of the bank's shareholder, there was one settlement agreement that covered obligations from both banks. In other words, each shareholder signed a settlement agreement that covered obligations from the two banks.

3. The Forgotten Ones: More Settlement Contracts

As elaborated above, the settlement agreements that were administered under the Shareholder Settlement Program basically comprised of five MSAAs, four MRNIAs and thirty APUs. These are the mainstream and the focal points of the study. Nevertheless, the notion of "burden-sharing-scheme" was not meant to be limited to the settlement agreements that came under the Program only. The basic idea was how to make IBRA banks' shareholders willing to share the burden that the government had to bear because of the banking systemic crisis, and in particular to recover the state funds that had been injected into the banking system and/or to minimize the costs of the crisis.

As a matter of fact, there were settlement accords between IBRA and several banks' shareholders that cannot be classified as one of the abovementioned settlement agreements under the Shareholder Settlement Program. As a result, these accords could not benefit from the legal and administrative treatment provided for the mainstream settlement agreements, and still they are worth mentioning in order to make this Study complete.

a) The Cash Settlement Agreements

Between 1999 and early 2000, after the structural design of the MSAA and the MRNIA were practically abandoned by the government, but before the official implementation of APU in April 2000, several controlling shareholders of IBRA frozen banks agreed to settle certain monetary obligations related to the banks they owned. Although the formula used in calculating the amount of obligation to be settled by the banks' shareholders was the same as that of APU, namely that of the loss allocation concept, these agreements between IBRA and the banks' shareholders had not been stipulated in one of the mainstream settlement agreements.

Instead, the agreement was contained in the form of a much simpler civil-law contract, the so-called *Sale and Purchase Agreement and Assignment of Receivables*, in which the banks shareholders agreed to pay IBRA the contracted obligations and in return IBRA agreed to surrender the account receivables it possessed against the banks' affiliated debtors. This was more like IBRA collecting full payment from IBRA banks' debtors or receiving proceeds from the disposal of IBRA banks' loans at the book value, but with an additional amount to cover allocated banks' losses.

Table 20

No.	Bank	Controlling Shareholder	Settlement Value (thousand Rp)
1	Bank Alfa	Bambang Trihatmodjo	8,101,595
2	Bank Sino	Suryadi & Subandi Tanuwidjaja	1,156,000
3	Bank Ciputra	Ciputra Family	5,112,793
4	Bank Orient	Aldo Brasali	859,033
5	Bank Danahutama	Sofyan Wanandi	1,294,000
		Total	**16,523,421**

As shown in Table 20, there were six controlling shareholders of five IBRA banks who signed settlement agreements of this type. The amount of settlement value was insignificant as compared to the mainstream settlement agreements, and therefore the banks' shareholders seemed to have no problem in fulfilling the obligations in cash within a short period of time. In

addition, the financial condition of all of the banks' shareholders was much better than that of most APU signatories as to allow cash payment. Unsurprisingly, there was also no requirement imposed upon the banks' shareholders to provide the necessary collaterals. It was a straightforward cash settlement arrangement, and most of the banks' shareholders were able to complete all their obligations by the end of 2001.

b) The Settlement of Group Debtors' Obligations

Different from the general premise behind the Shareholder Settlement Program, which was the settlement of their obligations by IBRA banks' shareholder as suffered by the banks they owned, but similar in method of payment with the aforesaid cash settlement scheme, there was another type of settlement agreement. It involved controlling shareholders of IBRA banks who insisted to settle the obligations of their affiliates to non-affiliated IBRA banks in cash.[435] The said settlement scheme was basically beyond the burden-sharing-scheme between IBRA and IBRA banks' shareholders, and could not come under the Shareholder Settlement Program, but it helped to reduce IBRA's overall monetary burden.

It was more similar to the handling of the IBRA banks' loans in general and to a certain extent used the same treatment applied to the IBRA banks' debtors who paid their obligations in cash, such as in the form of discounted interest and without the imposition of penalties. It was a variant of the "one-obligor concept" as applied to all IBRA banks' debtors.[436] The said settlement scheme was stipulated in a *Deed of Agreement on the Settlement of Group Debtor's Obligation and Acknowledgement of Indebtedness*, in which the banks' shareholders agreed to pay IBRA the obligations of their affiliates in cash and in return IBRA agreed to surrender the account receivables (claim) it possessed against the said debtors. The amount of obligations to be settled by the banks' shareholders was equal to the total amount of credits that the shareholders' affiliates had received from non-affiliated IBRA banks.[437]

Table 21

No	Origin of Loan	Bank's Shareholder	Settlement Value (million Rp)
1	Bank Yakin Makmur, Bank International Indonesia, Bank Central Asia, Bank Bumi Daya, Bank Pembangunan Indonesia, Bank Tabungan Negara, and Bank Yakin Makmur	Siti H. Rukmana, controlling shareholder of Bank Yakin Makmur	330,193
2	Bank Central Asia and Bank Danamon	Bambang Trihatmodjo, controlling shareholder of Bank Alfa	377,181
		Total	707,374

As shown in Table 21, there were two IBRA banks' shareholders who signed this type of

435 These were mainly individuals who were closely acquainted with the banks' shareholders, but who were not necessarily affiliated or related by law with the banks and who had borrowed money from the said banks or other IBRA banks.

436 The original one obligor concept was intended to simplify the handling of thousands of IBRA banks' customers who received loans from and/or had claims against one or more IBRA banks. By treating each of the debtors as one obligor, IBRA would learn about the actual exposure that each of the obligors had with IBRA banks and the actual claims that the government had against them. Its administration was a cumbersome, but it surely helped to prevent double counting.

437 These borrowers were mostly close friends or business associates of the banks' shareholders who would not have fulfilled their obligations without fierce fights, which might attract unnecessary attention. This would be unacceptable for the said banks' shareholders, who at the time were trying to stay off the public radar.

settlement agreement, and both were also APU signatories. They were close family members of former President Soeharto, and therefore they were more than willing, and had all the necessary resources, to settle their obligations as otherwise it would have adversely affected their family's reputation. Through this settlement accord, IBRA would be able to recover its claims in full, and the banks' shareholders would in turn obtain a subrogated claim against the borrowers.

c) Claims of Recapitalized Bank

As elaborated in Chapter II, there were two types of IBRA banks that were eligible to participate in the government recapitalization program. The first type included those banks that were handled directly by the government, i.e. the Minister of Finance, and were known as IBRA recap-banks. The second were known as IBRA take-over banks, which were recapitalized through IBRA. Basically, both types of banks were recapitalized by the government, but there were differences in the handling of these banks. For one thing, IBRA recap-banks were banks that had a *Capital Adequacy Ratio* (CAR) between 4 percent and minus 25 percent, in which the banks' controlling shareholders were willing to chip in to a minimum of 20 percent of the required recapitalization funds.

The recapitalization of IBRA recap-banks by the government was stipulated in an *Investment, Management and Performance Agreement* (IMPA), in which IBRA was acting as the sole proxy of the Minister of Finance.[438] Unlike IBRA take-over banks, which were required to write off all the banks' bad affiliated loans and to transfer these loans to IBRA, IBRA recap-banks were allowed to keep the banks' affiliated loans within the banks. As a result, all of the banks' affiliated loans that were not category 5 loans remained in the banks. One such IBRA recap-bank was PT Bank Internasional Indonesia, which was controlled by the Eka Tjipta Widjaja family who was the principal owner of the Sinar Mas Group ("SMG"). At the time, Widjaja was one of the well known owners of business conglomerates in Indonesia.[439]

Based on a particular government guarantee scheme, the family signed a settlement agreement with IBRA and with the banks concerning the execution of the guarantee, the terms and condition that SMG had to meet to repay the loans, and the counter guarantee provided by the family for the interest of IBRA and the government. In other words, the bank's controlling shareholders agreed to be personally responsible to settle the obligations of SMG if the group companies failed to repay their obligations to the bank, by giving IBRA secured collaterals with a value amounted to 150 percent of the total obligation as well as personal guarantees just in case the collaterals were insufficient to cover the obligations in full. Basically, it was similar to an APU type of settlement agreement, except that it contained a sovereign guarantee for the commercial resolution, and there was the bank as the third party beneficiary.

The said settlement agreement could not come under the Shareholder Settlement Pro-

438 The IMPA was formulated on the basis that the management of the banks would be left to the banks' controlling shareholders as an incentive to encourage them to participate in the recapitalization, while constrained by a list of performance criteria that must be met within a certain period of time. This approach was also chosen to retain some residual private domestic ownership in the banking sector, the components of which were likely to become the core private banks and the nucleus for the banking system after the crisis.

439 BII was recapitalized by the government on May 28, 1999, by which the government injected recapitalization funds at the amount of Rp. 6.63 trillion or equivalent to 59.63 percent of the total recapitalization funds as required for the bank. After the recapitalization, the government controlled 57.14 percent of the total shares issued by the bank. In mid 2001, the government was confronted with the alternatives whether to revoke the bank's license, merge the bank with other IBRA take-over banks, or to provide bridging finance to the bank, in light of the bank's affiliated loans to Sinar Mas Group ("SMG") having become bad loans at a total book value of Rp. 13.9 trillion and causing the affiliated loans to exceed the applicable lending limit.

The bank's affiliated debtors consisted of a number of interrelated companies that were part of an integrated enterprise in the production of pulp and paper. It was one of the largest enterprises in the international pulp and paper industry. One of the companies was Asian Pulp and Paper, a Singaporean duly established company, which had issued unsecured bonds to thousands of international investors. Somehow the company was unable to service its debts, which had adversely impacted other group companies including the bank's affiliated group companies. After taking the available alternatives into consideration, , the government decided to provide BII with bridging finance in the form of government's recycled bonds to guarantee the repayment of the affiliated loans. This way, the affiliated loans became current again. The reason was two-fold: *first*, the government had become the majority owner of the bank, and closing the bank would certainly diminish the value of that ownership, and *second* the placement of the said recycled bonds was the least costly solution for the government and also temporarily prevented the bank from being liquidated.

gram or be a part of the burden-sharing-scheme as aforementioned, because it was not meant to be and only existed because of an unexpected crisis. Should the recapitalization of *PT Bank Internasional Indonesia* have been done thoroughly and as expected, and the bank's affiliated loans to SMG had not gone bad, there was no need for a second recapitalization of the bank and the settlement agreement was also not required.

4. The Non-Cooperative Obligors

Under the Shareholder Settlement Program, the IBRA banks' shareholders who were required to compensate the government for the losses as suffered by their banks were called the shareholder settlement obligors. As aforementioned, not all of the IBRA banks' shareholders were required to partake in the Program, mainly because these banks and their shareholders did not meet the predetermined parameters. As was also evident, not all of the shareholder settlement obligors ultimately agreed to sign the settlement agreements with IBRA. Meanwhile not all of the shareholder settlement obligors who had signed settlement agreements with IBRA managed to fulfill their obligations as stipulated in the agreements. Accordingly, there were two types of non-cooperative shareholder settlement obligors.

Table 22

No.	Bank	Controlling Shareholders	Status
1	Deka	Dewanto Kurniawan, Royanto Kurniawan, Leo Lopulisa, and Rasjim Wiraatmadja	See Chapter V
2	Centris	Andri Tedjadharma, Prasetyo Utomo, and Banuara Silalahi	See Chapter V
3	ASPAC	Setiawan Harjono and Hendrawan Harjono	See Chapter V
4	Central Dagang	Hindarto Tantular and Anton Tantular	Assigned to the Attorney General
5	Dewa Rutji	Sjamsul Nursalim	Assigned to the Attorney General
6	Arya Panduartha	Kaharuddin Ongko	Assigned to the Attorney General
7	Dharmala	Sujanto Gondokusumo	Assigned to the Attorney General
8	Orient	Kwan Benny Ahadi	Assigned to the Attorney General

The first group comprises of those who had refused to sign settlement agreements with IBRA from the very beginning (Table 22). Mostly they argued that being the banks' shareholders they were not supposed to be personally liable for the banks' losses in excess of their paid-up capital, unless otherwise determined by a court decision that such limited liability had been pierced. Moreover, they also argued that their banks suffered from losses because the macroeconomic conditions were way beyond their control, and for that reason they should not be personally held accountable. *The second group* was actually more complicated to handle, because they were cooperative at the beginning, but were unable or unwilling to fulfill the terms and conditions as stipulated in the settlement agreements (Table 23). It was as if they signed the settlement agreement as a formality without any legal consequences and merely for public consumption to show that they were cooperative. The arguments and counter arguments were wide-ranging, and many of them were just plainly unwarranted.

Table 23

No.	Bank	Controlling Shareholders	Type of Agreement	Status
1	BIRA	Atang Latif	MRNIA	Incomplete *
2	Putra Multikarsa	Marimutu Sinivasan	MRNIA	Incomplete
3	Tamara	Lidya Muchtar	APU	Incomplete
		Omar Putihrai	APU	Incomplete
4	Namura	Yasonta Group	APU	Incomplete
5	Lautan Berlian	Ulung Bursa	APU	Incomplete
6	Umum Nasional	Kaharuddin Ongko	APU	Assigned to Police
7	Modern	Samadikun Hartono	APU	Assigned to Police
8	Pelita & Istismarat	Agus Anwar	APU	Assigned to Police
9	Namura	Maduma Group	APU	Assigned to Police
10	Putra Surya Perkasa	Trijono Gondokusumo	APU	Assigned to Police
11	Metropolitan	Santoso Sumali	APU	Assigned to Police
12	Bahari	Santoso Sumali	APU	Assigned to Police
13	Aken	Sudiarta & Darmawan	APU	Assigned to Police
14	Intan	Fadel Muhammad	APU	Assigned to Police + See Chapter V
15	Tata	Henky Widjaja	APU	Assigned to Police
16	Servitia	David Nusa Widjaja & Trunojoyo	APU	Assigned to Police + See Chapter V

Note
Incomplete: Transferred to the Minister of Finance as of the date of dissolution of IBRA. They had shown some levels of cooperativeness and yet were unable to meet their contractual obligations in full. Later, this group of obligors was handled by a special team under the Ministry of Finance.

Since the early stages of the Shareholder Settlement Program, the Attorney General had clearly suggested that the controlling shareholders of banks who were not in good faith and who did not have enough commitment to the interest of their nation and their country should be treated in such a way as to give them the necessary psychological pressure in order to prevent the recurrence of similar banking problems in the future.[440] It was also understood that such psychological pressure was meant to be an example for the shareholders of IBRA banks and other non-IBRA banks, including cooperative as well as non-cooperative shareholder settlement obligors.

For one thing, the Shareholder Settlement Program was an opportunity the government provided for specific IBRA banks' shareholders to compensate the losses as suffered by their banks through an out-of-court method of resolution. If a shareholder settlement obligor refused to participate in the Program or failed to complete the terms and conditions as stipulated in the settlement agreement that the obligor had signed, it would be considered a renouncement of the opportunity and seen as a preference for in-court settlement proceedings. At this point, the government was basically free to choose whatever legal measures available under the prevailing laws and regulations to handle the non-cooperative obligors.[441]

440 Letter from the Attorney General to the President of the Republic Indonesia No. R-192/A/G.1/1998, dated September 23, 1998, concerning The Final Report on Non-Litigation Undertakings with regards 14 IBRA Banks by the Joint Team of IBRA and Office of the Attorney General.

441 It was important that the government was in no doubt that the IBRA banks' shareholders could be held responsible in a court of justice and must be decisive in the handling of the obligors. In light of the allegation that the IBRA banks' shareholders had caused the banks to suffer losses and hence should be accountable to compensate the government, the government must be prepared to produce admissible evidence before the judiciary that the shareholders' wrongdoings had made the banks suffer losses. The government must also be tactical in confronting the obligors, in order to avoid discriminatory and ineffective treatment

The primary question that developed during the discussions concerning the choice of legal actions to be initiated against non-cooperative obligors had been about whether the government was to prosecute the obligors or rather to file civil law claims with the district court. Non-litigation and other administrative legal actions had been exhaustively considered. In 2000 the government ultimately decided to file civil law claims against the shareholders of four IBRA banks who refused to sign settlement agreements with IBRA. The legal claim was based on the allegation that the shareholders were accomplices in the banks' violations of the regulations concerning prudential banking and hence must be personally liable to compensate for the losses that were suffered by their banks. It was probably the first and the last case of piercing the corporate veil that had ever been initiated by a government institution.

The legal cases were supposed to be a legal breakthrough, but instead they ended up as legal experimentations without sufficient understanding of the relevant laws, and lacked the strategy to confront the actual conditions of the judiciary system. As a matter of fact, the legal action was sort of a compromised alternative between prosecuting and doing nothing against the non-cooperative obligors. IBRA was in favor of selective prosecution, as distinct from the law enforcement agencies, but this approach would have been accused of as discriminatory. However, prosecuting all obligors maladroitly would only have weakened the effort to recover the state funds that had been one of IBRA's main tasks. Moreover, there was also no guarantee that there would be no cherry picking by the law enforcement agencies.

Meanwhile, the law enforcement agencies kept investigating and prosecuting various shareholders and managements of IBRA banks. This was done without taking into account whether or not the banks' shareholders had in fact signed settlement agreements with IBRA through an out-of-court settlement mechanism. Most of the legal actions were carried out by the Office of the Attorney General, and they were mostly based on allegations that the banks' shareholders had violated the Corruption Law in relation to their misusage of the central bank's liquidity support their banks had received. As a result, several of the IBRA banks' shareholders who had signed settlement agreements with IBRA ceased to be cooperative and some of them ultimately became fugitives. Not only did this situation hamper IBRA's efforts to proceed with its tasks and functions effectively, it also generated uncertainty in the overall law enforcement undertakings.

On December 30, 2002, Megawati's administration issued Presidential Instruction No. 8 of 2002. This executive order was of the utmost importance in the implementation and the completion of the Shareholder Settlement Program, particularly in the handling of non-cooperative obligors. Based on this Presidential Instruction, IBRA alone was to determine who the cooperative obligors were and who were to be given legal certainty in the form of from any legal implication, both contractually and criminally, if they managed to fulfill their contractual obligations as stipulated in the respective settlement agreements. It was also clear that IBRA was the only

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among the obligors. Undoubtedly, the cooperative obligors would be confused and thwarted if no legal action was initiated and taken by the government against the non-cooperative obligors. Meanwhile, the least non-cooperative obligors were also expected to be treated differently from the more non-cooperative ones, which was a somewhat awkward and yet actual phenomenon. In reality, it was not an easy task to undertake. The treatment of non-cooperative obligors was an integral component in the overall law enforcement endeavors, and as explained above, the socio-political conditions in Indonesia before mid 2002 was the least conducive for the government to formulate and execute an effective policy as required. As a matter of fact, making of government policies in many sectors at that time was not half as difficult as carrying them out. Even after mid 2002, when there was a less perplexing socio-political atmosphere, the execution of government policy in the law enforcement undertakings was repeatedly hampered by the structural dysfunctional legal and court system. As a result, there were no effective and coordinated law enforcement undertakings to confront non-cooperative obligors before 2003.

Before 2002, there had been concerted efforts on the part of IBRA to initiate coordination with law enforcement agencies to handle recalcitrant obligors, because IBRA itself was not a law enforcement institution. The main idea was to establish a government task force to take charge of IBRA's recalcitrant obligors, in which the Office of the Attorney General and the Police would be key members. Nevertheless, after a series of meetings initiated by the Office of the Coordinating Minister of Economics, the proposal was more or less dropped and the task force was instituted. Part of the reasons was sectoral arrogance. The main law enforcement agencies might have felt that such a task force would undermine their legal function and responsibilities as sanctioned by the relevant laws and regulations, and somehow would lessen their freedom to decide which cases were worth investigating or prosecuting. According to the original design, IBRA would have had a veto regarding which obligors were recalcitrant and which were not, because it was considered important to prevent uncoordinated undertakings. Apparently, the agencies were not ready to be told how to run their business, and for them criminals were just criminals. The other part was lack of legitimacy. At the very basic, the Attorney General, the Head of Police, and the Coordinating Minister of Economics were all assistants to the President. Nevertheless, the public prosecutors and the police were each regulated by separate statutes. It was therefore considered to be illegitimate to regulate the said task force in the form of a ministerial decree. These arguments seem small-minded and did not touch the underlying issues on how to handle IBRA's recalcitrant obligors, but they became a major concern during the period when there was no strong leadership and everyone was in a standstill state of mind.

government agency that had the authority to determine whether an obligor was non-cooperative. Furthermore, the Presidential Instruction indirectly indicated that the handling of non-cooperative obligors would be undertaken by the Office of the Attorney General and or the Police, since IBRA was not a law enforcement agency.

Statistically, IBRA assigned more non-cooperative obligors to the Police after the issuance of the said Presidential Instruction, and there had been neither investigations nor prosecutions that had been conducted by the law enforcement agencies against cooperative obligors during the same period. The level of compliance also increased from 7.7 percent before the issuance of the Presidential Instruction to 76.9 percent after its issuance. It should not come as a surprise that not all obligors who had signed settlement agreements with IBRA were able to complete their full contractual obligations, because the shareholder settlements were by nature voluntary and very much depended on the willingness of the obligors to comply in good faith. This brings us to the question of whether the aforesaid settlement agreements were valid and binding upon the contracting parties and whether each one of them was enforceable like a statutory law.

B. CONTRACT VALIDITY AND ENFORCEABILITY

1. Principles and Rules

During discussions about the inception, the implementation, and the completion of the Shareholder Settlement Program in the previous Chapter, and the various types of shareholder settlement agreements in the preceding Section of this Chapter, it has been premised implicitly that the settlement agreements between IBRA and the IBRA banks' controlling shareholders were legally binding contracts and therefore were enforceable upon the contracting parties. The premise was based on the assumption that each of the shareholder settlement agreements was a valid contract, both in terms its making and the legal ramifications it had, and was intended to engender assurance that the contracting parties keep to their agreements and that as few avenues as possible should be afforded for escape from contractual obligations. So to say, the fundamental function of Contract Law, is to deter people from behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and to make costly self-protective measures unnecessary.[442]

A contract consists of one or more actionable promises. A contract is a promise or a set of promises for the breach of which the law provides a remedy, or the performance of which the law in some way recognizes as a duty. Meanwhile, every such promise involves at least two parties, a promisor and a promisee, and an outward expression of common intention and of expectation as to the declaration or assurance contained in the promise. In practice, this outward expression of common intention and of expectation normally takes the form of a contract. Therefore, it is necessary to ascertain at the outset, whether or not a valid and binding agreement had been concluded in accordance with the prevailing positive laws.[443]

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442 Richard A. Posner, *Economic Analysis of Law* (Little, Brown and Company, 3rd ed., 1986), p. 81. It could further be proposed, that the contract itself was the product of a desirable economic consideration or decision, and therefore it is value maximizing in nature. This remains to be discussed further, but at this point and in relation to this study, it is assumed that the making of the contract was less expensive than not having a contract at all to regulate the settlement agreement between IBRA and the banks shareholders. It does not mean that there could not have been any other way to regulate the agreement between the contracting parties; there was indeed, but it would have cost more. Nevertheless, the importance of formulating a proper contract should not second guess the importance of executing that contract, and it could certainly be viewed from a relevant economic analysis of the legal phenomena or acts.

443 The inquiry into the validity and sanctity of a contract is not as simple as it may seem, because it questions the legitimacy of the legal binding nature of a contract that was influenced by many important subject matters concerning the existence and the implementation of the regulatory framework on the making and execution of a contract. Contract Law may provisionally be described as that branch of the law that determines the circumstances under which a promise shall be legally binding on the person making it. *See generally* J. Beatson, Anson's Law of Contract (Oxford University Press, 28th edition, 2002), pp. 1-9. Contract Law is also part of the law of obligations that has traditionally been divided into contractual obligations, which are voluntary undertaken and owed to a specific person or persons, and obligations in tort that are based on the wrongful infliction of harm to certain protected interests, primarily imposed by the law, and typically owed to a wider class of persons. From the perspective of an economic analysis of law, the validity and enforceability of a contract are the predominant requirements to

Contract Law in Indonesia primarily originates from the laws and legislations that were in force during the Dutch colonial government, which followed closely the rules and legal text of the Kingdom of the Netherlands as a consequence of the principle of concordance,[444] and remained valid following the independence of Indonesia in 1945 based on Article II of the Transitional Provision of the 1945 Constitution.[445] Meanwhile, as the result of the colonial administration of justice, the private law in Indonesia had an apparent heterogeneous character, in which the private and commercial law differs from one population group to another and from area to another.[446]

The making and the execution of a contract has to be based on and judged by the applicable Contract Law as stipulated in the Indonesian Civil Code and Commercial Code.[447] Basically the Codes copied the 1838 Dutch Civil and Commercial Codes, which remained very close to the Napoleonic Code Civil (1804) and *Code de Commerce* (1807). Unlike the Netherlands, which in 1992 managed to enact a new civil code which in many respects differs from the old and thus from the French civil code,[448] the Indonesian Civil Code has maintained most of the principles and rules it inherited from the 1838 Dutch Civil Code.

Under the Indonesian Civil Code, Contract Law is stipulated in Book Three and laid down primarily in Articles 1313-1351 under the sub-heading of Chapter II concerning Obligations Resulting from Contract or Consent. Clearly, the Contract Law is part of the law of obliga-

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make the transaction economically desirable. What is desirable? If the contract was valid, then it would also be enforceable. The enforceability of a contract would cause the contracting parties to fulfill their obligations as contracted amicably, which would be less costly than to make them fulfill their contractual obligation by force. The inquiries could go on and on, infinitely and lost, but the Study is based on the premise that the validity and the enforceability of a contract is a prerequirement for the contract to function efficiently as the medium in which the settlement agreements between IBRA and the banks' owners were regulated. At the very least, it was efficient because it was out-of-court in nature. In other words, there were no costs from erroneous judicial determination and costs to operating the court system.

444 The principle of concordance was based on Article 131 paragraph 2(a) of *Indische Staatsregeling* ("I.S."), which is to be regarded as the Constitution of the Netherlands Indies. This Article states among others, that the civil and commercial law applicable to the population group of Europeans must be the same as the law in force in the Netherlands. This principle of concordance was also the cause for the validity of Dutch legal doctrine and case law in today's legal practice even after Indonesia obtained its independence in 1945. *See generally* Sudargo Gautama, *Indonesian Business Law* (PT Citra Aditya Bakti, 2002), pp. 5-9. Furthermore, references to several imminent Dutch law scholars on the matter in question have been inevitably due to the principle of concordance, but it would mainly be focused on the compatible positive legal norms as prevailed in the Kingdom of Netherlands, in particular in the (old) 1838 Dutch Contract and Civil laws.

445 The Republic of Indonesia declared its independence on August 17, 1945, while the Kingdom of the Netherlands recognized the independence after the so called "transfer of sovereignty" on December 27, 1949. From a historical perspective, there is a distinction between Indonesian nationalists' view and the Dutch official interpretation, on when Indonesia's independence was obtained. The Transitional Provision of the 1945 Constitution was meant to prevent a legal vacuum, by which all regulations in force at the time of independence were declared to remain valid, unless and/or until replaced with new ones.

446 The basis of legal pluralism in Indonesia was Article 163 I.S. Based on this provision, all living persons in Indonesia were divided into three population groups: 1) the Europeans (*Europeanen*), 2) the Natives (*Inlanders*), and 3) the Foreign Orientals (*Vreemde Oosterlingen*) that consisted of Chinese and Non-Chinese. The division of colonial society into these population groups brought about different applicable private laws for different population groups, and in practice this condition has survived Indonesia's independence notwithstanding continuing efforts to develop unified national laws and regulations. After Indonesia's independence, most of the private laws applicable to the Europeans in Indonesia were similar to those in force in the Netherlands, with the exception of certain matters, namely child adoption, business association, and bankruptcy proceedings. Since 1917, the aforesaid private laws applicable for Europeans were also made applicable to Foreign Oriental Chinese. Later in 1924, with the exception of family and heritage laws, the said private laws were also made applicable to Foreign Non-Chinese Orientals.

As for the Natives, the private law applicable for Europeans was never applied in its entirety. However, there were certain ways for Natives to make use of the private laws applicable for Europeans. This was namely the result of official equalization (*gelijkstelling*) or by means of voluntary submission (*onderwerping*), or by choice of law in interpersonal relations (*intergentiel recht*). In practice, more and more people made use in their daily lives of legal institutions and transactions regulated in the Civil and Commercial Codes, without explicit declaration. It was not until 1960 that Indonesia started to end this legal pluralism at the national level, markedly since the enactment of the Law No. 5 of 1960 concerning the Principles of Land Law even though in a very fractional manner. Since then, the government has issued several national laws that are applicable to all living persons in Indonesia uniformly, including but not limited to the Marriage Law of 1974, the Company Law of 1995, the Land Mortgage Law of 1996, and the Fiducia Law of 1999. *See generally* Sudargo Gautama.

447 Enacted and promulgated in the State Gazette No. 23, dated April 30, 1847. In 1963, the Supreme Court issued a circular letter No. 3 in which the Judiciary was of the opinion that the prevailing Civil Code and Commercial Code should be regarded as guidebooks only and yet the court elaborated that only certain specified articles of the Civil Code were no longer valid. Needless to say, the circular contained contradicting views regarding the validity of the Civil Code in its entirety, which had generated uncertainty in the legal system and among the judges. However, the majority of judges have accepted that not the whole Civil Code was invalid, although certain provisions might be invalid without legislative repeal. In 1996, the People Consultative Assembly (MPR) issued a decree that authorized the judiciary to undertake judicial review in regard to legislations and decrees of the MPR that were considered to be contrary with the 1945 Constitution. Based on the aforesaid, it would be reasonable to conclude that the Indonesian Civil Code and Commercial Code remain valid and binding until now, unless and until replaced with new ones. *See* Sudargo Gautama, *supra*. *See generally* Herlien Budiono, *Asas Keseimbangan Bagi Hukum Perjanjian Indonesia, Hukum Perjanjian Berlandasakan Asas-asas Wigati Indonesia* (Tristam P. Moeliono trans., 2006).

448 Sanne Taekema et al., ed., *Understanding Dutch Law* (Boom Juridische Studieboeken, 2004), p. 58. *See also* Jeroen Chorus, Piet-Hein Gerver and Ewoud Hondious ("Jeroen Chorus et al., ed."), *Introduction to Dutch Law* (Kluwer Law International, 4th edition, 2006), p. 15. *See generally* Hans Warendorf, Richard Thomas and Ian Curry-Sumner ("Hans Warendorf et al."), *The Civil Code of the Netherlands* (Wolters Kluwer, Kluwer Law International, 2009) pp. xxi-xxiii.+

tions that covers broader subject matters, namely obligations in general (Chapter I), obligations in tort (Chapter III), and the closure of obligations (Chapter IV), which also apply to the Contract Law. There are also sets of regulations applicable for certain types of agreements, as elaborated in Chapters V-XVIII. Moreover, according to Article 1339 of the Civil Code, an agreement is not only binding in regard to the terms and conditions it explicitly contains, but also regarding any other matters that due to the nature of the agreement are binding as a result of the applicable principle of reasonableness, local customary practices, or legislations.

Contract Law contains the basic legal principles and the rules concerning all matters related to contractual obligations as made between two or more parties. It does not only regulate the validity of a contract, but also the consequences of such a contract, its interpretation, and its execution, as well as its completion. Contract Law is constructed on the basis of certain landmark principles, which also function as the light-house in the implementation of the said law, while the making of a contract is made possible by the application of certain rules as laid down in the said law. Therefore, it is important for this study to elaborate some of the basic principles that are profoundly relevant to the Contract Law as applicable in Indonesia.

a) The Main Principles

The discussion about the basic principles that are considered to be the supporting foundation of Contract Law will help reveal the background reasoning and the understanding of the said Law. The study is intended to address only the main and foremost principles as found or inferred in Contract Law as applicable in Indonesia, which the author believes are closely relevant to this Study. The Study is also prepared to offer a conclusion whether or not the shareholder settlement agreement as signed by IBRA and the banks' shareholders was valid and legally binding, in particular from the prevailing Contract Law perspective. With such a background, there are basically **"four important principles"** that can be construed from relevant provisions in the Contract Law that are crucial for this Study.[449] They are as follows:

i) The Principle of Privé

The principle of *privé* is the first ground norm that can be found in Contract Law and is stipulated in Article 1315 of the Indonesian Civil Code, which says *"Generally, no one is allowed to establish an obligation or to conclude an agreement except for or on behalf of oneself"*. There are at least two basic premises contained in this provision. For one thing, the wordings in Article 1315 clearly assert that an agreement made by a natural person is only applicable and obligate to the person himself.[450]

Another point is that Article 1315 emphasizes the significance of individual autonomy to determine what is best for the individual. It is the first principle of liberal political morality

449 *In retrospective,* J.H. Nieuwenhuis proposed three basic principles of Contract Law as it applied under the 1838 Dutch Civil Code, which can be translated as follows: 1) contract freedom, 2) contractual sanctity, and 3) the principle of autonomy. *See* J.H. Nieuwenhuis, *Drie Beginselen van Contractenrecht en Uitzonderingen*, *Hoofdstukken Verbintenissenrecht, Hoofdstuk V* (Kluwer, Deventer, 1974). *See also* DR. L. C. Hofmann, *Het Nederlands Verbintenissenrecht: De Algemene Leer van de Verbintenissen, Deel 1 (Artt. 1269-1387 B.W. & Tweede Gedeelte (Artt. 1302-1303 and 1349-1387 B.W.),* as explained by S.N. van Opstall and/or P. Abas (H.D. Tjeenk Willink B.V., 9th edition, Groningen 1977), who proposed that there are three basic principles of Contract Law under the 1838 Dutch Civil Code, which could be translated as follows: 1) the freedom of contract, 2) the mutual consent, and 3) the contractual sanctity.

450 However, there are exceptions to the aforesaid provision, which are stipulated in Articles 1316 and 1317 of the Indonesian Civil Code. Article 1316 allows a person to guarantee or to secure another person that a third party will perform something as promised, in case this third party refused to fulfill the agreement. This provision opens the possibility of a co-debtor arrangement, as elaborated in Article 1280, in which there is more than one debtor for the interest of a creditor. However, when observed more closely, Article 1316 is not a direct exemption to Article 1315, because any obligation or agreement as promised on the basis of the said Articles are only applicable to and obligate only the person who has made the promise. In other words, the principle of *privé* applies as well. Meanwhile, Article 1317 allows a third party to benefit from something or to receive something on the basis of a requirement as agreed by other persons, which cannot be withdrawn if the third party has declared or acted to accept such benefit. In practice, this provision has been used widely as the basis for an insurance contract in which there is a third party beneficiary besides the insurer and the insured. Unlike Article 1316, the Article 1317 paragraph (2) is an exemption to Article 1315. *See in particular* A. Pitlo, in cooperation with M.F.H.J. Bolweg, *Het Verbintenissenrecht naar Het Nederlands Burgelijk Wetboek* (H.D. Tjeenk Willink B.V., Groningen, 7th edition, 1974), p. 171. *Nevertheless, see generally* Gunawan Widjaja, *Memahami Prinsip Keterbukaan (aanvullend recht) dalam Hukum Perdata* (PT Raja Grafindo Persada, 2006), pp. 250-257. *See also* Sudargo Gautama, pp. 86-87.

that we can feel secure as to what is ours so that our person and property will not be open to exploitation by others and that from a strong foundation we may express our will and expand our power in this world. This individual autonomy gives a living person a natural right to perform juridical acts on his own behalf, such as to impose on him obligations where none existed before, including to binding his personal properties as well.[451]

The importance of natural right and individualism has been the cornerstone of the *Renaissance* movement during the fourteenth and sixteenth centuries in Europe, which was marked by two important events that brought into life factors from which the modern world was born.[452] Without exception, the Dutch legal system and legal traditions have also been strongly influenced by this movement and were later incorporated into the prevailing laws and legislations, including in Dutch civil law. As a matter of fact, the concept of natural rights and the spirit of individualism have been the foundation of many law principles that are incorporated into the Indonesian Civil and Commercial Codes that were inherited from the colonial government, such as the following principles.

ii) The Principle of Freedom of Contract

The significance of the roles contracts play in any economic system can hardly be denied. The issue is the extent to which the law does, or should, assume that parties enjoy the freedom of economic decision when they enter into contracts. The principle of freedom of contract basically has two meanings. The *first* is the freedom of any living person to choose to enter into a contract on whatever terms he may consider advantageous to his interests, or to choose not to.[453] Contractual obligation is thereby attributed to the will of the parties, which was one of the cornerstones of nineteenth-century *laissez-faire* economics. It was generally assumed during this period that, as Adam Smith had proclaimed, the freedom to make enforceable bargains would encourage individual entrepreneurial activity.[454] Freedom of contract was taken up as an ideal into the classical economic theory.[455]

Meanwhile, freedom of contract also refers to the second idea that, as a general rule, there should be no liability without consent embodied in a valid contract.[456] This second and negative aspect of the principle of freedom of contract has been influential in narrowing the scope of those parts of the law of obligation which deal with liability imposed by the law, namely liability based on tort and liability based on risk. The rules of Contract Law impose limitations on the principle of freedom of contract, such as the principle of reasonableness and fairness, the principle of good faith, and the importance of public order, but there are many rules which are better understood as ways to guarantee that contractual freedom has real meaning.

Freedom of contract is recognized as the unwritten basic principles of Contract Law. As a matter of fact, there are probably no other enacted laws and legislations that clearly

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451 *See* Article 1131 of the Indonesian Civil Code that states "*Any property of the debtor, either moveable or immoveable, that either already exists or shall exist in the future, becomes collateral for any personal bindings/agreements*".

452 John M. Kelly, *A Short History of Western Legal Theory* (Calderon Press-Oxford, 1992), p. 159. These are namely the revival of the old Greco-Roman tradition in art and literature and the fracturing of the Old Catholic unity of Western Europe with the Protestant Reformation. The secularization of public life and the emancipation of the lay individual from spiritual authority, in turn found expression in its legal theory as was happening elsewhere. *See also* Herlien Budiono, *supra*.

453 J. Beatson, *supra,* p. 4.

454 *See* E. Allan Farnsworth, *Contracts* (Little, Brown and Company, 2nd edition, 1990), p. 21.

455 J. Beatson, *supra*.

456 J. Beatson, *ibid.*

recognize this principle.[457] Nevertheless, the principle can be construed from the relevant provisions in the Indonesian Civil Code that regulate the contents of contracts. Because the basis of Contract Law is the freedom of parties to determine their own joint will, the most important part of the contract consists of the explicit agreement between parties as laid down in the clauses of the contract.[458] Nowadays, freedom of contract is generally regarded as a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed and no injury is done to the economic interests of the community at large.[459]

There are statutory restrictions, such as in the field of the employer-employee relationship, consumer and investor protection, as well as in unfair trading and competition, in which the legislative provisions will override any contrary terms the parties may make for themselves. Despite the recent development of increasing government or administrative interferences into Contract Law on the basis of protecting public interest, which has somewhat weakened the application of the individual autonomy of the parties in many private undertakings, Contract Law does still rest on the assumption of freedom of choice.

iii) The Principle of Consensus

Closely related to the principle of freedom of contract is the principle of consensus. Because contracts are made by two or more parties, the will of only one party is insufficient. There has to be an agreement between all the parties about the terms of the contract. Based on Article 1320 paragraph (1) of the Indonesian Civil Code, a contract can only be valid and binding if it is based on the agreement of all the parties to the contract. As a rule of thumb, even a verbal consent between the parties is sufficient to make a contract valid and legally binding.[460]

Agreements are relational in nature, and therefore one person must make a promise to another, and the second person must accept it. Offer and acceptance are needed to determine whether an agreement has actually been concluded. In general, there are no formalities that have to be met by the offer and/or the acceptance to establish an agreement. There are, however, circumstances under which an agreement can only be valid and binding if it meets certain formalities,[461] such as the transfer of account receivables and other intangible goods (Article

457 Herlien Budiono, *supra,* p. 105.

458 In this regards, Article 1320 paragraph (4) of the Indonesian Civil Code determines that one of the qualifications for the conclusion of a valid contract is that it contains "a lawful cause". In the 1838 Dutch Civil Code, the equivalent provision was Article 1356 (4). In this context, Article 1337 of the Indonesian Civil Code clearly explains that "a cause" is unlawful if it is prohibited by statute or if it is contrary to good morals or against public order. In other words, every living person is free to enter into a contract and on whatever terms, as long as the contract is not about something that is against applicable statute, good morals, or public order. *See generally* Gunawan Widjaja, pp. 275-276.

459 J. Beatson, *supra*, p. 4.

460 Under the said article there are no formal requirements or procedures that need to be observed in order to conclude an agreement, except perhaps in certain particular circumstances to be explained later, and a consensus between parties is sufficient to institute a contract. The principle of consensus in Indonesian Contract Law can be traced back to the evolution that took place in Roman Contract Law. The earliest form of contract in ancient Rome was called a "stipulation" (derived from the Latin word *stipulatio*), which was a method of contracting that required the parties to recite a rigid formulaic question-and-answer. The Romans next developed a group of contracts dealing with the delivery of certain types of things, which were called "real" contracts (derived from the Latin word of *res*, or things). These types of contracts were generally affected by delivery only, and never by a mere promise. This type of contract is arguably similar in character to the particulars of Indonesian customary laws (*Adatrecht*), in which no enforceable obligation arises until the moment the thing being contracted for has been actually transferred/delivered. However, it is possible for the parties to seal their intention with a binder, in the form of a small amount of money or other objects, the transfer of which operates as a kind of down payment or as a token of good faith. Once the binder is conveyed, the parties feel morally bound to perform and will rarely back down (*See* Sudargo Gautama, supra, pp. 68-74). Finally, Roman law progressed to the point where all that was required to create a contract was the simple agreement of the parties. These contracts were called "consensual" contracts. In perspective, Roman Contract Law progressively advanced from very formal, formulaic requirements for creating a contract, to a stage at which parties merely had to agree without a strictly delineated pattern or structure. *See* E. Allan Farnsworth, *supra,* pp. 10-12. *See also* Herlien Budiono, *supra,* pp. 96-100.

461 For instance, Article 1666 of the Indonesian Civil Code states "*a donation (a gift) is an agreement by which the donor during his life transfers at no cost and irrevocably some property to the donee who accepts it"*. Furthermore, Article 1683 states "*no donation will be binding to or having any effect on the part of the benefactor that as from the day it shall be accepted in specific wording, either by the donee in person, or by another person who has been empowered by an authentic deed to accept donations, having been made or to be made in future to the donee*". Clearly, a donation is an agreement and therefore requires an offer and an acceptance. However, the said agreement has no legal effect unless it meets a certain formality. In this context, Article 1682 states "*no donation shall, except for donations as mentioned in Article 1687, on penalty of nullification, be concluded unless by a notarial deed, the minute of which shall be deposited with a notary*". Article 1687 of the Indonesian Civil Code states "*Donations from hand to hand, of moveable tangible properties or debt recovery letters to bearer, do*

613 of the Indonesian Civil Code), the establishment of a company under the Company Law, and the institution of land mortgage (Law No. 4 of 1996).

The fact that an agreement has been reached will frequently become self-evident, since, as a general rule, the Indonesian Civil Code has no requirements of writing of any form, and therefore it is most likely that the agreement will be set out in a document signed or initialed by both parties. But, under certain circumstances, it may be more difficult to discover whether the parties have agreed. Difficulties of proof will then arise and the resulting questions from the fact will have to be determined by a trial judge from the evidence given by the parties and their witnesses.

iv) The Principle of Contractual Sanctity

This principle is probably the most important premise in Contract Law, in which Article 1338 of the Indonesian Civil Code states: *"All contracts that are validly made shall apply as the law between the parties thereto. A contract is not revocable except with the consent of both parties, or for the reasons that by law are sufficient. A contract must be performed in good faith"*.[462] The said provision reflects the well-known principle of "pacta nuda a solemnitate sunt servanda", as introduced by Grotius (1583-1645) in his effort to seek justification for consensualism within the law of nature.[463]

If we accept the said principles as true and prevail, that each living person has the individual autonomy to determine what is best for him, and that he is generally free to enter into a contract with whomever he may choose on whatever terms, and that he is allowed to impose on himself obligations where none existed before, it would be only logical to recognize promissory obligations as contained in a contract or contracts as essentially self-imposed. One of the prominent legal scholars in Contract Law has argued that the obligation to keep a promise is primarily grounded in respect of individual autonomy and in trust, and therefore established from moral obligation rather than from external sanctions, which is similar but more constraining than the obligation to tell the truth.[464]

A contract must be performed by the parties in *good faith*. Arguably, the institution of good faith is one of the most direct challenges to the conception of Contract Law as a coherent expression of the principle of individual autonomy. The other known challenges include unfairness and duress, which can be inferred from the principle of good faith as well. The principle of good faith is said to challenge the concept of contract as promise because in one way or another it denies that promise is sufficient to define the relations between contracting parties. The challenge is based on the premise that even where there has been an explicit agreement, it is not the agreement but judgments of fairness and the substantive good that define how people should behave toward each other. *Good faith* is a way of dealing with a contractual party and within a contractual arrangement.[465]

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not need any deed and will be valid by rendering to the donee or to a third person, who will accept the donation for him".

462 *For further reading see* J.H. Nieuwenhuis, p. 105. *See also* Hofmann-Opstall-Abas, *infra,* pp. 11-12.

463 LB Curzon, Q&A Series Jurisprudence (Cavendish Publishing Limited, 3rd edition, 2001).

464 *See generally* Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981). Indeed, trust becomes a powerful tool for our mutual wills in the world, and the device that gives trust its sharpest and most concrete form is promise. In reality, there exists a convention that defines the practices of promising and its entailments, which provides a way that a person may create expectations in others. Therefore, it is wrong to invoke that convention in order to make a promise, and then break it (Charles Fried, p. 17). The vital function of contracts, particularly in commercial undertakings where speed and certainty have been said to be of paramount importance, requires that the Contract Law gives remedy for a breach of contract and recognizes the performance of a promise or promises as a duty. Businesspeople in particular are concerned to ensure that the parties to a contract keep to their promises, and that as few venues as possible should be afforded for escape from contractual obligations. Hence, it is judicious to find that the Indonesian Civil Code clearly establishes that a valid contract is legally binding upon the contracting parties, the fulfillment of which can be enforced before a court of justice. *See also* J. Beatson, *supra*, pp. 2-3.

465 The concept of good faith is regularly invoked not only to condemn deception and lack of sincerity at the time a bargain is concluded, but also to require a forthcoming attitude, to condemn unbecoming behavior and dishonesty in the carrying out of the contractual obligations. Although Indonesian Contract

b) The Formation of a Contract

The discussion of Contract Law can simply follow the different phases in the life of a contract, namely how it comes into being, what the consequences are when it exists and what rules govern its content, and how it ends. At the outset, it is crucial to comprehend the meaning of a contract between two or more parties and to make sure that such a contract has been validly concluded as to make it binding and enforceable. In this regards, Article 1313 of the Indonesian Civil Code states *"An agreement is a juridical act of two or more persons binding themselves to one or more other persons"*.[466] The said provision clearly defines that an agreement gives birth to a legal obligation of one party towards another, in which such a party has given his promise to the other party or parties that he will undertake to perform or deliver something and that the other party or parties are entitled to benefit from the said performance or delivery.[467]

Unfortunately, not all promises are legally enforceable and therefore not all contracts are legally enforceable. A contract must meet certain rules as stipulated in Contract Law in order to make it valid and hence legally enforceable. In this context, Article 1320 of the Indonesian Civil Code states *"To establish a valid contract, four elements are required: 1) the consent of the parties; 2) the capacity to contract; 3) a subject certain; and 4) a lawful cause"*. These four elements can further be classified into 2 main parameters, namely the subjective parameter covering the first and the second elements that are concerned with the contracting parties, and the objective parameter comprising the third and fourth elements that are associated with the matter of a contract.[468]

For a contract to be valid, **the parties must consent** to the basic matters in the agreement. To determine whether an agreement has actually been concluded, it is normally necessary to inquire whether in the negotiations which have taken place between the parties there has been a definite offer by one party, and an equally definite acceptance of that offer by the other. Offer and acceptance may take place in many forms, whether written or spoken, but an agreement may also be inferred from conduct alone. There will be no valid contract if the associated consent was given by mistake, under duress, or due to fraud (Articles 1321-1328).[469] Indeed, for a promissory

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Law is fairly reluctant to admit excuses for non-performance, courts do take into account the aforesaid challenges in interpreting a contract or contracts. Additionally, statutory protection often overrides unfair terms in certain types of contracts, for example those that have been made between consumers and businesses, and employees and employers. In most commercial relationships, various types of pressures are frequently brought to bear and terms may be imposed which are obnoxious, but the contract will still bind. The law will hardly permit a person of full age and understanding who failed to read the contract or to appreciate its full effect to escape from the contract. It will not re-write a contract for the parties or imply additional provisions merely because it would be reasonable to do so. On the contrary, the law will normally give effect to a contract in accordance with its recorded terms and conditions, and not admit evidence to show that one party intended them to be construed in a different way from that which they actually express. In this line of thought, one should not imagine that contractual obligations can be repudiated by one party merely because that party was in the weaker bargaining position. As the application of the principle of good faith more often than not depends on a court's judgment or statutory restrictions, it seems as if contractual relations depend not on the will of the parties but on externally imposed substantive moral judgments of what the relations between parties should be. Nevertheless, there are cases in which the court is more than willing to intervene and to modify contract provisions where such intervention is called for by standards of reasonableness and equity. As a matter of fact, the principle of reasonableness and fairness (*redelijkheid en billijkheid*) is among the most important legal rules that can be characterized as open norms, which has been invoked in many provisions in Contract Law as well as throughout the Indonesian Civil Code. *See generally* Sudargo Gautama, *supra,* pp. 85-86. *See also* Herlien Budiono, *supra,* pp. 100-104, and *in particular* Gunawan Widjaja, *supra*, p. 283-285.

466 The term "agreement" is used interchangeably with the term "contract". During the early years of legal education in Indonesia, it was taught that a contract is an agreement in writing between two or more parties. In other words, an agreement can be reached either verbally or in writing, or in any other forms. In this context, an agreement is pretty similar to the terminology of consensus or consent. In Article 1313 of the Indonesian Civil Code, we can find the meaning of obligatory agreement (*de obligatoire overeenkomst*). *See* A. Pitlo, *supra*. *See also* Sudargo Gautama.

467 As the said Article 1313 recognizes contractual obligation as based on promise, on the obligation that the parties have themselves assumed, the focus of the inquiry is on the will of the parties. It is the principle of will by which persons may impose on themselves obligations where none existed before and, therefore sees contractual obligations as essentially self-imposed. The principle of will has been recognized as the foundation of contractual binding. There is also the principle of declaration and the principle of reliance, which have been accepted as the basis of contractual binding as well. Regardless, the Indonesian Civil Code primarily bases contractual binding on the will of the parties and the trust as developed thereof at the time the parties reached an agreement regarding the contractual terms. The wordings of the said Article also imply that in every contract there are always at least two parties involved, in which the first party is obligated to perform or deliver something and the second party is protected by law to enforce the first party to perform or deliver as promised. *See* Sudargo Gautama, *supra. For Further reading see* Hofmann-Opstall-Abas*. See also* A. Pitlo, *supra*.

468 Gunawan Widjaja, *supra,* p. 286. In the 1838 Dutch Civil Code, Article 1320 of Indonesian Civil Code was equivalent with Article 1356.

469 "Mistakes" (*dwaling*) can be of two kinds, namely those involving the identity of the subject matter of the contract, and those involving the identity of the person with whom the contract is made. "Duress" (*dwang*) is any unlawful

obligation to be truly self-imposed, the promise must have been given freely.

The prevailing **Contract Law limits the capacity** of certain persons to bind them by a promise, or to enforce a promise made to them. As a general rule, all persons are legally capable of entering into contracts, except i) minors, ii) persons placed under guardianship *(curatele)*, and iii) married women, in the matters determined by the law, and in general to whom the law has restricted to enter into certain agreements (Articles 1329-1330 of Indonesian Civil Code). The underlying policy of rules limiting contractual capacity is to protect those under the said category against their own imprudent actions because they are considered incapable of performing juridical acts.[470]

The third requirement of a valid contract is that the **subject matter must be determinable** otherwise the contract is void by virtue of the laws. In this regard, Article 1333 paragraph (1) of the Indonesian Civil Code states *"A contract must have a subject matter in the form of goods at least the type of which can be determined"*. Furthermore, Article 1332 of the Code states "Only trading goods can be the subject matter of a contract". Without the existence of a subject matter that is materialized in the form of certain trading goods, both resulting from the performance as well as the performance itself, it is only logical to construe that there has not been a contract at all and hence there are hardly any obligations binding the contracting parties.[471]

The fourth element of a valid contract, as stipulated in Articles 1335-1337 of the Indonesian Civil Code, is that it **must have a lawful cause** *(oorzaak or causa)*. Contract Law is silent on the meaning of "causa". Nevertheless, it cannot mean a causal relation that gives birth to an agreement, and therefore it is not relevant with the legal doctrine of causality as developed mostly in the tort or criminal law. Moreover, it has nothing to do with the motives of the parties to entering into a contract, because the law is not concerned with what was present in the parties' mind when the agreement was concluded. According to jurisprudence, what has been interpreted as "causa" is basically the main purpose of the contract.[472]

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or illegitimate psychological intimidation or pressure, in which the will of the victim was coerced so as to vitiate consent. Duress can also be due to blackmail or under influence over a person in a weakened mental state. "Fraud" (*bedrog*) is a concealed act performed by one of the parties prior to the formation of the agreement with the intention to deceive the other party and induce him into concluding a contract that he would not otherwise have concluded. The existence of fraud cannot be assumed, and for that reason must be proven. Article 1449 of the Indonesian Civil Code states that contracts that are made by mistake, under duress, or due to fraud, gives right to a claim of annulment. A legal action to defeat contractual obligations on the ground of mistake, duress, or fraud can only be initiated by the injured party, and must be brought within five years of the cessation of the duress or within five years of the discovery of the mistake or fraud (Article 1454). *See* Sudargo Gautama, supra, pp. 76-78. *For further reading see in particular* Hoffman-Opstall-Abas, and *see also* A. Pitlo, *supra*.

470 In this regards, Articles 1446-1450 jo. Article 1454 of the Indonesian Civil Code clearly describe that all contracts concluded by minors or persons under guardianship shall be annulled by a court of law upon application of these categories of persons or their legitimate representatives, provided the action was brought within five years of the termination of the incapacity. Contracts which are made by married women shall be void by virtue of laws, only if such contracts surpass these women's authorities and were brought within five years as of the day of a divorce (if any). As far as minors and persons placed under guardianship are concerned, the claim of annulment can only be brought by the said categories of persons and will naturally be carried out if the said persons are injured. Therefore, the obligation of the other party to the contract is unaffected by incapacity unless and until the contract is annulled (Article 1331 of Indonesian Civil Code). Meanwhile, according to Article 108 of the Indonesian Civil Code, a married woman is lacking of the capacity to enter into contracts, unless with a favor in a deed or with a written approval from her husband. In 1963, however, the Supreme Court issued a circular deciding that Article 108 was no longer in force, because it was regarded as being contrary to the spirit of equality between genders. *Supra,* Supreme Court circular No. 3 of 1963. Although no legislative repeal has yet been enacted to revoke or replace the said provision, the lower courts seem to be following the said circular. *See* Sudargo Gautama, pp. 78-79.

471 The said arrangement, so to say, becomes an empty contract. As a general rule, the subject matters of a contract can be rights, services, goods, or things, whether in existence or to come into existence, so long as they are determinable. It is enough that the type of goods involved be mentioned in the contract, and yet it is not necessary to specify the precise quantity in the future (paragraph (2) Article 1333). On the other hand, all conditions in a contract to undertake a specific item that are impossible to be performed, shall be declared null and void, and hence the agreement which is depended on that conditions also becomes invalid (Article 1254). *See generally* Sudargo Gautama.

472 Unlike the third element, it is hardly straightforward to determine the existence of a lawful cause from the wordings in a contract. Any contracting parties can have the content of a contract formulated in such a way as to conceal the true purpose of the agreement. Nevertheless, an ostensibly valid contract may be tainted by illegality. Article 1337 of the Indonesian Civil Code determines "*A cause would be unlawful if it is prohibited by statute or if it is contrary to good morals or against public order*". Accordingly, in some instances the law may prohibit the agreement itself and the contract is then by nature illegal, but in the majority of cases the illegality lies in the object which one or both parties may have had in mind or in the method of performance. The subject of illegality is one of great complexity and the effects of illegality are by no means uniform because the seriousness of the illegality varies. Illegal objects may range from those tainted with evil, such as murder, to those where the harm to be prevented is relatively insignificant, such as a breach of licensing requirements or cases in which a person commits an unlawful act in order to escape danger to his life or the life of his family. Theoretically, one may make a distinction between illegal contracts where the law will refuse to aid a person whose cause of action is established upon such a contract, and those contracts of which the law simply says that they are void and have no legal effect. Notwithstanding, illegality covers a multitude of circumstances where the law, as a result of a statutory prohibition or for some reason of public policy, denies to one or both of the parties the contractual rights to which the party or parties would otherwise be entitled. For that reason, no person who is aware of the illegal nature of a contract can enforce it, or take benefit from it, or recover money or property transferred under it. *See generally* Prof. Subekti SH, *Pokok-pokok Hukum Perdata* (PT Intermasa, 19th ed., 2001).

The fact that there are requirements for a contract to be valid and legally binding engenders a confirmed legal ramification that the failure of meeting such requirements would make the contract invalid and/or unenforceable. This brings us to the issue of nullity of contract, as elaborated in Articles 1446-1456 of the Indonesian Civil Code. Different types of contract encompass different attributes, and therefore the nullity of a contract will depend on its own characteristics. As a general rule, the nullity of a contract can distinctively be elaborated into agreements that are null by virtue of the law and agreements that can be annulled upon claim.[473]

2. Validity of The Settlement Agreements

The shareholder settlement agreements as signed by the IBRA banks' shareholders and the government under the auspices of the Shareholder Settlement Program as carried out by IBRA are probably the first of its kind ever to have taken place in Indonesia and contained many interesting features that will be discussed in this study. It is therefore imperative to analyze whether or not these agreements have fulfilled the requirements to be valid and legally binding contracts. A valid and legally binding contract, at the fist instance, will provide the essential legal standing for the contracting parties to enforce the said contracts one upon the other, while on the other hand, it is also important to determine the extent to which the settlement agreements can be adjusted in order to make them more workable.[474]

To substantiate whether the shareholder settlement agreements had been validly concluded and therefore were legally binding upon the contracting parties, it is of the utmost necessity to evaluate the factual circumstances at place at the time the settlement agreements were actually signed by the IBRA banks' shareholders and the government. This was especially the case in view of the prevailing legal requirements concerning the making of a valid contract as stipulated in Article 1320 of the Indonesian Civil Code.[475]

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473 In light of the two main parameters of a valid contract as aforementioned, namely the subjective and objective parameter, a contract is null by virtue of law and cannot be enforced if it fails to meet the objective parameters, while a contract can be annulled by a court of law upon application of the injured party if it fails to meet the subjective parameters. Nullity of contract can also be viewed either in a relative sense, where the nullity applies only to certain individuals, or in an absolute sense, by which the nullity applies to all persons without exemption. According to Articles 1451 and 1452 of the Indonesian Civil Code, nullity of a contract means that the relevant act does not have the intended legal consequences and, if there have already been consequences, these need to be undone. In other words, the situations must be brought back to the way it was before the juridical act as contracted was conducted. Meanwhile, an annulment is no more than the active invoking of nullity, and for this reason the result of an annulment is nullity. The Indonesian Civil Code specifically provides the legal standing and procedures for a person to call off an agreement to which he is a contracting party, if the said person is a minor or has been placed under guardianship or if the agreement has been concluded on the basis of mistake, duress or fraud. Both cases concern a faulty determination of one's will, whereby the most fundamental kind of failure in meeting the requirements of a valid contract is indeed the lack of the real will of the parties to make the contract. According to Article 1453, and provided therein for any reason, the party to whom the application of annulment has been addressed may be required to compensate the injured party for expenses, losses, and interests. Meanwhile, due to the Principle of Privé as aforementioned, the Indonesian Civil Code does not have a general rule for a third party to cancel a contract. Regardless, Article 1341 of the Indonesian Civil Code provides an exclusive venue for a creditor to submit a request with the district court for a cancellation of a contract made by the debtor, if the debtor is not compelled to conclude such a contract and that the contract has deteriorated the interest of the creditor. This was known as *Actio Pauliana*. (*For further reading on Actio Pauliana, see* Hoffman-Opstall-Abas, *supra. See also* Prof. Subekti SH. and A. Pitlo, *supra*.) In conclusion, the nullity of a contract can be invoked by the contracting parties or, under some unusual circumstances, a third party by way of application with the court of law. If it was impossible to bring the situation back to the way it was before the juridical act was conducted, the court can award damages to the injured party. *See in particular* Gunawan Widjaja, *supra*, pp. 289-294.

474 It should be noted that the problems during the implementation of the Program were not so much about the making of the settlement agreements themselves, but rather the disputes on the nature and extent of the rights and duties that the parties themselves had created. In other words, the disputes that arose were not over Contract Law, but rather over the law of the contract. As elaborated in the previous Chapter, there was a period when the inception, the implementation, and the completion of the Shareholder Settlement Program were at its worst. During this period, both the government and the IBRA banks' shareholders generally lacked the reasoning and the good faith to carry out the promissory obligations as instituted under the relevant settlement agreements. As was evident, the administration under Gus Dur's presidency tried to review and modify unilaterally the *Master Settlement and Acquisition Agreements* (MSAA) that had been signed by the government and several of the major IBRA banks' controlling shareholders during Habibie's administration based on the allegation that these settlement agreements were built on unconscionable bargains and that it would be contrary to the principle of reasonableness to uphold them. On the other hand, the relevant shareholder settlement obligors were harshly opposed to such unilateral endeavor and argued that nothing was wrong with the content of the settlement agreements and inevitably ceased to comply with the settlement agreements altogether. Meanwhile, the administrative inconsistency and legal uncertainties that had been caused started to worry other unaffected shareholder settlement obligors, and they also began to cease to comply with the settlement agreements. This was the very reason that when Megawati took on the presidency from Gus Dur in 2002, the administration immediately decided to appoint an independent legal-aid team to determine the validity of the settlement agreements, and to review the compliance level of the shareholder settlement obligors. The result of the said due diligence, as was evident, was one of the most important milestones in the inception, the implementation, and the completion of the Shareholder Settlement Program as carried out by IBRA. However, it was not tested before the court of law, except in one particular case.

475 The equivalent legal norm of Article 1320 of the Indonesian Civil Code, as stipulated in the 1838 Dutch Civil Code, was Article 1356. As explained in the previous Chapter, there were basically three distinct periods during which different state of affairs occurred that influenced the way IBRA carried out the Program and influenced the IBRA banks' shareholders' frame of mind in deciding to participate in the Program. The first period was during Habibie's

a) The Consent of the Parties

As the first and most fundamental element of a valid contract, the existence of a real will of the contracting parties to make the contract is the utmost important. In regard to the shareholder settlement agreements, the fact that an agreement had been reached was self-evident since the agreement had been set out in a document signed or initialed by both the government and the IBRA banks' shareholders.[476] Nonetheless, a valid contract can always be annulled if the relevant consent was obtained by mistake, duress, or fraud, upon application by the injured party with the court of law. In light of the shareholder settlement agreements, the question to be asked is whether there was in fact a mistake, duress, or fraud when the government and IBRA banks' shareholders reached the consensus to sign the settlement agreements.

Clearly, the probability of "mistake" in relation with the shareholder settlement agreements was relatively small, whether in regard to the nature of the object that forms the foundation of the contract or in terms of the identity of the person with whom the contract is made (Article 1322 of the Indonesian Civil Code). Mistake, or error, is the defect of will following from a misunderstanding or lack of relevant information. Closely related to mistake is the defect of will called "fraud", which can be described as a special kind of error as it was based on intentional deception of the other party. The nature of the object of the shareholders settlement agreements was seemingly pretty straightforward because before the settlement agreements were actually signed there had been intensive negotiations between the government and the IBRA banks' shareholders during which the parties would have exchanged information relevant to the subject matter of the contract.[477]

There could also not be any "duress" in regard to the shareholder settlement agreements. For one thing, the Shareholder Settlement Program was designed as an opportunity given by the government to the IBRA banks' shareholders to compensate the losses as suffered by the IBRA banks and to share the costs as incurred from the banking crisis. The IBRA banks' shareholders had to make a choice whether or not to settle their obligations through an out-of-court mechanism or to resolve it differently. The signing of the settlement agreements by the IBRA banks' shareholders, therefore, was in itself voluntary. Meanwhile, duress has been construed as coercive behavior that is not uncommon in the abuse of the bargaining process. Coercive behavior may take the form of physical compulsion or of a threat.[478] There was no evidence that the signing of

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administration when everything seemed to be transitional and yet there were so many significant tasks that needed to be done in a short period. The second was during Gus Dur's presidency, when internal conflicts were rampant and there was a high degree of administrative inconsistency and legal uncertainty that put the implementation of the Program in disarray. The third period was when Megawati took the presidency, after which concrete steps were taken by the administration and substantial progresses was attained to put the Program back on the right track. It is not the author's intention to say that one administration was better than the others, but the aforesaid descriptions are arguably relevant and necessary to provide a better picture regarding the influential factors that shaped the Shareholder Settlement Program.

476 The fact that the government and the IBRA banks' shareholders had signed shareholder settlement agreements would prevent any confusion as to whether or not it was one of the circumstances where it may be difficult to discover whether the parties did indeed agree. If there was no dispute that an agreement had been reached, it is also reasonable to presume that there had been negotiations during which one party had conveyed a legitimate offer, and the other party had accepted the offer. In other words, there is no point to inquire what counts as an offer or as an acceptance.

477 Clearly, there was a much smaller probability of mistakes being made regarding the identity of the contracting parties with whom the contract was made. IBRA was undoubtedly a government agency, and the Shareholder Settlement Program was a sanctioned government undertaking. The IBRA banks' shareholders were the owners of the IBRA banks, as registered in the company registry. It is as simple as that. There might be circumstances, however, in which the flow of information as exchanged between the parties was not as optimal as it was supposed to be, for instance due to the limited time allocated for negotiations, the complexity of the terms and conditions as contracted, and the magnitude of the settlement arrangement. Such shortages need not necessarily have become mistakes *per se* if the parties to the contract are aware of the said probabilities and tried to overcome any unpleasant situation that could possibly generate a misunderstanding and end up in dispute. Take for instance the MSAA, which was the first type of settlement agreement and the only true asset settlement method of payment, which had to be concluded within only one month. In regard to this, both IBRA and the IBRA banks' shareholders knew that it would be impossible to obtain the exact fair value of the settlement assets to be used as payment for the banks shareholders' obligations within the said period. However, the matter had been decided by the government and had to be complied with. Therefore, both parties agreed that IBRA would have to rely on the valuation as proposed by the banks' shareholders, and in turn IBRA would secure the right to undertake due diligence at any time after the closing date and to demand cash indemnification from the banks' shareholders at a later date. This would be based on whether or not IBRA could establish that the said proposal was based on misrepresentation and/or breach of warranties.

478 *See* Sudargo Gautama, *supra*, p. 76.. In the case of physical compulsion, the end result would be that no contract had been concluded at all or the contract would be voidable because the victim would have been a mere mechanical instrument and his action not effective to manifest assent. Duress by threat

the settlement agreements by the IBRA banks' shareholders was under such force. However, a court of law may not agree with this argument.

Also, there could not be any "fraud" in regard to the making of the settlement agreements. Fraud can consist in intentionally giving the wrong information, in intentionally suppressing information, or in another trick by which someone is induced to perform a juridical act. A false statement by itself is not fraud, as it must be accompanied by a deceitful act.[479] The deceitful act must be carried out by or in the name of a party to the contract, the person perpetrating it must intend to deceive, and the act must be of such a nature that the deceived party would not have entered into the contract but for the deception. Shareholder settlement agreement was not an ordinary contract, and unlike a sale and purchase agreement or a lease arrangement, the shareholder settlement agreement contained no elements that could trigger a deceitful act on the part of the government.[480]

b) The Capacity to Contract

A juridical act, such as making a contract, by an incapable person is either null in itself or can be annulled. Minors and persons who have been placed under legal restraint are incapable persons. It is automatically void when it is a juridical act which is not addressed to another person, for instance, the making of a last will and testament. An act can be annulled when it is two-sided (such as a contract) or, when one-sided, when it is addressed to a specific other party. The main exception regarding their incapacity is that incapable persons can act if they have the permission of their representative.[481]

The shareholder settlement agreement was definitely a contract, and none of the signatories of the settlement agreements could be classified as incapable persons. All of the IBRA banks' shareholders who signed the settlement agreements were legally capable individuals and were allowed to undertake juridical acts. Long before the signing of the agreements, they had been under the authority of the bank supervisory agency and there was no way they could establish or own a bank in the first place if they were minors or persons placed under guardianship. Moreover, according to the Indonesian Civil Code (Articles 433-461), legal restraint for persons placed under guardianship is achieved by court procedure and almost certainly involves the appointment of a curator who manages the affairs of the incapable person. The incapability has to be registered and can thereafter be invoked against anyone who claims to have contracted with the incapable person.

Meanwhile, the government or its instrumentality was undoubtedly a legally capable juridical person to enter into a private law contract. IBRA was clearly a government agency

addresses more difficult and more important inquiries, and there are requirements to show that such duress is indeed real. First, there must be a threat. Second, the threat must be improper. Third, the threat must induce the victim's manifestation of assent. Fourth, it must be sufficiently grave to justify the victim's assent. *See also* E. Allan Farnsworth, *supra,* pp. 246-249. There were allegations that the government had threatened to instigate criminal prosecutions against the IBRA banks' shareholders if they refused to sign the settlement agreements. Normally, this would be considered as an improper means of inducing the victim of the threat to make a contract, and yet it must be proven in a court of law. One thing was for certain, the government did promise not to prosecute the IBRA banks' shareholders for violations of the banking prudential regulations and/or the misuse of the central banks' liquidity support if they would only fulfill the obligations as agreed to in the settlement agreements. It was not a threat in inducing to make a contract *per se*, but a promise given in return for the fulfillment of contractual obligations. Moreover, a mere prediction of the probable consequences of a course of action may not amount to a threat.

479 *See.* E. Allan Farnsworth, p. 257.

480 The promise by the government not to instigate criminal prosecution against the banks' shareholders was not a deceitful act because it was well within the government's authority and the delivery of such a promise basically relied on the fulfillment of the banks' shareholders' contractual obligations. The banks' shareholders could not have argued that they had been deceived into entering the settlement agreements, just because there was a split in opinion within the administration, especially during Gus Dur's presidency, regarding whether or not the government was entitled to deliver the said promise. The split in opinion was not an intention to deceit, but rather the result of a dynamic political interplay during which time the total reform euphoria was at its peak. If the government for whatever reason was unable to deliver its promise, supposedly after the banks' shareholders had fulfilled their contractual obligations, it might be classified as a breach of contract, but for sure it was not due to fraud. All in all, consent obtained by mistake, duress, or fraud is not in itself void, but gives birth to a legal ground for its annulment. A legal suit to avoid a contract on grounds of mistake, duress, or fraud can be initiated only by the injured party within the time frame as elaborated in the Indonesian Civil Code.

481 *See* Sudargo Gautama, *supra*, pp. 78-79.

whose chairman was appointed by the President, and the President is part of the executive branch of the State, both as the Head of Government and the Head of State. Before the inception of the Shareholder Settlement Program, evidently the government or certain government agencies had become contracting parties in many private law undertakings and agreements. Nevertheless, the shareholder settlement agreement might have been the first of its kind and it contained specific terms and conditions, which raised some concerns about whether or not, at the time of signing of the agreements, the particular administration was a legitimate one.[482]

c) A Subject Certain

The shareholder settlement agreement was essentially a contract between IBRA, representing the government of the Republic of Indonesia, and the IBRA banks' shareholders in their individual capacity, in which the government agreed not to instigate criminal prosecution against the banks' shareholders for any violation of the banking prudential regulations and/or the misuse of the central bank's liquidity support and, in return, the IBRA banks' shareholders agreed to compensate the government for the losses suffered by their banks and/or the costs that had been incurred from the systemic banking crisis. The settlement agreements further elaborated the terms and the conditions to be fulfilled by the contracting parties. It would be almost impossible for anyone to dispute or to prove that the settlement agreements contained otherwise an uncertain subject matter.[483]

Moreover, the settlement agreements did not contain terms and conditions that were impossible to perform. Indeed, a contract which is impossible of performance at the time it is executed is deemed to be void.[484] This should be distinguished from *force majeure or overmacht*, in which an obligor can be released from his obligation to pay expenses, losses, and interests lest he failed to carry out the promises as had been agreed upon, because of unexpected circumstances.[485] Clearly, the shareholder settlement agreement did not insist on something that was impossible to perform at the time of its execution, in particular because the subject matter was definite and determinable. The question was more about the willingness of the contracting parties to fulfill the obligations as promised, rather than the likelihood of performing them.

d) A Lawful Purpose

The questions to ask are: What exactly was the main purpose of the shareholder settlement agreement? And: Was such a purpose unlawful or contrary to good morals or public order? As aforementioned, the shareholder settlement agreement was a pragmatic resolution to settle potential and actual disputes between the government and the IBRA banks' shareholders through an out-of-court mechanism. On the one hand, the shareholder settlement agreement could be deduced as a way for the government to obtain compensation from the IBRA banks' shareholders in light of the effort to recover the state funds that had been injected into the banking system and/or to

482 If the legitimacy was in serious doubt, as it was further argued, the State was in no obligation to deliver whatever promises had been contracted. When Habibie became the third president of the Republic of Indonesia, replacing President Soeharto who stepped down of his own will, there was a pervasive political polemic regarding his legitimacy to hold the office. Yet, there had not been any attempt in light of the prevailing Constitution to replace or impeach him. Nevertheless, the Indonesian Civil Code does not take into account any political reasoning as the basis to determine whether a person or juridical person is capable to enter into a contract, and hence there should not be any hesitation regarding the validity and the binding nature of the shareholder settlement agreements that were signed by IBRA during President Habibie's administration.

483 This was not only because of the determinant nature of the agreements themselves, but also due to the fact that the Indonesian Civil Code basically provides broad leniency for the parties to agree on the terms and the conditions that will bind them. Meanwhile, there is no requirement in the Indonesian Civil Code of reciprocity, whereby a person may obligate himself to another without obtaining anything in return. *See* Sudargo Gautama, *supra*, pp. 79-80.

484 Impossibility is not necessarily uncertainty, however, and in this regard impossibility must be construed in light of the requirement as laid down in the Indonesian Civil Code that a valid contract must have a determinable subject matter. Indeed, it would be impossible to perform promissory obligations on the basis of an uncertain subject matter, because it would be difficult to determine whether or not the performance had been carried out as expected. (*See* Article 1290 of the Indonesian Civil Code). *See also* Sudargo Gautama, *ibid.*

485 The Indonesian Civil Code, Articles 1244 and 1245.

minimize the costs as incurred from the banking systemic crisis. On the other hand, it could also be construed as an opportunity for the IBRA banks' shareholders to settle the matter primarily on the basis of a commercial scheme and to prevent possible legal ramifications, both criminal prosecution and civil action, the government might instigate.[486]

In this regard, we need to re-visualize the actual difficulties the government faced at the time in determining whether or not to prosecute the banks' shareholders based on IBRA's assessment of possible criminal wrongdoings. As explained in the previous Chapter, IBRA's establishment and the introduction of the relevant regulatory frameworks were based on the actual circumstances that the prevailing legal and court system were dysfunctional. The prevailing legal system did not permit for a swift and decisive handling of the problems at hand, which, if left unattended would certainly make the condition much worse. The court system was overcrowded and filled with allegedly corrupted people, which had generated a system of high-cost judicial proceedings and widespread legal uncertainties. Meanwhile, the socio-political configuration was in its most transitional state of affairs.

The decision by the government to introduce the out-of-court method of dispute resolution, and its promise not to prosecute the banks' shareholders if they fulfilled their contractual obligations as stipulated in the settlement agreements, were based on a pragmatic assessment of the situation as a whole and the limited alternatives that were available. The government had only five years to overcome the crisis and to revitalize the deteriorating banking sector and economic system. Therefore going after the banks' shareholders through the judiciary was certainly not the best course of action. Meanwhile, a pragmatic resolution is not necessarily unlawful or contrary to good moral or public order, as long as it does not (i) abolish basic civil rights, (ii) violate human rights, (iii) violate the principles of legality, and (iv) violate the principles of democracy, egalitarianism, and non-discrimination.[487]

e) The Compliance Audit

The independent legal-aid team Megawati's administration appointed in 2002 had delivered a horrifying picture of the level of compliance of the banks' shareholders who had signed the settlement agreements, and yet this was not surprising. According to the results of the compliance audit, out of 44 signatories of the settlement agreements, only 3 were in full compliance. This incompliance included but was not limited to non- or fractional-payment, failing to provide the agreed collaterals, failing to pay the interest that had accrued or to pay penalties for late-payment, and being unable to provide the required legal-administrative documentation.[488]

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486 It was a *quid pro quo* situation, and the settlement agreement had become the medium to settle the matter in question. Meanwhile, the shareholder settlement agreement was probably analogous to an action plan that might typically be proposed and implemented by an operating bank, and approved by that bank's supervisory agency, in order to improve the bank's unfavorable financial conditions within a certain period of time in order to meet the banking prudential regulations. Take for example the violation of the legal lending limit, in which case the alternative bank will persuade the shareholders to inject fresh capital into the bank. It has apparently been an acceptable custom, at least in the banking industry, in order to mitigate certain violations of publicly applicable laws and regulations by means of non-criminal resolutions. Criminal prosecution will only be instigated if the bank in fact had failed to alleviate the alleged violations in due time, or if the violations consisted of grossly fraudulent behavior that had already caused extensive damages to investors. Since the moment of the inception of the Shareholder Settlement Program, particularly as an out-of-court method of dispute resolution in recognition of IBRA banks' shareholders' alleged violations of banking prudential regulations, there had been debates regarding whether or not the promise given and honored by the government not to instigate criminal prosecution against the IBRA banks' shareholders who had fulfilled their contractual obligations under the settlement agreements was indeed lawful or contrary to good morals and public order. Was the government acting within the law not to prosecute the banks' shareholders, despite the abundance of preliminary evidence as to their criminal wrongdoings? Was it conceivable that the banks' shareholders were given the opportunity to buy their freedom by compensating the government for the losses their banks had suffered and that were allegedly caused by their own wrongdoings? Could a private law settlement scheme supersede the prosecution of criminal conduct? Was it not contrary to good morals to let the so called "black business conglomerates" go free? Would the settlement scheme create serious imbalances to public order? We will discuss the ongoing debates in more detail in the next Section of this Chapter.

487 Supreme Court's Decision No. 01/P/HUM/1999, dated December 1, 1999, concerning the refusal, and the reasoning behind this refusal, of a request to undertake judicial review against Government Regulation No. 17 of 1999 regarding the Indonesia Bank Restructuring Agency/IBRA ("PP-17").

488 The report further suggested several options for the government to confront the condition, both amicably and offensively, in case the government decided not to continue with the out-of-court method of settlement. However, the legal-aid team also pointed out that these options looked good on paper bur were certainly difficult to execute, because one way or another it would involve the ill-equipped law enforcement apparatus, the allegedly corrupt court judges, as well as long and costly legal proceedings, which would be counter-productive in the effort to recover the state funds that had been injected into the banking

Notwithstanding the result of the audit, the legal-aid team was evidently of the opinion that each of the settlement agreements that had been signed by IBRA and the IBRA banks' shareholders was a valid and legally binding contract. The legal-aid team did not find any indications of mistake, duress, or fraud in the making and signing of the settlement agreements, and as of the date of the audit report, there had not been any legal action brought by the obligors to annul the settlement agreements on the basis of mistake, duress, or fraud. All of the promissory obligations to be fulfilled by the obligors as stipulated in the settlement agreements were valid and enforceable against the said obligors, particularly in light of the contractual terms and conditions as well as the prevailing laws and regulations.

In its entirety, the audit report also revealed several practical difficulties that the contracting parties had been confronted with in fulfilling their contractual obligations, which became important inputs for the government to make some adjustments regarding the commercial terms and conditions of the settlement agreements.[489] The adjustments were undertaken to encourage a higher level of compliance of the obligors in meeting their promissory obligations, and hence to increase the probability for the government to recover the lost state funds, as well as in speeding up the completion of the Shareholder Settlement Program in concordance with IBRA's official term that ended in February 2004.

3. Additional Notes on The Settlement Agreements

The *Master Settlement and Acquisition Agreement (MSAA) and the Master Refinancing and Notes Issuance Agreement* (MRNIA) were the first generation of shareholder settlement agreements. The *Akta Pengakuan Utang* (APU) and its variants was the subsequent generation, and was intended mainly to overcome some of the peculiarities embedded in the MSAA and the MRNIA, which had been considered uncommon. This is not to say that the execution of APU was free from obstacles, but they were less structural than those confronted by the MSAA and the MRNIA. The first generation of shareholder settlement agreements was designed and formulated at the time when IBRA was just six months old and was certainly lacking the needed resources.[490]

There have been debates regarding various features of the MSAA and MRNIA that had raised concerns about the merit of the contractual terms and conditions, and even questioning its' enforceability. It is therefore vital for this study to bring to light some of these features in order to reinforce the premise that the settlement agreements were valid and legally binding contracts and could be enforced upon the contracting parties, and also to justify the adjustments that were made to the settlement agreements by the contracting parties at a later stage.

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system. Having recognized the possible hurdles that had to be dealt with regarding each of the options, the legal-aid team recommended that the government take into serious consideration to enact a new emergency law, properly sanctioned by parliament, in order to handle the unfavorable situation. During that time, this recommendation was almost impossible to execute.

489 These adjustments should not be construed as a deviation from the principle that the settlement agreement must be carried out "as is", as had been decided by Megawati's cabinet on March 7, 2002, because it did not alter the basic premise that the obligors were still required to fulfill the contractual obligations as agreed in order to obtain warranty of legal certainty from the government.

490 The government had no experience whatsoever in handling the severe impact of one of the worst financial catastrophes in history, the multidimensional crisis was far from over, the prevailing administration was transitional in nature, and the socio-political atmosphere was in a rapid transformation. In most cases, the government and IBRA had to rely on foreign financial advisors who were fully sanctioned by the IMF and the World Bank, who in turn relied on foreign lawyers to design and formulate the MSAA and the MRNIA. Not only were these lawyers unfamiliar with the Indonesian legal system, let alone the legal traditions, they were also only given a couple of months to finalize their tasks. The APU, on the other hand, had been prepared and drafted by one of the most prominent lawyers in Indonesia who previously, in 2000, was appointed by the government to review the MSAA and the MRNIA, i.e. Kartini Muljadi. This lawyer knew the basic weaknesses of the MSAA and the MRNIA, and was proposing a new structural design for APU, which arguably was the ideal one and yet unfortunately proved to be no more effective than the MSAA and the MRNIA.

a) The Management of Settlement Assets

One of MSAA and the MRNIA's main features[491] which had raised concerns along its implementation was the fact that IBRA did not legally own and manage the settlement assets. The settlement assets were *de jure* owned and *de facto* managed by special purpose vehicles, i.e. holding companies, which were established to pool and dispose of these settlement assets. However, each of the holding companies was wholly owned by the banks' shareholders, whose obligations to the State were taken over by these very holding companies through the issuance of promissory notes and/or the issuance of personal guarantees by the banks' shareholders.[492]

At that time, the government did not have sufficient resources to manage the settlement assets by itself, and even if it did, there was no grand design on how to manage these assets in a value enhancing mode. In a way to protect IBRA's interest the shareholders of the holding companies would pledge all of their shares in the holding companies to IBRA and appoint IBRA as irrevocable attorney in fact to exercise the shareholders' rights to vote in shareholder meetings, to appoint directors and commissioners, and to receive dividends. The holding companies would also pledge all of the shares and interests that the companies owned, in regard to the settlement assets as tendered-in by the banks' shareholders for the payment of their contractual obligations.[493] Was it an economically desirable arrangement? Or was it socially undesirable?

In the meantime, IBRA was obligated to meet its targets to contribute to the annual state budget, which made it difficult for IBRA to come up with a long-term planning for each of the settlement assets. In practice, IBRA was forced to liquidate the settlement assets as soon as possible and to cash in the proceeds to the state treasury. IBRA's inability to manage the settlement assets directly, combined with the need to liquidate the assets in accordance with the annual state budget had generated seemingly a fire sale of many of the settlement assets. Except perhaps in certain cases, most of the settlement assets were sold far below their settlement value. The management flaws and the undesirable consequences had raised serious concern about fairness and common sense, but it did not unwind the fact that the MSAA and the MRNIA as signed by IBRA and the banks' shareholders were valid and legally binding contracts.

b) The Valuation of Settlement Assets

Notwithstanding the different characteristics of each type of shareholder settlement agreement, each of them involved the valuation of assets tendered in by the banks' shareholders for the settlement of their contractual obligations. Among the main types of settlement agreements, perhaps the valuation of the settlement assets for the MSAA was the most controversial, both in terms of

491 There were not too many concerns regarding the organizational structure in relation with the MRNIA, because the scheme was not an asset settlement method of payment and there were personal guarantees issued by each of the banks' shareholders to compensate IBRA in case the proceeds obtained from the asset disposal were insufficient to pay the full amount of promissory notes issued by the holding companies. However, this was not the case with the MSAA, which was the only true asset settlement method of payment, where the government would have to absorb any decrease or increase in value as occurred in regard to the settlement assets.

492 Initially, as was evident from the wordings of the settlement agreement, IBRA was supposed to be the controlling owners of each of the holding companies. However, the settlement agreement was later amended and IBRA decided not to own any shareholdings in the holding companies. It is unthinkable to assume that the government and IBRA were not aware of the consequences of this decision, and did not have any contingency arrangement to overcome potential problems. The settlement assets, as the payment for the banks shareholders' obligations as explained in the previous Chapter, were operating companies in various lines of business. The question remains, however, whether such an arrangement was sufficient to protect the interest of the government and to accomplish the mission of the Shareholder Settlement Program.

493 In other words, although IBRA was not their legal owner, IBRA was pretty much in control of the affairs of the holding companies and the disposal of the operating companies. Nevertheless, IBRA neither had the legal basis to control the day-to-day operation of these operating companies, nor the people to act as IBRA's nominees in these companies. Please note that these holding companies were not operating business enterprises, and that their assets mainly comprised of shareholdings in and account receivables of the operating companies. Allegedly, most of the incumbent management in the operating companies was loyal to the banks' shareholders, and IBRA had no way of knowing whether they acted in IBRA's good interest or even in the interest of these companies. In practice, the contractual rights as bestowed upon IBRA were effective only in determining how and when the settlement assets ought to be disposed of, but were pretty inadequate to maintain, let alone to increase the value of the operating companies. It was more like a chicken and egg situation.

the circumstances surrounding the valuation process and the end result.[494]

The valuation of the settlement assets for the MSAA and the MRNIA was undertaken by international financial advisors in cooperation with two state-owned finance companies who were appointed by IBRA and endorsed by the IMF and the World Bank.[495] Based on the report submitted by the financial advisors in January 2000, there were several important points worth mentioning that could give a better picture on how the valuation of the settlement assets was undertaken. They are as follows:

Firstly, the Ministry of Finance imposed a four-week deadline for IBRA and the banks' shareholders to reach an agreement. The time allocated for the valuation of a total of 112 companies in 14 industries was nonetheless inadequate.[496]

Secondly, the Ministry of Finance requested that a positive view of the future of the Indonesian economy and a normalized political environment, which impacted revenue, margin, growth, and discount rate assumption, be incorporated into the valuation models.[497]

Thirdly, there was no uniform approach in the valuation of the settlement assets, as the bank's shareholders used multiple standard valuation tools. Hence, multiple approaches were needed to confirm the results of individual approaches, which included discounted cash flow analysis, comparable company analysis, comparable transaction analysis, and liquidation value analysis.

When IBRA and the banks' shareholders reached an agreement on the final settlement value of the assets, no one complained about the structure of the settlement arrangement and the valuation methodology. However, when the market values of the settlement assets decreased or when the proceeds obtained from the disposal of the settlement assets were below the agreed settlement value, people started to condemn the whole framework of the settlement conception and related processes. They insisted that the MSAA be revised and changed into a similar type of settlement agreement as the MRNIA or APU. They would like to see that the asset settlement scheme was abandoned.[498]

Notwithstanding the imperfection of the asset valuation, and in spite of the efforts by the government to modify all of the MSAAs, the existing settlement agreements were undoubtedly valid and legally binding contracts.

c) The Use of Foreign Language

The MSAA and MRNIA were prepared, formulated, and drafted by foreign lawyers. Not only did the MSAA and the MRNIA import many foreign legal conceptions and institutions, the said settlement agreements were also written in English. It was also unclear whether they were written in British English or American English. Although there was no explicit requirement in the pre-

494 It was very true, even if compared with the MRNIA that also used the same valuation methodology, because the MSAA was the truest asset settlement type of agreement where the risk of asset depreciation or appreciation in value was to be borne by IBRA qq. the government. Unlike the MSAA and the MRNIA, the valuation of settlement assets in the case of APU was more straightforward because it mostly involved real properties, which valuation could always be referred to the prevailing land tax and the value of real property has the tendency to increase over time.

495 The international financial advisors were Lehman Brothers and J.P. Morgan, and the domestic financial advisors were PT. Danareksa and PT. Bahana.

496 Unlike real properties, the value of company is difficult to appraise, let alone to maintain or enhance, as it consisted of many variables and is influenced by many factors.

497 This normalized economic and political scenario certainly had a great impact on the end result of the valuation, despite the fact that the financial advisors achieved a weighted average reduction of 52 percent from the original valuation as proposed by the banks' shareholders.

498 The changes of the government's standpoint has been common and was expected during, or as the result of, changes in governments, changes of ideology, and/or changes in the surrounding circumstances. This was clearly unacceptable for the banks' shareholders who signed the MSAAs, especially the obligors who thought to have fulfilled their contractual obligations, and from that point on the implementation of the Shareholder Settlement Program moved into its darkest period. The banks' shareholders refused to cooperate, the disposal of settlement assets did not work as planned, IBRA obtained nothing from the Shareholder Settlement Program, and everyone seemed to wait and see who would make the first move.

vailing laws and regulation to write a private law contract in Bahasa Indonesia, it would still have caused many difficulties if a dispute arose regarding the real meaning of the contractual terms and conditions. This would not make the settlement agreements invalid per se, of course.[499]

Moreover, the fact that the settlement agreements were written in English would make the agreements incompatible to be used as evidence in a court of law. According to the prevailing judicial convention, a document written in foreign language may be admitted as evidence only if the document is accompanied by its translation in Bahasa Indonesia, as prepared by a sworn translator who has been recognized by the relevant court of law. However, many times the translator does not have sufficient knowledge of many legal terminologies, which usually makes the translation of a legal document into Bahasa Indonesia much less clear compared to a document that has been written originally in Bahasa Indonesia.

The matter could have been worse, since the MSAA and the MRNIA were the first of its kinds and contained many complicated financial schemes and administrative undertakings that were uncommon in Indonesia.[500] Needless to say, although the MSAA and the MRNIA were written in English, and not in Bahasa Indonesia, they were still valid and legally binding contracts. Was the validity and legally binding nature of the shareholder settlement agreements covering the adjustments as made to each type of the agreement at a later stage?[501]

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499 It may sound as disturbed nationalism, but the question remains unanswered because the parties to the contract were Indonesian legal entities and individuals, and the settlement agreements explicitly stated that the laws of Indonesia prevail upon the contracts. In practice, one can find many commercial contracts that are written in English, and yet there is always an Indonesian version. If there was a dispute, the Indonesian version would usually prevail. Meanwhile, if there was a dispute regarding the meaning of certain provisions in the MSAA or the MRNIA, it might have caused doubt as to whether there was indeed a coincidence of intention between IBRA and the banks' shareholders regarding the said provisions, particularly within the meaning of Article 1320 of the Indonesian Civil Code. Take for instance, the terminology "best effort" as used in many contexts in the agreements. There is a huge difference as to the meaning of such terminology in Bahasa Indonesia as compared to English, which in turn would have generated different ramifications in the execution of the relevant promissory obligations. In *Bahasa Indonesia*, the term "best effort" would mean that the person who gave a promise would do his best to fulfill the promise. In English, on the other hand, the terminology would have meant that the person who gave such a promise would do his best to fulfill the promise until he was unable to do so due to reasons beyond his control or capability. It may sound similar, but each of these meanings has different consequences. It is actually not a question of language, but of the cultural values lying behind certain language usage. As a matter of fact, this is what actually happened when the legal-aid team appointed by Megawati's administration tried to obtain feedback from the banks' shareholders in its effort to come up with a more comprehensive and balanced due diligence. There were many instances where IBRA and the banks' shareholders could not agree on the meaning of certain terminologies in the agreements, which resulted in different assessment in regard to the level of compliance.

500 The judge surely has full discretion to decide whether or not to instruct the parties in a legal suit to translate certain legal documents into *Bahasa Indonesia*. Either way, it is in the interest of the party who has submitted a document as evidence to make sure that the judge understands the real meaning of the terms and conditions as contained in the documents in order to prevent undesirable judgment.

501 When Megawati took the office as the fifth President of the Republic of Indonesia in 2001, she was determined that economic recovery was the main issue that her cabinet needed to focus on. She understood very well that IBRA and many of its programs were crucial for the successful achievement of the economic recovery, or at least, to provide the necessary modality for economic recovery. In regard to the Shareholder Settlement Program, Megawati was determined to honor the existing settlement agreements as the only way to resolve the ongoing problems through an out-of-court mechanism, while at the same time she seemed to be open-minded in considering possible adjustments in the execution of the promissory obligations as had been laid down in the settlement agreements in order to increase the level of compliance and the probability to obtain more and concrete benefits from the said Program. To that end, Megawati had instructed and mandated the Financial Sector Policy Committee ("FSPC") to design the ground work for and to carry out the necessary adjustments regarding the settlement agreements, in view of the results of due diligence on the compliance level as had been undertaken by the independent legal-aid team as well as the feedback obtained from the banks' shareholders.

Following the cabinet decision on March 7, 2002, the FSPC issued a decree on March 18, 2002, to concretize the appointment of the independent legal-aid team, to establish the Steering Committee for Legal-Aid, and to set up a check-and-balance mechanism in which IBRA, the FSPC, the IBRA's Oversight Committee, and the said Steering Committee were to interact with one another. As was previously mentioned, based on the due diligence as was undertaken by the independent legal-aid team, almost all of the shareholder settlement obligors did not comply with the terms and conditions that were stipulated in the settlement agreements. IBRA was to communicate the result of the said due diligence with the obligors, and to get feedback from them as well. Based on the responses, the majority of the obligors were of the opinion that the settlement amount was too high, unfair, and unreasonable. In addition, the obligors also explained that they would not be able to provide sufficient collateral in the fulfillment of their contractual requirements and raised concern regarding the indecisiveness of the government regarding the legal treatment for those banks' shareholders who had refused to sign the settlement agreements from the very beginning. Most of the concerns addressed were actual and legitimate, but there were also limitations for IBRA and the government in accommodating them. Based on the corridor as was laid down from the cabinet decision of March 7, 2002, and taking into account the feedback obtained from the shareholder settlement obligors, as well as inputs from the Steering Committee for Legal-Aid and the IBRA's Oversight Committee, IBRA had proposed a series of recommendations for the FSPC to decide on. Since then the FSPC had issued a number of decrees in regard to the terms and conditions of the contracts.

a) Perfection of the MSAA

Among the existing types of shareholder settlement agreements, the *Master Settlement and Acquisition Agreement* ("MSAA") was probably the most controversial. IBRA understood very well that any effort to modify even one single contractual term and or condition would have opened Pandora's box, and this would be contrary to the premise that the contract should be executed "as is" and would have caused a flood of demands from some of the obligors to revisit the entire contractual terms and conditions. The FSPC nonetheless affirmed that the asset settlement scheme as was designated in the MSAA ought to be upheld, but some improvements were needed to strengthen IBRA's position regarding the settlement assets. As aforementioned, the valuation of the settlement assets and the debt restructuring scheme that had been carried out under the MSAA were to be accepted as given, but the actual practice regarding the management of the settlement assets had raised concerns about the effective control IBRA had over those assets. Based on the recommendation proposed by IBRA, the FSPC agreed in principle that IBRA was to take the necessary steps to perfect the control of the settlement assets, whether in terms of asset possession, the day-to-day management, or the disposal of the said assets. This was very important in recognition of the essence of the asset settlement scheme under the MSAA whereby

IBRA should have had full control of the settlement assets, because the depreciation or appreciation in value of the assets would be borne solely by IBRA.

As was evident, there were some settlement assets that had not been fully transferred to the holding companies established to pool and dispose of these assets. IBRA and the banks' shareholders agreed that the said assets were to be tendered in for the settlement of the contractual obligations and had also reached an agreement regarding the settlement value of the assets, but for some legal-administrative reasons these assets had not been legally owned by the holding companies. There were two outstanding issues that needed to be solved. First, should the un-transferred assets be transferred to the holding company as was required by the MSAA, despite the fact that the said holding company was legally owned by the banks' shareholders? Second, whether IBRA should accept the assets at the value as was initially agreed upon by IBRA and the banks' shareholders, bearing in mind that so far these assets had never been legally owned by the holding company. On the first inquiry, basically it did not matter whether the assets were to be transferred directly to IBRA or to the holding company as long as the parties had agreed that the assets were meant to be tendered in for the settlement of contractual obligations under the MSAA. In any case, the holding company was just a vehicle, which was established solely for the interest of IBRA. However, in light of the aforementioned details regarding the management structure and actual operation of the holding company, IBRA was of the opinion that it would be better if the settlement assets were to be transferred directly to IBRA. This way, IBRA would have full control over the assets. The second issue was more delicate, and ultimately required a much more careful resolution. In this regards, IBRA decided that the settlement assets needed to be re-valued by an independent appraiser in order to obtain the current fair market value. IBRA further insisted that the banks' shareholders compensate IBRA for the difference between the initial agreed settlement value and the current fair market value, in case the former was higher than the latter. Surprisingly, IBRA was able to reach an understanding with the banks' shareholders to proceed according to the said action plan.

At the same time, IBRA was also taking steps to strengthen its presence and its roles both in the holding companies and in their subsidiaries. As was previously explained, these holding companies' subsidiaries were the settlement assets that had been surrendered by the banks' shareholders for the settlement of their contractual obligations under the MSAA. Based on the existing legal framework, IBRA was both the creditor of the holding companies and the attorney in fact of the legal owners of the holding companies, by which IBRA was allowed to install its nominees in the holding companies as well as in its subsidiaries. Unfortunately, IBRA never used this opportunity optimally. Part of the problem was that IBRA had not been able to recruit enough skilled people to be positioned in these companies. As a result, IBRA had been unable to do anything to maintain, let alone to increase, the value of these companies. The other part was due to unfavorable macro economic conditions, which made it difficult for these companies to raise working capital or to initiate new investments. Would it now make any different for IBRA to install its nominees after all those years? Most likely in a big way, but at the least IBRA could undertake measures to prevent the companies from further deteriorating and to prepare them for disposal in line with the disposal program as had been scheduled by IBRA. Unless the government decided not to dispose of these companies, and was willing to free IBRA from its obligations to meet the target for the state annual budget, there was no way that IBRA could do anything significant to increase the value of these companies in such a short period of time. During this period, IBRA had only two more years left before its official term ended, and the only way for IBRA to maximize the benefit out of these companies was to optimize the proceeds obtained from the disposal of these companies through a direct, transparent, and competitive disposal program. For this reason, IBRA had appointed a number of its officials to be installed temporarily in these companies, mainly to prepare these companies for its disposal.

As a final point, IBRA decided to take full control of the disposal of the settlement assets. In fact, this was not limited only to the MSAA. According to the MSAAs that were required for the establishment of a holding company, the disposal of the settlement assets would be executed by the holding companies. On the one hand, the disposal must obtain prior consent from IBRA. On the other hand, the disposal by the holding companies must be in accordance with the disposal program as had been approved by IBRA. In any case, the final say about which assets were to be sold, how the disposal must be conducted, and who would be the end investor and at what price, rested in the hands of IBRA alone. The holding companies could submit a proposal or recommendation, but IBRA was the ultimate decision maker. Based on this construction, there should not have been any problems if the disposal of the settlement assets was to be conducted by IBRA itself, and it should not be construed as a deviation from the settlement agreements. IBRA had several disposal programs, depending on the type of assets, which comprised of a disposal program for receivables, shares, and properties. Most of the settlement assets under the MSAA were shareholdings in various companies, and hence most of them were to be disposed of through the disposal program for shares. By undertaking the disposal itself, IBRA arguably would have had more chances to optimize the proceeds from the assets disposal, to prevent any possible conspiracies that had been allegedly carried out by the management of the holding companies or its subsidiaries to slow down the disposal process, and/or to speed up the completion of the settlement agreements in its entirety.

b) Resolving the MRNIA

The *Master Refinancing and Notes Issuance Agreement* ("MRNIA") was to be signed by IBRA and the banks' shareholders if the value of the settlement assets were inadequate to settle the contractual obligations of the banks' shareholders. Under the MRNIA, besides the obligation to surrender settlement assets and to transfer them to the holding companies, each of the banks' shareholders was required to issue a personal guarantee. This personal guarantee was intended as a guaranty for the fulfillment of the promissory notes that were issued by the holding companies, in case the proceeds obtained from the disposal of the settlement assets were insufficient to pay the full amount of the promissory notes. Conceptually, it would have been a better settlement arrangement than the MSAA. However, in reality, not only was the execution of the MRNIA a true disappointment, but the relevant structural design had generated new problems. For one thing, the banks' shareholders (who each one of them was also the issuer of the aforesaid personal guarantee) seemed to be reluctant to dispose of the settlement assets, because regardless of the proceeds obtained from them, they would still be required to compensate IBRA for the outstanding amount of the promissory notes. In other words, they seemed to have no real motivation and have the capacity to be cooperative even from the very beginning. Being the sole holder of such personal guarantees, IBRA should have had recourse to the personal assets of the banks' shareholders. In fact, all of the personal assets and potential revenues of the banks' shareholders should have been devoted to guarantee the fulfillment of the said promissory notes. However, unless the banks' shareholders had disclosed all of their personal belongings and assets, IBRA would not have known where to find them. IBRA did not have the capacity and the resources to conduct asset tracing and forensic investigation. At the end of the day, how would IBRA execute such personal guarantees? IBRA must certainly file a civil suit with the district court against the banks' shareholders, because the said personal guarantees were not self-executing.

From a different perspective, the claim that IBRA had against the holding companies as derived from the loan agreement for the issuance of promissory notes and the personal guarantees issued by the banks' shareholders to guarantee the fulfillment of such promissory notes, must have a commercial value. Meanwhile, if the holding companies and banks' shareholders were able to fulfill all of their obligations as stipulated in the loan agreements and the MRNIA, IBRA would have had to the banks' shareholders from any further liability and the government would not instigate criminal prosecution against them. If not, then IBRA and the government were not obligated to meet their contractual obligations under the MRNIA. However, should the government decide to instigate criminal prosecution against these banks' shareholders, MRNIA must first be canceled by a court decision and everything must be brought back to the conditions prior to the signing of the agreement. Even if the government succeeded to put the obligors behind bars, there was no guarantying that the government would be able to find and confiscate their personal assets. On the other hand, there was no prohibition in the MRNIA for IBRA as a creditor to sell the aforesaid claim to a third party. The claim basically consisted of account receivables of the holding companies, and therefore was like any other commercial loan. From the business point of view, the loans together with the settlement asset that had been transferred to and were owned by the holding companies, coupled with the personal guarantees of the banks' shareholders, would be considered as an opportunity. Was there a more practical alternative?

Based on the aforesaid legal conundrum and the potential dilemma, after a thorough consultation with the IBRA's Oversight Committee and the Steering Committee for Legal-Aid, the FSPC decided to allow IBRA to sell the aforesaid loans to a third party through an open tender. Decree No. KEP.02/K.KKSK/09/2003, dated September 15 2003 jo. Decree No. KEP.01/K.KKSK/02/2004, dated February 4, 2004. However, the FSPC further determined that such loans could only be disposed of if the total proceeds that would be obtained by IBRA, including the proceeds as had been obtained from previous disposal of the settlement assets, was no less than 15 percent of the total par value of the promissory notes. There were four MRNIA's obligors, and all of them were against the idea. This was not surprising, considering the fact that if the loans were actually sold to a third party investor, it would also include their personal guarantees and that they would have to deal with a new creditor. Meanwhile, IBRA did not require the obligors' approval to sell the loans; based on Article 613 of the Indonesian Civil Code a mere notification would be more than sufficient. Some people were not exactly in favor of the aforesaid approach, since most of the alternatives that had been suggested by them were not exactly immaculate and, as they had anticipated, were also difficult to execute. By selling these loans to a third party, IBRA would at the least acquire something from the said settlement agreements, out of potentially nothing, and at the same time minimize impending problems for the next administration to confront. Furthermore, IBRA and the government did not have to fulfill their contractual obligations as stipulated in the MRNIA, which to a certain extent was politically susceptible. It was not an ideal resolution, but for the most part it was pragmatic.

c) Adjustment of the APU

Compared to the MSAA and the MRNIA, the number of IBRA banks' shareholder who signed the *Akta Pengakuan Utang* ("APU") were enormous, and yet the total claim that IBRA had was less than 20 percent of the total claim under the MSAA and the MRNIA combined. Most of IBRA banks whose controlling shareholders signed the APU were much smaller banks compared to those under the MSAA and the MRNIA, and the behavior of the banks' shareholders was much more diverse. Some of them were eager to settle the obligations and had the capacity, while others were willing but had no capacity. Some had no capacity and no intention to settle the matter, while others were not keen to settle the obligations though they had the capacity. One thing for certain, based on the aforesaid compliance review, only two of the banks' shareholders were in full compliance with the contractual terms and conditions that were stipulated in the settlement agreements. The main complaint the banks' shareholders made, was that the obligations to be fulfilled by the banks' shareholders were unreasonably severe, both in terms of the settlement amount and as well as the requirement of collaterals to guarantee the payment of the settlement amount, especially in light of the actual macro economic conditions that had not yet fully recovered. Unlike the MSAA and the MRNIA, the government was expected to be more thoughtful in handling the APU and the problems thereof, as it involved more than thirty IBRA banks' shareholders and because the government had been trapped in its own campaign that APU was a better type of shareholder settlement agreement.

The structural design of APU was invented and implemented as a direct reaction to the MSAA, which at that time was considered to be insufficient in promoting the government's interest to recover the state funds that had been injected into the banking system. Notwithstanding the merit of the said reasoning, the APU was created mainly with the spirit that the banks' shareholders must be penalized and the government must gain as much as possible from the settlement agreements, and further, the government should not repeat the mistakes it made when the asset settlement method of payment under the MSAA was adopted. The banks' shareholders were to pay in cash a settlement amount, which principal amount was calculated on the basis of the banks' group loans plus interest as recorded in the banks' latest balance sheets, an annual interest rate of 3 percent above the Bank Indonesia certificate three-monthly interest rates, a penalty for late payment, and a requirement to provide collaterals up to 150 percent of the value of the outstanding amount. The banks' shareholders must complete the obligation within 4 years after the signing of the settlement agreements. The said terms and conditions were certainly good on paper, but somewhat unworkable. The structure of APU was primarily inspired by an ordinary bank loan agreement, and yet its simplicity was not necessarily compatible with the Shareholder Settlement Program because there was no cash disbursed directly by the banks to the shareholders, no prospective business project was actually financed, and therefore no source of income to repay the obligation. The low level of compliance among the banks' shareholders was not only generated by the aforesaid terms and conditions, but also by the fact that before Megawati took the presidency there was no adequate policy consistency and legal certainty on the part of the government. The issue was therefore twofold: one of commercial and the other one of political will.

The decision of the cabinet on March 7, 2002, was the beginning of more policy consistency and legal certainty on the part of the government in regard to the Shareholder Settlement Program. The political will was clear, and was actualized when Megawati issued Presidential Instruction No. 8 on December 30, 2002, and IBRA issued for obligors who had fulfilled their contractual obligations at a later stage. The next issue standing in line was the commercial issue. Based on communications between IBRA and the banks' shareholders, following the result of compliance level as had been conducted by the independent legal-aid team, it was pretty clear that most of the banks' shareholders who signed the APU were in favor of a more reasonable settlement amount and more flexible methods of payment. Their main complaint was that the interest rates that had been imposed on the settlement amount were unrealistic, because at the end of the day they would have to pay much more than the benefits that they allegedly had received from the banks. Meanwhile, the settlement amount had also taken into account the interest rates as imposed on the original banks' affiliated loans, which at that time was considerably too high for normal banking practice. This was in a way a double counting of the interest rates. While on the other hand, they had also addressed the issue of liquidity difficulties. The macro economic conditions at that time were not auspicious for them to mobilize enough cash to fulfill the contractual obligations, and they argued that they should have been allowed to pay the settlement amount in kind like in the case of the MSAA and the MRNIA. No one was to lend them money, let alone the banking system, because the media had been quite successful in creating the image of them as black bankers or enemies of the state. It was a dilemma, because every time they failed to meet the dead line of the agreed periodic installment, the settlement amount would accumulate and the penalty kicked in, which made it even more difficult for the banks' shareholders to fulfill their obligations. One thing for sure, none of the banks' shareholders denied that they did have unfulfilled contractual obligations to complete.

After many long and exhaustive dialogues with the IBRA's Oversight Committee and the Steering Committee for Legal-Aid, and based on proposals submitted by IBRA, the FSPC issued a series of decrees to accelerate the completion of APU. Based on the decrees, the settlement amount which was initially agreed upon by IBRA and the banks' shareholders was reformulated by which the interest rates imposed on the banks' group benefit, i.e. group loans and affiliated foreclosed assets, was recalculated in line with the applicable interest rates for IBRA banks' third party loans/foreclosed assets. Moreover, the interest rates and penalties for late payment that was imposed after the signing of the settlement agreements were also abolished. In average, the settlement amount was discounted up to 30 percent from the initial settlement amount, and hence the reformulated settlement amount was now fixed. In addition, FSPC also allowed the banks shareholders to pay their obligations with other forms of payment than in cash for a maximum of 70 percent of the reformulated settlement amount. The payment in kind was limited to the form of real property, recapitalized bonds issued by the government, negotiable instruments issued by IBRA, and if the banks' shareholders were also somehow affiliated with one of the big corporate obligors whose debts were under restructuring, the said obligations could be added into the restructuring scheme by means of *novatie* and became the debts of the said obligors. The bank recapitalization program as conducted by the government was carried out by placing government bonds into recapitalized banks. Government bonds are risk free, and therefore can be used to increase the financial performance of the banks, in light of the new prudential requirements as determined by the central bank. Several types of the government bonds were negotiable and traded in secondary markets, and the market was a pretty active for the said government bonds. Based on the negotiation between the government and the controlling shareholders of 7 recapitalized banks, the banks were to issue negotiable instruments to the shareholders that gave rights to the shareholders to receive cash proceeds from the disposal of banks' non-performing loans that had been transferred to IBRA or to sell these instruments to a third party who will in turn acquire the same right. Either way, the negotiable instruments established an obligation on the part of IBRA to give cash for the holders and therefore could be used to set-off IBRA's claims.

Unlike the MSAA and the MRNIA where the settlement assets were mostly in the form of shareholdings in private-owned companies, the means of payment in the case of APU were more concrete and its value could be measured by available objective benchmarks. The FSPC also required that real properties must be appraised by independent valuer using the most conservative valuation method, and that the properties must be clear and free from any encumbrances. Following the new policy framework, IBRA initiated a series of negotiations with the banks' shareholders with the main purpose to accelerate the completion of the settlement agreements. It was only logical that with a lower settlement amount and a more flexible method of payment, the banks' shareholders would be more than able to fulfill their obligations much faster. IBRA insisted that the new consensus was to be put in writing as an addendum to the original settlement agreements. This way it would prevent any accusation that there was no consensus regarding the new terms and conditions. A special clause was inserted in the addendum that would put the original terms and conditions back in force again if the banks' shareholders failed to fulfill the new terms and conditions within the accelerated time frame. More than 75 percent of the shareholder settlement obligors signed the addendum agreements, but two of the obligors who did not signed the new terms and conditions were those who were actually able to complete their contractual obligations before the introduction of the new policy framework. Like the original terms and conditions, the participation of the obligors in the new policy framework was voluntarily in nature. It was supposed to be a balanced resolution. The obligors had lower contractual obligations to fulfill, but also a shorter period to complete their obligations.

The question remained whether or not the new policy decision was contrary to the cabinet decision of March 7, 2002. No one had ever raised the issue, but the answer is certainly negative. The cabinet emphasized the importance to honor the contracts as they had been signed by IBRA and the IBRA banks' shareholders as an out-of-court method of dispute resolution, but did not prohibit some inconsequential adjustments to the commercial terms and conditions as long as they were still in line with the principle of the aforementioned burden-sharing-scheme. It was more of a reminder to the relevant government agencies to coordinate one with the other, and a warning to non-cooperative shareholder settlement obligors of the available legal ramifications. Nothing had actually changed. The obligors were still obligated to meet their contractual obligations, whether or not they had participated in the new policy framework. There were no additional burdens to the obligors as compared to the original terms and conditions, and the government would not instigate legal actions against the obligors as long as they were cooperative. On the other hand, IBRA would not loose or gain anything more than what it was supposed to receive, because the new terms and conditions were more actual and workable. The new policy design was not only pragmatic, but also more reasonable.

4. Conclusion on Validity and Enforceability

Based on the prevailing Contract Law, as stipulated in the Indonesian Civil Code, there cannot be any doubt that each of the shareholder settlement agreements as signed by IBRA and the IBRA banks' shareholders was indeed a valid contract. There was no proof that the said consensus was concluded by means of mistake, fraud, or duress at the time they were signed. Meanwhile there was also no evidence that the contracting parties had no legal capacity to conclude a contract, and therefore there was no legal ground for either of the contracting parties to cancel the agreements on the basis of incapacity. The subject matter of the contracts was certain and determinable, in which the banks' shareholders agreed to settle the obligations of the banks' affiliated debtors and/or to compensate the losses of the banks, in accordance with the terms and conditions as stipulated in the agreements.

Moreover, the contracts did not contain any unlawful causes or purposes, because the agreement that was reached between IBRA and the IBRA banks' shareholders was not an illegal or unlawful juridical act, and it was an integral part of IBRA's tasks to optimize the recovery of the state funds that had been injected into the banking system as mandated by the 1998 Banking Law and PP-17. All in all, the shareholder settlement agreements as concluded between IBRA and IBRA banks' shareholders under the auspices of the Shareholder Settlement Program were all valid contracts in light of Article 1320 of the Indonesian Civil Code, and arguably there should not be any lawful reasoning or proper legal standing to annul the said settlement agreements.

The adjustments that had been done to the shareholder settlement agreements particularly during Megawati's presidency, whether they were to perfect the execution of the MSAA, to resolve the problems surrounding the MRNIA, or to reformulate the commercial terms and conditions of the APU,[502] were either completely intact with the original agreements or had been carried out on the basis of consensus of the contracting parties. If both the original settlement agreements and the amended ones were valid contracts, based on Article 1338 of the Indonesian Civil Code, such contracts shall apply as the law between the contracting parties. However, the validity of settlement agreements did not necessarily make the contracts enforceable in the actual sense.[503]

To sum up, it is rational to conclude that the shareholder settlement agreements as signed by IBRA and IBRA banks' shareholders are indeed valid and enforceable contracts. This is not to say that the court cannot decide otherwise. However, the court must have a very strong reason and solid legal grounds to revoke the settlement agreements, but there is no guaranty to that end because the prevailing court system has yet to be objective and free from corruption. At the end of the day, it is for the interest of the contracting parties to comply with the contractual terms

502 The MSAA represented a true assets settlement scheme and therefore IBRA's concrete actions to regain full control of the settlement assets, whether in terms of legal possession, day-to-day management, and disposal of the settlement assets, were still valid under the agreed scheme. The decision of the government in allowing IBRA to sell the claims as derived from the loan agreements and personal guarantees under the MRNIA was not contrary to the initial agreements because there was no clause in the agreements that prohibited IBRA to do so and the prevailing laws and regulations treated such claims like any other intangible property rights. The adjustments made to the terms and conditions of the APU were carried out by means of an addendum to the original agreements and were based on the consensus of the contracting parties and hence were also valid in light of Article 1320 of the Indonesian Civil Code.

503 The shareholder settlement agreements were not just ordinary private undertakings, because they involved the government as one of the contracting parties and because the contracts had been designed as an out-of-court method of dispute resolution. The government consisted of and was influenced by many conflicting forces and interests one intertwined with the other. There was the President and the members of the cabinet. There was also Parliament and the Members of Parliament. There were different non-governmental peer groups. There were also the people at large. Each of the elements brought different colors and nuances, which made the decision making process different from the way decisions were normally made. When the first batch of settlement agreements was signed during 1998-1999, the socio-political conditions were experiencing an unprecedented dynamic transformation from the New Order regime to the Order of Reformation. The government and every element in it were stunned by the winds of change. The newly elected administration seemed to part itself completely from the previous government, and had a tendency to neglect previous policy decisions. Policy inconsistency and legal uncertainty were out of control, which put the implementation of the Shareholder Settlement Program in a state of uncertainty. The level of contractual incompliance was high, which gave contract enforceability little or no meaning. Enforcement should have been twofold, whether in regard to those obligors who did not comply and in recognition of those who complied. One thing was for certain, an agreement must be performed in good faith. This was very relevant for the contracting parties, but even more relevant for the government because the main reason for the banks' shareholders to sign the settlement agreements as an out-of-court method of resolution was the very promise that the government would not instigate criminal prosecution against them if they fulfilled the agreed contractual obligations. It was not until Megawati's presidency that there was a clear political will and concrete action was taken to provide the cooperative obligors with the warranty of legal certainty.

and conditions as stipulated in the settlement agreements. Contractual compliance, which is the most important factor in contract enforceability, would be economically desirable as compared to any contractual incompliance. Incompliance may generate or can generate disputes, which if not settled amicably in due time, will end up in a court of law. The court system and its mechanism would be costly.

Please also note that the dysfunctional court system and the dwindling law enforcement performance were the reasons behind the introduction of the Shareholder Settlement Program in the first place, in which there were at least the intrinsic costs of erroneous judicial judgments and the actual costs to operate the procedural system. Nevertheless, which element of the shareholder settlement arrangement must be fulfilled by the contracting parties unconditionally, in order to make the Shareholder Settlement Program worthwhile? Which is the common ground in the settlement agreements that both the deal maker as well as the deal breaker at the same time? In this context, it is imperative for this study to elaborate on the core issue as had been promoted through the said Program, which was the **"Release and Discharge"** clause as embedded in the settlement agreements. The said clause was the main consideration for the contracting parties to sign the settlement agreements, and also one of the main factors for the efficient and effective implementation of the Shareholder Settlement Program.

C. THE RELEASE AND DISCHARGE CLAUSE

1. Relevant Connotations

The controversies surrounding the Shareholder Settlement Program were not limited to the notion that the Program was an out-of-court mechanism of dispute resolution, or to the fact that the asset settlement method of payment was allowed to resolve all or part of the contractual obligations, but were also about the government's promise to release the banks' shareholders from further liabilities as was explicitly or implicitly embedded in the settlement agreements, provided they fulfilled the contractual obligations as agreed upon. As a matter of fact, until today, the polemic regarding the matter in question has yet to be concluded.[504]

The vigorous polemic regarding the *"Release and Discharge"* clause contained in the shareholder settlement agreements was bound to happen because the contracts were the first of their kind in the history of the Indonesian legal tradition, and coincidently the Shareholder Settlement Program was taking place during a time when the socio-political atmosphere and configuration in Indonesia had reached a point of no return to become more democratic and open. All the while, there are several connotations regarding the terminology of "Release and Discharge", and a brief discussion of the various meanings as available may help the reader to understand the intended connotation under the Program.

a) The Contract Law's Inference

Contract Law is an integral part of the law of obligation as stipulated in Book 3 of the Indonesian Civil Code. Under the prevailing law of obligation, the discharge of an obligation *(verbintenis)* may take place by agreement, by frustration, by breach of contract, or by the operation of the law. As it is their agreement which binds them, so by their agreement they may be discharged.

504 Some of the arguments pointed out that the private settlement deals which had been signed between IBRA and the banks' shareholders could not bring to an end the existence of criminality, and that those who had been indicated to have been involved in alleged criminal wrongdoing must still be prosecuted, regardless of the completion of the settlement arrangement. Some milder arguments questioned the way IBRA gave and delivered the promise because IBRA had no clear legal standing to eliminate alleged criminal undertakings and the fact that there were certain procedures that needed to be followed. As aforementioned, before Megawati took the presidency and issued Presidential Instruction No. 8 of 2002, IBRA had issued several letters to certain shareholder settlement obligors that had mistakenly been regarded as Release and Discharges.

Contracts do not exist forever and many end as soon as they are made. Nevertheless, the natural end for a contract is by performance, in which each party fulfils its obligation by performing what he promised to do.[505]

The legal duty to perform a contractual obligation is called *prestasi or prestatie,* which consists of two main elements namely the obligation that a person has *(schuld)* and the liability to perform such obligation *(haftung)*.[506] While normally *schuld* and *haftung* are referred to the same person, there are circumstances where a contract does establish *schuld* without *haftung or vice versa.*[507] By way of interpretation, all kinds of obligations or prestatie under the Contract Law in particular and the law of obligation in general can be measured in monetary denomination.[508] Under the law of obligation, a contract is essentially an agreement between a debtor and a creditor, where the debtor has a debt to fulfill and the creditor has the right to the fulfillment of the debt.

If a debtor has successfully performed his obligation under a contract, in principle he must be released from further liability. Presumably, the contract shall also be discharged. Nevertheless, one cannot find any provision in the Indonesian Civil Code that explicitly stipulates the obligation of a creditor to a debtor who has performed his obligation as stipulated in a valid and legally binding contract. Likewise, the contract law does not have a particular explanation regarding the meaning of *"Release and Discharge"*. However, the Code does elaborate the circumstances by which an obligation is deemed to be fulfilled, or in other words, the right to performance of an obligation is extinguished.[509]

In short, the prevailing contract law does not have a specific provision that regulates the issuance of a confirmation by a creditor to a debtor who has fulfilled his obligation as stipulated in a contract. However, the law of obligation recognizes that an obligation, whether contractual or incurred from tort, is deemed to be fulfilled by means of payment and consequently that the right to performance of a contract will cease to exist all together. In this context, the terminology

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505 When parties make a bilateral contract, they exchange promises in the expectation of a subsequent exchange of performance. Although the consideration for each party's promise is the other party's return promise, each party enters into transaction only because of the expectation that the return promise will be performed. The law of obligations classifies three types of contractual obligation that contracting parties are required to perform. They are the obligation to give something, as inferred from Article 1235, and the obligation to do or not to do something, as referred in Article 1239 of the Indonesian Civil Code. The general rule is that performance of a contract must be precise and exact. A party performing an obligation under a contract must perform that obligation precisely within the time frame set by the contract and exactly to the standard required by the contract. Whether the alleged performance satisfies the agreed terms and conditions is a question to be answered by construing the contract, so as to see what the parties meant by performance, and then by applying the ascertained facts to that construction to see whether or not that which has been done corresponds to that which was promised. *See* Sudargo Gautama, *supra,* pp. 83-86.

506 M. Yahya Harahap, *Segi-segi Hukum Perjanjian* (Penerbit Alumni Bandung, 2nd edition, 1986), pp. 17-19.

507 Gunawan Widjaja, *supra,* pp. 313-325.

508 Article 1236 of the Indonesian Civil Code states "*The obligor obliges to compensate the costs, damages, and interests to the creditor, if he has become incapable to deliver his property as agreed, or has not been able to maintain the property for preservation*". Likewise, Article 1239 states "*Every agreement to do, or not to do something, must be completed by means of reimbursement of costs, damages, and interests, if the debtor fails to fulfill his obligation*". Furthermore, Article 1131 clearly states "*Any property of the debtor, either movable or immovable, already exists or existing in the future, becomes collateral for any individual bindings/agreements*".

509 Article 1381 of the Indonesian Civil Code states *"An obligation ceases to exist: because of payment; because of cash payment, followed by preservation or consignment; because of debt novatie; because of set-off or compensation; because of the mixture of debt; because of the acquittal of debt; because the indebted property has been demolished; because of nullity or nullification, because of the happening of nullification, as governed by the first title of the Book 3 of the Code; and/or because of the expiration, which shall be governed in a separate chapter"*. One mode of the complete performance of an obligation under the law of obligation is by payment, in which according to Article 1381 paragraph (1) of the Indonesian Civil Code, the right to performance of a contract also ceases to exist. There is a common, but mistaken, supposition that payment of an obligation or debt can only be proved by the production of a written receipt. Except maybe for something payable annually or in shorter periodic payments as elaborated in Article 1394, the Indonesian Civil Code does not regulate specific evidence to prove the existence of payment. Payment may be proved by any evidence, and a receipt is only *prima facie* evidence that a debt has been paid. Payment normally means payment in cash. However, the parties may agree, expressly or implicitly, that payment may be made in some other manner, and, in the absence of any express stipulation, the method of payment may be determined by course of dealing between the parties.

Unlike the payment of a contractual obligation, which does not require particular evidence to prove of its existence, the acquittal of debt as stipulated in Article 1438 of the Indonesian Civil Code clearly states that such juridical act shall not be presumed, but must be proven. Article 1439 of the Code provides an example of proof that an acquittal of debt is deemed to exist. The voluntary return of the original copy of account receivables, by a creditor to a debtor, is a proof of acquittal of debt, which also includes the debts of other persons who are jointly liable. The discharge of contractual obligation by means of payment must be distinguished from those because of acquittal of debt and also because payment of obligation definitely means that the debtor has fulfilled his contractual obligations in their entirety and the discharge of the relevant contract occurs by the operation of law. Moreover, acquittal of debt is always initiated by a creditor and the relevant debtor must explicitly agree to such proposal, regardless whether or not the contractual obligations have been met in full. Needless to say, both methods will release the debtor from further obligations and that the said contract will be deemed to cease. *See* Sudargo Gautama, pp. 97-98. *See generally* A. Pitlo, *supra. See also* J.H. Nieuwenhuis. *For further reading see* Dr. L.C. Hoffman, *Het Nederlands Verbintenissenrecht: De Algemene Leer der Verbintenissen: Tweede Gedeelte* (Art. 1388-1492 B.W.), as explained by H. Drion and K. Wiersma (J.B. Wolters, 8th edition, Groningen, 1959).

of "payment" is not limited to payment in cash only, but rather to the fulfillment of a contractual obligation in its broadest sense, such as to deliver something, to do something, or not to do something.[510]

b) The Criminal Law's Perspective

From the criminal law perspective, the terminology *"Release and Discharge"* can be inferred from the applicable criminal rules and throughout the relevant criminal law proceedings. Unlike Contract Law, the terminology in the prevailing criminal law is much more straightforward in conception and its implementation does not depend on the will of the people or their interaction with each other.[511] Every country has adopted its own conception of punishable behavior, its own definition of offenses, its own principles for determining questions of self-defense, necessity, insanity, negligence, and complicity. If we look at the maze of criminal rules, the rules break down into two general categories: rules of substance and rules of procedure.[512]

The main function of criminal law is to provide the law enforcement agency who is acting on behalf of the public interest and the state with the legal ground and mechanism to determine and prove that a certain act is against the prevailing criminal rules and to make sure that the person who conducts the wrongdoing is punished.[513] The rules of legal procedures allocate functions among the public prosecutors, the defense lawyers and the judges in finding the facts of the case. In this context, it is important to mention that the Attorney General has the authority to waive criminal charges for reason of public interest, even when there is adequate legal evidence or the act does constitute an offence.[514]

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510 *See generally* Miriam Darus Badrulzaman, *The Indonesian Civil Code, Book 3, The Law of Obligation and The Elucidation* (PT. ALUMNI Bandung, 2005). Since the law of obligation allows a creditor to release a debtor unconditionally from all of his debt by means of acquittal of debt, as regulated in Article 1382 of the Indonesian Civil Code, it is only logical to construe that the Indonesian Civil Code acknowledges that a debtor who has performed his contractual obligation deserves to be released from any further liability and that the relevant contract is discharged by the operation of the law. With such payment, the right of a creditor to the performance of a contract has been satisfied and therefore ceases to exist. In any case, there is no prohibition or requirement in the Indonesian Civil Code for a creditor to issue a separate written confirmation to a debtor who has fulfilled his contractual obligation in full, even if the contract does not require the creditor to do so. However, if the parties to a contract have agreed on the issuance of such a letter by the creditor, it automatically becomes a contractual obligation of the said creditor to fulfill when the relevant condition does occur. Such a letter will also be *prima facie* evidence that the contractual obligation has been fulfilled by the debtor.

511 *See generally* Wirjono Prodjodikoro, *The Principles of Criminal Law in Indonesia* (PT Refika Aditama-Bandung, 3rd Edition, 2003).

512 George P. Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press, 1998), p. 3. The substantive rules define the crimes that are punished in the particular country; the rules establish "guilt in principle". The rules of procedure determine how the state enforces the criminal law by proving the occurrence of crime and convicting and punishing those responsible for the crimes; the rules determine whether individuals are "guilty in fact". Initially, there was dualism in the criminal law in Indonesia. Before the *Wetboek van Strafrecht voor Nederlandsch-Indië* came in force in January 1918 (*State Gazette 1917 No. 497)*, there was a separate criminal law for Europeans and for non-Europeans in Indonesia. The criminal law for Europeans was stipulated in the King's Order No. 54 of February 10, 1866 (*State Gazette No. 55*) and the criminal law for non-Europeans was elaborated in the *Ordonnantie* of May 6, 1872 (*State Gazette 1872 No. 85*). Both criminal codes copied the French Napoleonic Penal Code, which was made applicable when the Kingdom of the Netherlands was incorporated into the French Empire. It was not until 1918 that the Dutch colonial administration started to implement a uniform Criminal Code in Indonesia, which due to the operation of the Transitional Provisions in the 1945 Constitution, the Constitution of the Republic of the Indonesian Federation, and the Provisional Constitution of 1950, continues to apply until today. By the enactment of Law No. 1 of 1946, dated February 26, 1946, some of the provisions in the Criminal Code were amended or revoked. However, it was not until September 29, 1958, and by the enactment of Law No. 73 of 1958, that the said Law was officially reaffirmed to be applicable as positive law throughout Indonesia. By 1981, Indonesia enacted Law No. 8 of 1981 concerning the Code of Criminal Procedure, replacing *Het Herziene Inlandsch Reglement (State Gazette 1941 No. 44)* and Emergency Law No. 1 of 1951 as well as all relevant implementing regulations. In addition to the uniform rules of substantive and procedure as aforementioned, the Indonesian legal system allows the insertion of criminal provisions in certain laws and regulations, which may or may not already be covered by the prevailing Criminal Code and therefore operate as *lex specialis* to the applicable generic rules.

513 There are many principles and norms that must be taken into account before a person can be determined to be guilty and therefore be sentenced, and likewise there are also justifications and excuse defenses to prevent a person from being convicted and punished. The prevailing Criminal Code recognizes that if grounds for *justification* are present, the violation of the law does not constitute a criminal offence, such as in the case of necessity, self-defense, public duty, and official orders. Meanwhile, if grounds for *excuse* are present, the violation does constitute a criminal offence, but the offender cannot be blamed for having committed the offence, due to insanity, duress, excessive self-defense, and obeying a seemingly lawful order. In both cases, the offender is not criminally liable. At the first instance, the police and/or the public prosecutors must collect sufficient legal evidence and establish a convincing case against an alleged criminal offender, before the said person can be prosecuted in a court of law. During the pre-trial investigation and prosecutorial phase, the police and public prosecutors may discontinue the whole process on the basis that the legal evidence is insufficient to establish a case, or the act does not constitute a criminal offence, or by the operation of law.

514 This authority is based on the principle of opportunity, and the rationale was that prosecution should not be automatic, but should serve a concrete social objective. In Indonesia, the use of such authority by the Attorney General must be consulted with other state institutions that may be relevant to the matter in question. Previously, the authority was elaborated in Article 32 of Law No. 5 of 1991 concerning the Public Prosecutor of the Republic of Indonesia. In the new law regarding The Public Prosecutor of the Republic of Indonesia, the authority is preserved in Article 35 paragraph C of Law No. 35 of 2004.

If there was no reason not to prosecute the alleged criminal offender, the public prosecutor will summon the suspect to appear in court. A court hearing will commence with the identification of the accused by the chairman of the court and the reading of the charge by the public prosecutor. After evidence has been presented and discussed, and both the public prosecutor and the defense counsel have addressed their closing speeches, the court will deliberate the verdict and determine the sentence. In a judgment, the court can take either procedural or substantive decisions.[515] When the accused has been found guilty and a sentence has been rendered, upon request by the convicted person, the President can grant him/her pardon *(gratie)* and rehabilitation *(rehabilitatie)*.[516] In the case of capital punishment, the execution of the said sentence shall not be carried out before the President has had the opportunity to consider and decide whether to grant or not to grant a gratie. In addition, the 1945 Constitution also gives the President the power to grant amnesty *(amnestie)* and abolition *(abolitie)*.[517]

In conclusion, the prevailing Criminal Law acknowledges several circumstances under which a suspect is to be released and discharged from criminal liability, whether or not there has been a court judgment that such a person is in fact guilty as charged. Under the prevailing Criminal Law, the expression of "Release and Discharge" can be found throughout the different phases of criminal proceeding and is associated with various sources of authority, and the essential connotation is to prevent an individual from being prosecuted or punished, or from carrying out criminal sentence.[518]

c) The Contractual Intention

When IBRA and the IBRA banks' shareholders signed the shareholder settlement agreements, they basically agreed to deal with their differences by means of an out-of-court method of dispute resolution. On the one hand, the government's interest was to recover the state funds that had been injected into the banking system and/or to minimize the costs as incurred from the systemic banking crisis. On the other hand, the banks' shareholders were generally willing to make up for all the benefits they had received from their banks and/or the losses as suffered by the banks, provided that the settlement scheme was convincingly workable and the government could give

515 *See generally* M. Yahya Harahap, SH., *The Study of Problems and Implementation of the Indonesian Code of Criminal Procedure* (Sinar Grafika, 2nd Edition, 2000). On procedural matters, the court can declare the charge null and void, can declare itself to be incompetent to try the case, can dismiss the case, and can suspend further prosecution. A sentence is imposed when the evidence that the accused has committed a criminal offence is beyond reasonable doubt and when the accused is criminally liable for the offence. On the other hand, the accused is to be acquitted (*vrijspraak*) when the essential facts as charged are not proven by the evidence presented. A discharge of the accused (*ontslag van rechtsvervolging*) takes place when the facts are proven, but do not constitute a criminal offence, or when the offender is not liable due to justification or excuse defenses. If the accused was acquitted or discharged, he will be released and discharged from criminal liability. The verdict must be reasoned. The reasoning concerns the question whether the charge is proven, why an explicit defense is denied, or why despite guilt no penalty is imposed. A verdict is valid and final if it was rendered in a publicly open court proceeding. Successive prosecutions for the same act are prohibited by Article 76 of the Criminal Code.

516 The power is elaborated in Article 14 paragraph (1) of the 1945 Constitution, which has been amended several times. A *gratie* is the President's constitutional power to pardon a convicted person from carrying out a sentence that has been rendered by a valid and final court decision. *Rehabilitatie* is also a constitutional power of the President to restore the honor and reputation of a person, which may or may not be granted in conjunction with the granting of a *gratie*. In granting a *gratie* or *rehabilitatie*, the President must first seek the opinion of the Supreme Court of Justice. By the granting of a *gratie,* a convicted individual is released and discharged from the obligation to carry out the sentence, but his/her status as a convicted criminal is unchanged and therefore subject to criminal rules on the prohibition of successive prosecution and recidivist.

517 The power is elaborated in Article 14 paragraph (2) of the 1945 Constitution, which has been amended several times. Unlike *gratie*, the granting of *amnestie* and *abolitie* is not based on a case-by-case approach, and the President must first seek the opinion of Parliament. *Amnestie* is the constitutional power of the President to decriminalize on the whole criminal sanctions of certain offences, whether or not there has been prosecutorial decision or court judgment. *Abolitie*, on the other hands, is the President's power to disregard accomplished criminal undertakings and prosecutions, by which those undertakings are deemed to have never happened.

518 Pre-trial investigation or prosecutorial proceeding shall be discontinued if there is no sufficient legal evidence to build a strong case or if the alleged action does not constitute a criminal offence, while the Attorney General has the authority to waive a criminal prosecution for reason of public interest. At the judiciary level, the court may decide to acquit the accused if the essential facts charged are not proven by the evidence presented, or to discharge the accused, if the facts are proven, but do not constitute a criminal offence, or when the offender is not liable due to justification or excuse defenses. On the other hand, the President may grant a *gratie* to a convicted criminal, which will release the said person from the obligation to carry out the sentence as had been rendered by a valid and final court decision.

them some assurance of legal certainty if they managed to fulfill their contractual obligations.[519]

If we carefully observe the wordings as contained in each of the settlement agreements, namely the MSAA, the MRNIA and the APU, they were actually not standardized. Among the settlement agreements, only the APU did not mention anything explicit about the government's promise not to instigate criminal prosecution against the banks' shareholders.[520] Under the MSAA and the MRNIA, IBRA and the Attorney General had given *"promise not to commence or prosecute any legal actions or enforce any legal rights against the banks, the banks' shareholders, and the banks' managements in respect of any matters related to such statutory and regulatory violations related to the affiliated loans and/or any matter related to the central bank liquidity supports, if the obligors were able to fulfill the contractual obligation upon IBRA's satisfaction"*.[521]

It was clear from the outset that under the framework of the Shareholder Settlement Program, the terminology *"Release and Discharge"* would mean to the banks' shareholders as escaped from both civil and criminal liabilities if they fulfilled their contractual terms and conditions, even though most of the settlement agreements did not stipulate the said clause explicitly. Undeniably, this was the only reason that the IBRA banks' shareholders were willing to sign the settlement agreements in the first place. It was the most important consideration. As was evident, the promise given by the government not to prosecute the banks' shareholders had generated continuing debate among many constituents.[522]

2. Conflicting Schools of Thought

Since the inception, during the implementation, and until the completion of the Shareholder Settlement Program, the "Release and Discharge" clause as embedded in the existing shareholder settlement agreements generated polemics among opponents and proponents of this point of agreement, the relevant policy decision, and its implementation. After the dissolution of IBRA

519 The need for legal certainty on the part of the banks' shareholders was not entirely irrational because the socio-political atmosphere at that time was not conducive to shelve rampant uneasiness among the people resulting from the absence of a stable government and due to the allegation campaigned impulsively by the law enforcement apparatus that the main cause of the systemic banking crisis was the abuse of a great number of banks by the banks' controlling shareholders. As a matter of fact, before the team from the Office of the Attorney General and IBRA started to negotiate officially with the IBRA banks' shareholders on the substance and form of the out-of-court settlement mechanism, another team from the Office of the Attorney General and the Police had conducted a pre-trial investigation on possible criminal offences allegedly conducted by the banks' shareholders relating to the violation of banking prudential regulations and the misuse of central bank liquidity supports. The pre-trial investigations were far from conclusive, and yet the questioning of the banks' owners and management by the public prosecutor had caused panic among the banking industry and had attracted the attention of the mass media. One thing led to another and the incident became news headlines and generated polemic causing unnecessary pressure on the law enforcement apparatus. The banks' shareholders basically demanded that if they signed the settlement agreements and fulfilled their contractual obligations, the government would not instigate criminal prosecution against them for the alleged violation of banking prudential regulations and the misuse of central bank liquidity supports. The concern on the part of the banks' shareholders regarding legal certainty was later proven to be partly accurate when the government under Gus Dur's presidency asserted to amend the MSAA unilaterally, which in turn brought the implementation of the Shareholder Settlement Program to a sudden halt. Even then, there was no clear affirmation that Gus Dur's administration intended to abandon the non-litigation approach.

520 Indeed, the APU was designed and formulated after the controversies regarding the "Release and Discharge" clause as stipulated in the MSAA and the MRNIA came to the surface and had turned into a political debate. Yet it was not entirely clear whether the government would refuse to give assurance of similar legal certainty or would still instigate criminal prosecution against the banks' shareholders who had signed the APU and had fulfilled the contractual obligations.

521 The MSAA and the MRNIA were supposed to be signed by IBRA and the Attorney General. Unfortunately, the Attorney General did not sign the settlement agreements. As a result, there was doubt as to whether the settlement agreements had been properly sanctioned by the Attorney General, and whether the Office of the Attorney General was legally bound by the contractual terms and conditions. This was where the complications surrounding the clause as stipulated in the settlement agreements started because under the Indonesian legal system only the Attorney General has the authority to waive a criminal charge/prosecution. It was unclear why the Attorney General refused to sign the settlement agreements at the last minute, because it was the team from the Office of the Attorney General who suggested to the President to follow an out-of-court settlement mechanism. Although not identical in wordings and sentencing, the italic phrase represented an "actual promise" as given by the State and as stipulated in MSAA and MRNIA, in light of the prevailing Contract Law and the Indonesian Civil Code.

522 Given the fact that the Attorney General did not sign the settlement agreements, many had questioned IBRA's legal standing to keep up with such promissory obligation, let alone to fulfill the said promise. Even if the Attorney General did sign the settlement agreements, many argued that the Attorney General also had no strong justification to waive prosecution against the banks' shareholders. Some of them suggested that the government should continue to execute the settlement agreements in an effort to recover the state funds and nonetheless send the banks' shareholders to jail. In reality, there were those who were opposed to allowing the government to release the banks shareholders from criminal liability regardless of the existing settlement arrangement (legalistic approach) and those who did not immediately oppose to the said government undertaking as long as the banks' shareholders were cooperative and managed to fulfill their contractual obligations as stipulated in the settlement agreements (pragmatic approach).

in April 2004, when IBRA had issued a number of evidences of completion to cooperative IBRA banks' shareholders in accordance with Presidential Instruction No. 8 of 2002, the polemics seemed to be forgotten temporarily.

However, the issue once again emerged in 2007 when President Susilo Bambang Yudhoyono appointed a new Attorney General, and a new team of public prosecutors was established to investigate the alleged misuse of the central bank liquidity support (BLBI) *vis-à-vis* the Shareholder Settlement Program. It is important for the study to elaborate the conflicting views regarding the clause in order to understand the reasoning behind each of the stances, as well as to understand the weaknesses of the arguments.

a) The Quarrel of Legality

Those who were opposed[523] to the agreement reached between the government and the IBRA banks' shareholders, in which the government promised not to instigate criminal prosecution against cooperative obligors, based their rationale more or less on two main premises. The first referred to Article 1853 of the Indonesian Civil Code, which states *"In regard to the interests of civil affairs arising out of a crime or offence, an amicable settlement may be concluded. This amicable settlement shall under no circumstances hinder the public prosecutor to prosecute the alleged crime or offences"*. Based on this article, they argued that the agreement between the government and the IBRA banks' shareholders was unlawful and therefore unenforceable. It is the principle of legality in criminal prosecution, which prevails in countries such as Germany, Austria, and Spain.[524] This principle unfortunately was not the positive law in Indonesia.

Secondly, they referred to Article 27 of the 1945 Constitution, which more or less states *"Every citizen of the State (of Indonesia) is equal before the laws and in the governance of the country, and must comply with the laws"*. In this context, they argued in a specific manner that it was illegal for the public prosecutor not to prosecute the IBRA banks' shareholders and their alleged offences, notwithstanding the available data and information that led to criminal wrongdoings, because it is discriminatory and therefore unconstitutional.[525] Basically, the opponents of the clause in the shareholder settlement agreements argued that the point of agreement between the government and the IBRA banks' shareholders was not only unlawful, but also unconstitutional.

The aforesaid line of thought was pretty appealing, but it comprised of striking weaknesses that made the relevant arguments unworkable because:

Firstly, it seemed to deny the fact that the socio-political conditions during the inception and the implementation of the Shareholder Settlement Program were far from favorable to undertake more decisive action in handling of the problems at hand.[526] In reality, the government was

523 Among the opponents of such an agreement was the Indonesian Legal-Aid Foundation, who submitted a request with the Supreme Court of Justice to undertake a judicial review against INPRES No. 8. In addition, there are several authors who have been known to disagree with the out-of-court method and mechanism of the Shareholder Settlement Program. Among them is Mr. Marwan Batubara who wrote a book entitled *"Skandal BLBI: Ramai-ramai Merampok Negara* (Haekal Media Center, Jakarta 2008).

524 *See in particular* Indriyanto Seno Adjie, *Asas OPORTUNITAS: Polemik Implementasi Dalam Tindak Pidana Korupsi,* presented in a One-day Seminar organized by the Office of Attorney General in cooperation with Partnership for Governance Reform in Indonesia, September 13, 2003.

525 For that matter, on February 26, 2003, the Indonesian Legal-Aid Foundation filed a claim of judicial review against Presidential Instruction No. 8 of 2002, dated December 30, 2002, with the Supreme Court of Justice. The Supreme Court rendered its decision on the request to undertake judicial review against INPRES No. 8 of 2002, i.e. Decision No. 03 G/HUM/2003, in which the request was denied because the issuance of an instruction by the President to cabinet members and government officials is allowed and the contents of the said Presidential Instruction is well within the government policy jurisdiction, and therefore cannot be the object of judicial review.

526 Actually, the banks' shareholders did not go unpunished for what they allegedly had done, but under the Shareholder Settlement Program it was a different kind of punishment by which the banks' shareholders were compelled to compensate the government for the benefit they had gained unfairly from the banks and/or some or all of the losses the banks suffered. Only if the obligors managed to fulfill their contractual obligations as stipulated in the settlement agreements, there would be an obligation on the part of the government to the cooperative obligors from possible legal ramifications as had been agreed. Before this happened, the lives of the banks' shareholders with the status of obligors of the government would be miserable. Most of the IBRA banks' shareholders were business people, which would put them in a more miserable condition and, most of the time, even their legitimate businesses were significantly adversely affected. They lost control of their assets, and were hardly able to start new businesses. On the other hand, sending the IBRA banks' shareholders to imprisonment would not solve the multidimensional crisis as was being confronted by the nation at that time and might even be contra-productive for the effort to revitalize the banking

confronted with too many problems at the time and there were very few good solutions available. The line of thought was too legalistic, which made it rather unrealistic;

Secondly, Article 1853 of the Indonesian Civil Code does not prohibit the settlement of civil aspect arising from a criminal event through an out-of-court settlement mechanism, but it merely preserves the right of the Office of Public Prosecutor to instigate or not to instigate prosecution against any criminal undertaking. Unquestionably, the article does not give rise to an obligation on the part of the public prosecutor to prosecute any alleged criminal undertakings;

Thirdly, the reference to the 1945 Constitution was no less ambiguous because the government did not actually deny the same treatment to other citizens in similar cases, but rather the government was trying to solve a problem by using limited available solutions within a very constrained environment. In principle, Article 27 of the 1945 Constitution prohibits discrimination based on ethnicity, religion, race, and peer group, but does not in any way prohibit the government from carrying out its task and function to confront the problems at hand.

The proponents of this line of thought seemed to disregard the importance of building a strong case in criminal proceeding, especially related to non-conventional undertakings such as banking and other white-collar crimes, and undermined the legal uncertainty as might be resulted from unreliable court system. It is not an easy task to prove that a bank has violated prudential banking regulations, let alone to prove that the bank's shareholders are directly responsible for the occurrence of such violation, because the public prosecutor first has to accept as true that there are exact criminal rules and sanctions against the matter in question. Was it simply embezzlement of the banks' money by the banks' shareholders? Did the prevailing banking laws particularly address and regulate the alleged offences? Or was it more than that, and was there perhaps an element of corruption in the substance and form of the alleged criminal undertaking? Was there sufficient legal evidence to prove the occurrence of corruption? How to calculate the losses as suffered by the state and the nation, during the time of an ongoing multidimensional crisis?[527]

Unfortunately, the actual, and for the most part, detrimental, conditions and circumstances at the time just did not allow anyone to be inflexible. However, the spirit and the support of this line of thought remain strong until today, despite the decision of the Supreme Court to refuse to grant the request for judicial review against Presidential Instruction No. 8 of 2002.

b) The Commercial Consideration

At the other spectrum, those who did not oppose to the insertion of the clause in the shareholder settlement agreements,[528] or to the actual delivery of the related promise by the government, primarily based their arguments on the indispensable necessity to resolve the IBRA banks' bad assets as part of the effort to overcome the systemic banking crisis and to recover the state funds that had been injected into the banking system. In many instances, however, they ignored the important reality that IBRA was a government agency. In fact, IBRA was designed as a super body on

system and the private sector, as well as to minimize the costs of the crisis. It was not for the public prosecutors to assess and analyze the socio-political climate and impact of its action, and yet the public prosecutor should have obeyed whatever policy decisions were being made by the government. After all, the Attorney General and the Police were appointed by the President of the Republic of Indonesia.

527 First the entirety of these inquiries and maybe many more needed to be confronted and addressed before any instigation of criminal prosecution by the public prosecutor was to commence. Meanwhile, the punishment that might have been rendered by the court upon the wrongdoers would hardly contribute significantly to solve the larger and much more complex problems the nation confronted. It is not to say that there is no merit in this particular line of thought, but on the contrary, it reiterated an important moral value that had been forgotten for some time and had influenced constructively the socio-political climate in Indonesia.

528 Under this category, the Steering Committee for Legal-Aid of the Financial Sector Policy Committee could be considered as the main proponent of the *clause* as stipulated/embedded in the settlement agreements. Moreover, the administration and the government officials who actually designed, introduced, and implemented the Shareholder Settlement Program were also the leading proponents of the *clause*, including the Attorney General who, in 1998, wrote a report and a recommendation to President Habibie in favor of the out-of-court method and mechanism of the Program as well as the asset settlement method of payment.

which the Banking Law had bestowed an enormous amount of power and which was further able to control an enormous volume of assets placed under its control. This caused IBRA to become the center of attention, in which many conflicting interests became entwined.[529] It was delicate.

The proponents of the clause believed that the government's promise not to instigate criminal prosecution was the logical consequence of the willingness on the part of the banks' shareholders to cooperate and to fulfill their agreed contractual obligations. It was the prime consideration for the banks' shareholders to sign the settlement agreements. There was no rationale for the banks' shareholders to be cooperative and willing to compensate the government for the debts owed by their group companies and/or the losses as suffered by the banks, if they would have been prosecuted nonetheless. In all practically, the government could not expect to obtain compensation from the IBRA banks' shareholders and yet send them to jail.[530]

The argument was no less appealing than the line of thought discussed in the previous Section, and yet there were also flaws involved that proved to hamper the smooth implementation of the government's policy decision. For one thing, the policy decision had never been consulted with the relevant constituents. The authority not to instigate criminal prosecution is by law the prerogative of the Attorney General, who is a high-ranked government official, but the use of such authority can only be undertaken after thorough consultation with the relevant state institutions and only for reason of public interest. There was no proof that the Attorney General had discussed the government's intention to implant the clause into the shareholder settlement agreement in 1998, and hence it should have been explicable as to why the Attorney General refused to co-sign the MSAA and the MRNIA at the last minute.[531]

Another flaw was discovered in the implementation of the Shareholder Settlement Program as carried out by IBRA. The flaw was related to the way the Program was initially executed, during the time when IBRA lacked clear governmental guidelines and benchmarks on how it and its officials should administer, oversee, and enforce the Program. Without such guidelines and benchmarks, IBRA's decision makers and executors lacked the sense of responsibility that should have been displayed by officials of a government agency, which made the implementation of the Program far from transparent and unbiased, and accountable. In addition, there were almost no effective communication and coordination between IBRA and other relevant government agencies

529 When the first batch of shareholder settlement agreements was introduced and actually signed, namely the MSAA and the MRNIA, IBRA was confident that the out-of court settlement structure would be the best solution to handle the IBRA banks' bad affiliated loans. IBRA was in the same government team that was led by the Office of the Attorney General to negotiate with the IBRA banks' shareholders, and it was the Attorney General who suggested to President Habibie to pursue an out-of-court settlement method in handling the IBRA banks' shareholders. In fact, the Attorney General was supposed to sign the settlement agreements together with IBRA. Moreover, IBRA and the Minister of Finance had been given the authority by the President to sign the settlement agreements on behalf of the government. Everything seemed to be in order until the Attorney General declined to sign the settlement agreements, a newly elected government came into office, and the socio-political climate was changing dramatically.

530 The banks' shareholders had been arguing that as shareholders they should not be personally accountable for the liability of the companies, and that the losses the banks suffered were not caused solely by them but mostly by the unprecedented financial crisis that took place in Indonesia during 1997-1998. As a matter of fact, many of the banks' shareholders were better prepared to fight the government, both in and out of the court system, because they all had the resources needed to win any legal battle. As was evident, the socio-political conditions at the time were far from stable. Everyone in the government had more or less the same idea about the high level of difficulty that would be confronted in prosecuting the banks' shareholders, but no one had the confidence of an assured positive ending. This lack of confidence had to do with the large number of banks' shareholders being processed at the same time, and thus requiring an enormous capacity and the luxury of time needed to build strong cases against them. It would involve many top-notch litigators in town, whom the banks' shareholders were equipped to recruit and pay. It was also surrounded by uncertainty as to the court's competency and integrity in examining the legal charges, let alone to expect a favorable decision. Meanwhile, the aforesaid proponents were also aware that the government basically had the power not to instigate prosecution against the banks' shareholders, and hence they argued that it should have been tolerable for the government to promise the banks' shareholders something that was within its jurisdiction. Once promised, it had to be honored. For sure, you cannot always get what you want.

531 IBRA and the Minister of Finance should have been alerted by the Attorney General's reposition, and should not have continued to act by relying solely on their own authorities, even if they were backed up by the President himself. The matter became more complicated when in 1999-2000 IBRA issued several written closing confirmations or receipts of payment to a number of cooperative obligors, which many had misunderstood as *Release and Discharges*. This misunderstanding was also the main trigger behind the polemic that accused IBRA to have gone beyond its authority. In its earliest stage of commencement, the Shareholder Settlement Program and, in particular, the government's promise not to prosecute cooperative IBRA banks' shareholders, had never gained actual socio-political comprehension and support from the relevant important constituents, both within and outside the administration. It was a fragile subject matter, and the issue became one of the most attractive topics to be talked about, debated, disputed, and cursed during the period following President Habibie's administration. Without a good and strong start, it had become a very tiring and difficult moment for IBRA and its staff to explain repeatedly to the newly elected administration and parliament as to the historical background and the cost-benefit aspect to continue or discontinue the Shareholder Settlement Program. There always was the tendency that the new government did not want to be trapped in the problems caused by or inherited from the previous government, or otherwise to introduce new policy guidelines that undermined the policies of the previous government. The polemic became intense especially during the peak period of the euphoric demand for total reform and after President Habibie had revoked all censorship rules and measures against free press and freedom of speech.

in carrying out the Program. IBRA was basically walking and working alone.

The proponents of this line of thought were mostly no-nonsense people and they were correct to believe that the government, should it want to, indeed has the authority not to instigate criminal prosecution against the IBRA banks' shareholders. However, they seemed to ignore this, or just simply forgot, that there were rules and unwritten conventions that had to be taken into account in undertaking IBRA's task and function. IBRA did not live in a vacuum and there were many constituents that needed to be consulted, coordinated, and listened to in order to make IBRA's programs effective. As was evident, IBRA had been accused of surpassing its authority, was deemed to be over-confident, and to a certain extend was also maladroit in executing and administering the Shareholder Settlement Program. A sensible policy decision without an effective scheme of implementation would only be in vain.

c) Unwarranted Polemic: The Impasse

Despite the reasoning and the merit of each of the aforesaid lines of thought, the ongoing disagreement regarding the clause as embedded in the shareholder settlement agreements did contribute to the policy inconsistencies and legal uncertainties in the implementation and the completion of the Shareholder Settlement Program.[532] The government should not have delivered the promise without first having ensured a strong legal foundation and the proper mechanism to determine that the obligors had fulfilled their contractual obligation to the government's satisfaction. Surely, the Shareholder Settlement Program was not IBRA's responsibility alone because it was a government undertaking.

It is always constructive for a government if there are one or more factions among the people that keep watching every step it takes in undertaking its tasks and functions and then reminding the government if it has gone beyond its constitutional mandate. However, there are legal venues available for these people to feed their aspiration, and it would be more constructive for those who were opposed to the clause to make use of these venues rather than generating a never ending polemic before the public.[533] As was explained in the previous Chapter, the financial crisis that had taken place in Indonesia during 1997-1998 was triggered by many factors, both internal and external. The systemic banking crisis was caused by a mixture of structural flaws, both in the banking industry and in regard to the functioning of banking supervision.

The collapse of the national economy was in fact inevitable, and the financial crisis was only one of the triggering points in an already weak economic structure. It was an unprecedented life-time incident, which had cost the nation so much, whether we liked it or not. The Shareholder Settlement Program was designed to minimize the cost, rather than to spend the state's money as in the case of the bank recapitalization program and the disbursement of the central bank's liquidity supports, and if properly executed would have given much more back to the state. Unmistakably there was nothing erroneous with the government policy decision to the IBRA banks'

532 The proponents of those who were opposed to the government's promise not to prosecute cooperative obligors were not entirely accurate in their insistence that the government, i.e. the Attorney General, had the obligation unconditionally to prosecute any offences, because the prevailing positive law in Indonesia concedes the principle of opportunity in criminal prosecution. As explained, the Attorney General has the authority to waive a criminal case for reason of public interest, and in addition, the public prosecutor has the power to discontinue pre-trial investigations and prosecutions if there is insufficient legal evidence or if the act does not constitute a criminal offence. While on the other hand, the people who supported the viewpoint that the government has the authority to promise the IBRA banks' shareholder not to be prosecuted if they fulfilled the obligations under the settlement agreements, should not have taken the said perspective for granted. As was evident, the insertion of the clause into shareholder settlement agreements had generated mixed reactions from the Office of the Attorney General and had met with strong resistance from other government officials of the newly elected administration, which inevitably caused bewilderment among IBRA's officials and the IBRA banks' shareholders. The matter would have gone out of control or even would have come to a standstill if there were no guidelines or benchmarks for the government to deliver the promissory obligation under the settlement agreements.

533 They should try to accept the final decision of the Supreme Court refusing to grant the request of judicial review on Presidential Instruction No. 8 of 2002, as well as the decision of the Supreme Court to refuse a similar request in regard to Government Regulation No. 17 of 1999. They also should have attempted to comprehend the indispensable necessity that was being challenged by the government to make such a policy decision, especially during the financial crisis when the available solutions to solve the many problems the government faced were pretty limited, and the prevailing legal infrastructure was not adequate enough to undertake more decisive measures. They should not contain their standpoint merely to oppose the government's policy decisions, but rather to think holistically and to provide constructive inputs in order to prevent the recurrence of the same mistakes in the future.

shareholders who had signed the settlement agreements and had fulfilled their relevant contractual obligations, but much improvement was needed at the working level.[534]

Megawati's administration promptly realized the problems at hand. Nonetheless, it took President Megawati more than six months to finally render a decisive standpoint that discontinued the policy inconsistencies and legal uncertainties surrounding the Shareholder Settlement Program. There seemed to have been intensive consultations between the relevant elements in the executive branch and between the government and its counterparts in parliament and the judiciary, regarding the present and the future of the Program.[535] Megawati's administration was also proactive in establishing a working relationship with the relevant parliamentary committees and the Supreme Court in order to obtain the political support needed and to familiarize the judiciary with the government's policy decision and its implementation. Meanwhile, IBRA had also taken significant steps to improve its image and performance.

On December 30, 2002, President Megawati issued Presidential Instruction No. 8 of 2002, which stipulated the guidelines and the benchmarks for the administration in delivering the promise as given by the government under the settlement agreements. It was hoped that all of the aforesaid endeavors would end the unnecessary debates regarding the clause, and the people of Indonesia could instead concentrate to transform into the future. Nothing of the sort happened. The polemic reemerged even stronger in nature, and some people predicted that new policy inconsistencies and legal uncertainties were created and that President Megawati was trying to cease in the first place. Many were afraid that the recent observable fact would bring the state and the nation back to a state of *déjà vu*. Was it true that, according to some people, Indonesians are short in memory? In this context, it would be of the essence for this study to discuss Presidential Instruction No. 8 of 2992 into more detail, in order to provide the reader with the factual background and the basic reasoning behind the issuance of the said executive order.

3. The Presidential Instruction No. 8 of 2002

a) The Pragmatic Proposition

The policy inconsistencies and the legal uncertainties surrounding the inception, the implementation, and the completion of the Shareholder Settlement Program amidst the ongoing debates regarding the clause as described, had brought nothing to benefit the state and the nation. It did nothing to minimize the costs of the crisis, nor did it contribute positively to the efforts to revitalize the banking system and the private sector. It only created more confusion within the administration, which was not favorable for the development of the new socio-political configuration after Soeharto's era. To a certain extent, it became the bargaining chips in many political trade-

534 For one thing, the policy decisions regarding the Shareholder Settlement Program are found in many executive orders and legislations, and before President Megawati's administration came to office, no one had taken the initiative to assemble the scattered policy guidelines into one single policy. However, there were many loose ends that were responsible for the disappointing performance of the Program. The People's Consultative Assembly had twice reminded the government on the subject matter. Parliament and the President had specifically regulated the matter as part of the national development program. The administration had issued many executive orders to overcome the predicaments that occurred in IBRA's implementation of the Program. Meanwhile, there was no decisive standpoint acceptable as the truth that the settlement agreements IBRA signed as representing the government and the IBRA banks' shareholders were valid and legally binding contracts, and therefore shall apply as the law between the parties thereto. Furthermore, there was no check-and-balance mechanism IBRA could use to judge the fulfillment of the contractual obligations by the parties to the settlement agreements. The operating guidelines not only had to be clear for IBRA to carry out, but they must also be accountable to justify the assessment that the banks' shareholders had satisfactorily completed their obligations as stipulated in the settlement agreement. There were also no clear guidelines regarding the proper mechanism and the instruments to be used for the delivery of the government's promise to waive criminal charges against cooperative banks' shareholders.

535 On March 7, 2002, Megawati's cabinet decided to honor the settlement agreements that had been signed by IBRA and the IBRA banks' shareholders. In this regard, the cabinet also instructed the Financial Sector Policy Committee ("FSPC") to undertake a compliance review on the fulfillment of the contractual obligations of the IBRA banks' shareholders. Furthermore, the FSPC was given a full mandate to regulate the standard operating procedures for IBRA to carry out the Program and to determine the corrective measures needed to improve the compliance level of the obligors. IBRA must all the time work hand in hand with IBRA's Oversight Committee, the Steering Committee for Legal-Aid, and the Secretary of the FSPC. Any decision made by IBRA must be checked and balanced by the said constituents and had to be endorsed by the FSPC and ultimately by the cabinet. On December 30, 2002, President Megawati issued Presidential Instruction No. 8 of 2002, which stipulated the guidelines and the benchmarks for the administration in delivering the promise as given by the government under the settlement agreements.

offs that were unrelated to the interests of the people at large.

The basic premise behind the decision not to prosecute IBRA cooperative banks' shareholders appeared to be based on the query that, if prosecuting the obligors did not guarantee that the government would achieve its goal, why should the government prosecute them in the first place? After all, the government has the authority to waive criminal charges in the interest of the public. It was a pragmatic assessment. While there was no assurance that justice and legal certainty would be served, the Shareholder Settlement Program did provide the government with a much better playing field to deal with the obligors. Based on the settlement agreements, the government was not compelled to deliver its promise until the banks' shareholders had fulfilled all of their contractual obligations. In case of full contractual fulfillment, how should the government keep its promise?

Based on the deliberation of the Steering Committee for Legal-Aid in April 2002, there were two possible ways for the government to fulfill its promise, namely (1) based on the Law of Public Prosecutor in which the Attorney General has the power to waive a criminal case for the purpose of public interest *(deponeren)* or (2) through the enactment of a new law approved by Parliament on the Granting of Release and Discharge. The said deliberation also underlined that it was up to the government to choose between the available alternatives, taking into consideration many factors such as the processing time for each alternative, the political impact, and the legal certainty.[536]

There were basically two conditions the Attorney General had to meet in executing the authority of *deponeren as derived from the principle of opportunity.* Based on the elucidation of Article 32 of Law No. 5 of 1991, the Attorney General can waive criminal charges against an alleged offender only relevant to the case at hand. The Attorney General seemed reluctant to exercise his authority in the absence of an unambiguous consensus of the so-called "public interest", in spite of the fact that the cabinet as a whole had agreed to honor the shareholder settlement agreements. This had brought the whole process to a standstill, and did not at all help to improve the compliance level among the banks' shareholders.

After the cabinet meeting on March 7, 2002, the cabinet ultimately agreed to leave the matter to the President to decide what would constitute "public interest" in light of the clause as embedded in the shareholder settlement agreements. Based on the cabinet's proposition, President Megawati issued Presidential Instruction No. 8 of 2002, dated December 30, 2002. The issuance of this Presidential Instruction unraveled many of the unanswered inquiries that had generated the policy inconsistencies and the legal uncertainties surrounding the implementation of the Shareholder Settlement Program.[537]

The issuance of the aforesaid Presidential Instruction was the President's standpoint on the meaning of "public interest". Would the standpoint engender injustice upon the people? It would create injustice only if the policy standpoint was not carried out in accordance with the general principle of good governance and did not serve the main purpose as embedded in the principle of opportunity. The assurance of legal certainty, no matter how bitter, would in turn enhance the maturity of the legal tradition and advance the people's confidence in the legal system. With

536 Clearly, the Steering Committee for Legal-Aid was very cautious in giving its opinion, and the result was a compromised standpoint that did not comprehensively solve the problems at hand and somewhat obscured the actual intention behind the government's promissory obligation as embedded in the settlement agreements. As aforementioned, the first batch of settlement agreements clearly indicated that it was the Attorney General, representing the government, who had promised not to prosecute IBRA's cooperative obligors. This assertion should also be relevant with the latter batch of settlement agreements. It was therefore extraneous to suggest any other alternatives, especially in the form of a new law. What was actually missing were the political grounds and the supporting mechanism for the Attorney General to carry out his authority to waive criminal charges against cooperative obligors, taking into account the relevant laws and regulations.

537 For one thing, it declared unequivocally that it was in the best interest of the people for the government to preserve legal certainty in Indonesia and that even the government was not above the law. In this context, it meant not only to honor the settlement agreements as signed by IBRA and the banks' shareholders, but also to actually deliver the promise the government had given not to prosecute the cooperative banks' shareholders. If the government was unable to keep its promise in this particular case, it would be further perceived that the government would never ever be able to keep its promise in any other cases either. The shareholder settlement agreements were valid and legally binding contracts, and therefore should apply as the law between the parties thereto.

this presidential standpoint, it was unnecessary for the Attorney General to formulate his own version of "public interest".

In this regards, the principle of opportunity in the criminal prosecution was the *overheidsbeleid* for the implementation of the *staatsbeleid* as had been pronounced by the President, and therefore may be exercised by the Attorney General as legally binding discretionary power.[538] The Attorney General would presumably be protected from possible political inquiries in the future, because he only carried out the policy decision that had been instructed to him by the President. It was the President who must answer about the policy decision and not the Attorney General, and according to the aforementioned Supreme Court's decision,[539] the Presidential Instruction is basically a *beleidsregel* and therefore the President cannot be held accountable before the prevailing court of law.

b) The Structural Design

i) Reinventing the Stick and Carrot

Presidential Instruction No. 8 of 2002 accentuated the importance of differential treatment between cooperative and uncooperative obligors. The cooperative obligors, which comprised of the IBRA banks' shareholders who had signed settlement agreements and fulfilled all their contractual obligations, must be provided with the necessary legal certainty. Meanwhile, the uncooperative obligors that consisted of IBRA banks' shareholders who refused to sign the settlement agreements or who had not complied with the contractual terms and conditions as signed must be punished with decisive and concrete legal action.[540] In this regard, the level of compliance indeed played an important role to determine whether a bank's shareholder was cooperative or not, but the actual completion of all of the contractual obligations was definitely the utmost determinant factor.

The stick-and-carrot methodology as employed by the Presidential Instruction was not a new discovery.[541] The settlement agreements gave only two options for the banks' shareholders to choose from, either to fulfill all of the contractual obligations or nothing at all. If the banks' shareholders failed to fulfill their contractual obligations, not only did they lose the opportunity to attain the legal certainty as warranted by the government, but according to the Presidential Instruction, they should also be penalized. The Legal-Aid Team that was appointed by the Financial Sector Policy Committees to review the compliance level of the obligors had recommended several ways to handle uncooperative obligors.[542]

At the time, for some reason, not even one of the recommendations the Legal-Aid Team

538 Indriyanto Seno Adjie, *supra,* p. 15.

539 Supreme Court Decision No. 03 G/HUM/2003, *supra.*

540 The Presidential Instruction indicated a new feature that went beyond the contractual terms and conditions as stipulated in the settlement agreements. The treatment of the banks' shareholders who refused to sign settlement agreements should have been pretty straightforward because the warranty of legal certainty as promised by the government was irrelevant. The banks' shareholders who had signed the settlement agreements but failed to fulfill all of their contractual obligations could also be held liable for something that was not explicitly included in the settlement agreements. However, until now, it was still unclear as to what decisive and concrete legal actions would be imposed against them, despite the fact that during its official term IBRA had turned over a number of uncooperative obligors to the police and the public prosecutor.

541 The notion had been declared previously by the People's Consultative Assembly in 2001 and 2002, and was also regulated in Law No. 25 of 2000 concerning the National Development Program. President Megawati's decision to issue Presidential Instruction No. 8 of 2002 did not come out of the blue, but it was a legitimate follow up of the guidelines that had been vigorously sanctioned by the state's highest institution and the parliament. None of the administrations before Megawati had undertaken what should have been done.

542 The recommendation comprised of many standard legal actions, both civil and criminal, but the Team had also warned that there would be many obstacles along the route and the chance of a better recovery was practically diminished. In light of the probable impediments, the Team also suggested that the government should consider enacting an emergency law that would allow the government to take unconventional legal actions against the obligors, facilitate the establishment of an *ad hoc* court chamber and judges, and enable the imposition of severe punishments. The suggestion reflected the general feeling at that time that the prevailing laws and regulations, namely Article 37A of the 1989 Banking Law and its implementing regulations, were not as effective as they were supposed to be, especially in handling uncooperative obligors under the auspices of the Shareholder Settlement Program.

presented was considered to be workable, let alone the suggestion to enact a new law. This brought both IBRA and the banks' shareholders back to the terms and conditions as stipulated in the settlement agreements, and the level playing field was practically unchanged. The banks' shareholders must fulfill their contractual obligations as stipulated in the settlement agreements, and the government was compelled to deliver its promise not to prosecute them. In this context, the stick and carrot would mean that the cooperative obligors were entitled to the warranty of legal certainty, while the uncooperative obligors were eligible for nothing.

Nevertheless, the message in the Presidential Instruction is crystal clear and still valid today, even after the dissolution of IBRA in 2004. Sooner or later, the government must initiate decisive and concrete legal actions against uncooperative obligors. Otherwise, it would be unfair to the cooperative obligors, which would inevitably emasculate the essence of legal certainty that the government has been struggling to establish.

ii) The Check-and-balance Mechanism

Presidential Instruction No. 8 of 2002 managed to allocate clearly the task and function among IBRA,[543] the Financial Sector Policy Committee ("FSPC"), the Minister of State-owned Enterprise, and the law enforcement agencies,[544] for the delivery of the government's warranty of

543 Based on Presidential Instruction No. 8 of 2002, IBRA had been given a focal role in the delivery of by the government. Nevertheless, IBRA could not act alone, because it had to obtain full endorsement from the Financial Sector Policy Committee and the Minister of State-owned Enterprise in every decision it was about to make. In this regard, IBRA was to classify the obligors into three groups. *The first group* consisted of banks' shareholders who had fulfilled their contractual terms and conditions as stipulated in the settlement agreements. This group was to be given evidence of completion in the form of as part of the warranty of legal certainty in accordance with the settlement agreements. *The second group* comprised of banks' shareholders who, at the date of issuance of the Presidential Instruction, had not fulfilled all of their contractual obligations in the settlement agreements. This group was to be given the opportunity to complete their unfulfilled contractual obligations within the time frame as determined by the Financial Sector Policy Committee. In other words, they were not immediately considered as uncooperative. *The third group* contained the banks' shareholders who did not complete or were unwilling to complete their contractual obligations as stipulated in the settlement agreements within the time frame as determined by the said Committee. In this context, IBRA was to coordinate with the Attorney General and the Head of Police to undertake decisive and concrete legal action against them. Based on the Presidential Instruction, IBRA, mainly in its capacity as the contracting party to the settlement agreements was instructed to sort out which obligors were cooperative and which were not.

IBRA became the sole component in the implementation of the Shareholder Settlement Program who knew for a fact whether or not the banks' shareholders had fulfilled their contractual obligations. IBRA was not entitled to mingle with any other matter beyond the fulfillment by the banks' shareholders of their contractual obligations. The evidence of completion to be issued by IBRA was to be understood as the from further contractual obligations. Clearly, IBRA was not a law enforcement agency and therefore was ineligible even to discuss non-contractual related matters. In executing the said presidential mandate, IBRA must take into account the decision of the Financial Sector Policy Committee regarding the time frame and other parameters for the obligors to complete their unfulfilled contractual obligations and must report periodically to the Committee and the Minister of State-owned Enterprise as to the relevant progress. IBRA was to use the result of review on compliance level as conducted by the aforesaid Legal Aid Team as one of its basis to determine where and how to begin, what kind of corrective measures needed to be undertaken, and how it would end. IBRA was to submit proposals with the Financial Sector Policy Committee on how to undertake its task and function, and must base its action at all times on the decisions of the Committee and on the approval of the Minister of State-owned Enterprise. In due course, the issuance of by IBRA to obligors who had completed their contractual obligations as was stipulated in the settlement agreements could only be carried out by the Chairman of IBRA alone after the Financial Sector Policy Committee and the Minister of State-owned Enterprise had given their approval on the matter. The Presidential Instruction had not only put IBRA back on the right corridor, but also pronounced that the Shareholder Settlement Program was a government sanctioned undertaking. As discussed in the previous Chapter, during the dark period there was a tendency that the then prevailing administration did not actually support the Program in its entirety. The new administration seemed inclined to rebuff the products it inherited from the preceding government, and even tried to modify them unilaterally, which unfortunately had brought the whole Program into disarray. Meanwhile, the new administration was too busy promoting its own products, which regrettably had generated policy inconsistencies and legal uncertainties. IBRA was out on the limb and unable to carry out the Program effectively. IBRA's staff had regularly been summoned by the law enforcement agencies for questioning, and the banks' shareholders ceased to fulfill their contractual obligations.

544 Presidential Instruction No. 8 of 2002 also determined detailed duties to be undertaken by law enforcement agencies, namely the public prosecutor and the police, in recognition of the Shareholder Settlement Program as well as IBRA's relevant task and function. As it was now clear that the said Program was a government's sanctioned program, it was only logical to expect that the said law enforcement agencies were to carry out the instruction of the Head of the Government to whom they were ultimately accountable. As aforementioned, the Presidential Instruction functioned as the legal ground for the law enforcement agencies to execute their relevant authority as stipulated in the prevailing laws and regulations. Simply speaking, the soldiers should not ask questions but were only to follow orders once the commander-in-chief had rendered the ruling. In recognition of IBRA's duty to determine which obligors were cooperative and which were not, the law enforcement agencies were instructed to perform two main tasks. In handling the uncooperative obligors, the police and the public prosecutor must coordinate with IBRA to undertake decisive and concrete legal actions against the said obligors. IBRA was to provide the law enforcement agencies with the relevant data and information, but the agencies had to initiate the legal proceedings against the uncooperative obligors. In light of the cooperative obligors and the of the said obligors from criminal aspects directly related to the Shareholder Settlement Program, the law enforcement apparatus was to discontinue any ongoing pre-trial investigations and prosecutions against cooperative obligors in accordance with the prevailing laws and regulations. Based on the Presidential Instruction, the law enforcement agencies were practically instructed to wait for IBRA's confirmation before making any further action against or in favor of the banks' shareholders.

Unlike the Police, the Office of the Attorney General is authorized to represent the state both in criminal and civil affairs. Hence, there should be more room for the Office of the Attorney General to implement the Presidential Instruction in handling uncooperative obligors. As aforementioned, there were two kinds of uncooperative obligors, namely the banks' shareholders who refused to sign the settlement agreements in the first place and the banks' shareholders who signed the settlement agreements but were unable or unwilling to complete all of their contractual obligations. In regard to the first kind of uncooperative obligors, the Office of the Attorney General could commence criminal investigations and prosecutions against the obligors on the basis of the prevailing banking law, corruption law, and criminal code. There might be evidence of criminal undertakings that involved the obligors in regard to the violation of prudential banking regulations and/or the misuse of the central bank's liquidity supports. In addition, either simultaneously or consecutively, the office of the Attorney General could also initiate civil actions against uncooperative obligors. In this context, the Office of the Attorney General would be acting as the attorney in fact of the govern-

legal certainty relating to the Shareholder Settlement Program. By all accounts, there should be no more hesitation about who should do what. In addition, the Presidential Instruction also designated a mechanism by which IBRA in particular was to perform its task and function and how IBRA was to interact with the FSPC and the Minister of the State-owned Enterprise.

As indicated in the Diagram 6, IBRA had to undertake two main tasks, namely (1) to improve the compliance level of the banks' shareholders in fulfilling their contractual obligation[545] and (2) to conclude which obligors had completed the settlement agreements.[546] In undertaking these tasks, IBRA had to take into account the cabinet's decision of March 7, 2002, as well as other implementing executive orders issued by the FSPC. While carrying out the guidelines of the FSPC, IBRA must regularly submit a progress report with the FSPC. In addition, IBRA was to communicate intensively with IBRA's Oversight Committee and the Steering Committee for Legal-Aid on a weekly or on-call basis.

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ment representing the banks that had been put under IBRA's receivership, and might instigate a civil legal claim against the banks' shareholders on the basis of a breach of controlling shareholders' fiduciary duty that caused the banks to suffer losses. Meanwhile, in regard to the second group of uncooperative obligors, the office of the Attorney General could also initiate similar legal actions but in a more precise manner. It could file a civil claim with the local district court against the said obligors on the basis of breach of contract. Simultaneously, it could instigate a criminal investigation and prosecution on relevant criminal wrongdoings as allegedly conducted by the banks' shareholders. All of these needed to be proven in a court of law with all the problematic technicalities attached to it, but it would be worthwhile because of the fact that the obligors had been uncooperative and refused to make use of the opportunity as provided by the government to settle their problems through an out-of-court mechanism.

The handling of the cooperative obligors should be more straightforward than the handling of uncooperative obligors. The Presidential Instruction clearly directed that once IBRA had issued evidence of completion to a given bank's shareholder, the police and the public prosecutor were to discontinue any ongoing pre-trial investigation and/or prosecution against that obligor. Based on the prevailing Laws on Criminal Proceeding and on the Public Prosecutor, there are several ways for the law enforcement agencies to execute the said instruction. At the first instance, the police and the public prosecutor could discontinue ongoing criminal investigations against the obligor on the basis of insufficient legal evidence or if the act did not constitute a criminal offence. The public prosecutor could also be prevented from prosecuting the obligors based on the same reasoning. However, the aforesaid would be irrelevant in the case of sufficient legal evidence and the act did constitute a criminal offence. In this context, the public prosecutor could waive criminal charges against the cooperative obligors for the purpose of public interest, even though the legal evidence was sufficient or the act did constitute a criminal offence. It was this power of the Attorney General that the Presidential Instruction intended to carry out rather than any other. Furthermore, the Presidential Instruction must be construed not only to directing the law enforcement apparatus to stop ongoing pre-trial criminal investigations and prosecutions, but also to prevent the instigation of new legal actions, both criminal and civil, against cooperative obligors on matters relating to the Shareholder Settlement Program.

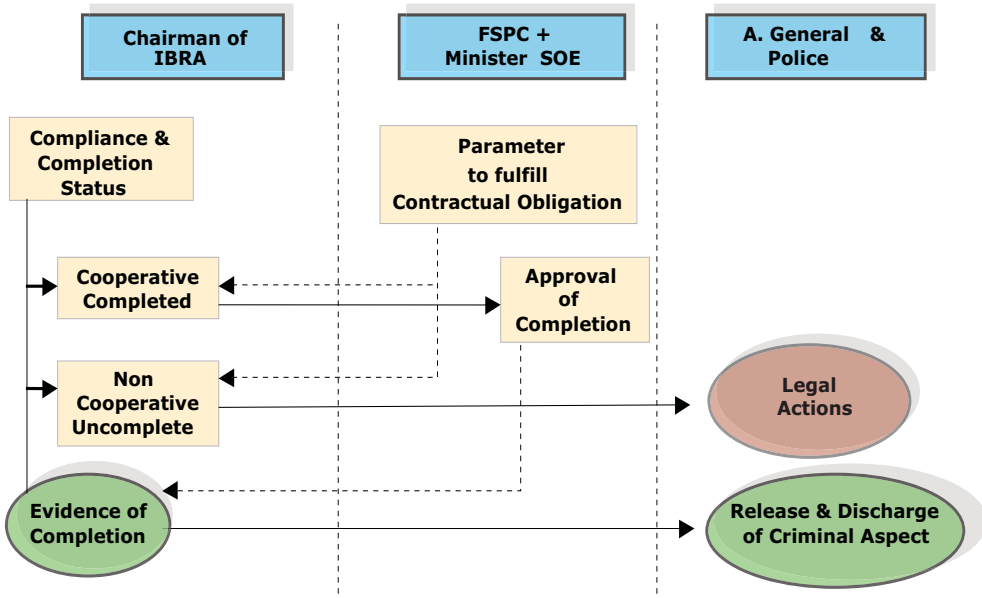
The Presidential Instructions undoubtedly reaffirmed the link between the government's contractual undertaking under the auspices of the Shareholder Settlement Program and the government's affairs in the enforcement of criminal law, which had been debated since the inception, during the implementation, and even after the completion of the Program. It should be noted that there is nothing illegal about the policy decision to waive the cooperative obligors from criminal charges because the prevailing law does allow it. It became a public polemic due to the fact that the government had never publicized the use of such authority in other cases, and probably because in this case it involved individuals who had been campaigned as "black business conglomerates" due to their close association with former President Soeharto. Nevertheless, the matter in question was indeed a sensitive issue and needed to be executed in the utmost vigilant manner. In this regard, it is imperative for the study to elaborate the decision making mechanism to be adhered to by IBRA in pronouncing which obligors were cooperative and which were not, because IBRA was the key element in the delivery of the government's promise to the banks' shareholders from criminal charges that were related to the Shareholder Settlement Program.

545 At the first instance, IBRA had to take into consideration the results of the review on compliance as produced by the independent Legal-Aid Team appointed by Megawati's administration. The review would be able to help IBRA in knowing where the banks' shareholders position in the fulfillment of their contractual obligations as was stipulated in the settlement agreements, and in assessing the problems that had hampered the implementation of the Shareholder Settlement Program, as well as in determining the corrective measures that needed to be carried out. By referring to the said compliance review, IBRA was compelled to act objectively and prevented from potentially cherry picking among the obligors. IBRA had to work closely with the Steering Committee for Legal-Aid and IBRA's Oversight Committee in making use of the review. The committees were to give their remarks on the review and to suggest a corridor for IBRA to communicate with the banks' shareholders.

As indicated in Presidential Instruction No. 8 of 2002, the FSPC was to determine the time frame during which the banks' shareholders had to fulfill their contractual obligations. In this context, the FSPC had given IBRA and the banks' shareholders a three month period to discuss the results of the compliance review, the remarks made by the aforesaid committees, as well as the possible solutions to improve the compliance level of the contracting parties. This period of communication was part of the time frame to be determined by the FSPC, and it was an important avenue for either party to decide whether or not the out-of-court settlement method was still viable to solve the problems at hands. This was an increased improvement from the previously used methods that were used by the administrations before Megawati's in an effort to amend the MSAA, in which the obligors were not given the chance even to voice their apprehension.

546 IBRA's proposal for the attainment of approval from the FSPC and the Minister of State-owned Enterprises that an obligor had fulfilled her/his entire contractual obligation was based on the aforesaid mechanism. Such a proposal would then be reviewed and rechecked by the Steering Committee for Legal-Aid, IBRA's Oversight Committee and the Secretariat of the FSPC, before being addressed in the FSPC meeting. In this case, the FSPC was always in the position to invite high-ranked officials from Police Head Quarters and the Office of Attorney General to attend the its meetings.

Diagram 6



The FSPC was not only to determine the time frame for the banks' shareholders to fulfill their contractual obligations, but it also formulated the guidelines that would enable the implementation and the completion of the Shareholder Settlement Program well within the corridor indicated by the cabinet on March 7, 2002. It must take into account the result of the compliance audit, the remarks made by the Steering Committee for Legal-Aid and IBRA's Oversight Committee, and the communication between IBRA and the banks' shareholders/obligors. It was certainly not an easy task, because the FSPC had to make sure that the guidelines did not contravene the cabinet's decision, while in reality there were circumstances where some adjustments on the settlement agreements were required to make them more doable.[547]

The said governing mechanism had not existed before Megawati's presidency. The appointment of the Legal-Aid Team, the establishment of the Steering Committee for Legal-Aid, and the introduction of a new procedural due process surely enriched the existing establishment and, combined with the FSPC, IBRA, and IBRA's Oversight Committee, they became the ultimate mechanism for the proper functioning of Presidential Instruction No. 8 of 2002. However, this was only part of the whole picture. In reality, IBRA had also taken several initiatives to improve the awareness and understanding of many pertinent constituents because their support was crucial for the successful completion of the Shareholder Settlement Program. However, will it last?

4. Implementation Strategy

Presidential Instruction No. 8 of 2002 was undoubtedly the most important milestone in the implementation and in the completion of the policy decision as declared by the cabinet meeting on March 7, 2002 regarding the Shareholder Settlement Program. It was significant not only because

547 It is therefore understandable that the FSPC emphasized procedural due process rather than normative deliberation. If an adjustment was to be made on the settlement agreement and it was uncertain whether such an adjustment was within the cabinet's sanctioned corridor, the FSPC was inclined to bring the matter to the cabinet meetings for a decision. Regularly, the FSPC held meetings to discuss many matters related to IBRA's affairs and, from time to time, the FSPC also called meetings in regard to specific issues relating to the Program.

it reaffirmed the government's warranty of legal certainty in the execution of the Program, but it also elaborated the procedures that had to be adhered to by all relevant elements in the administration. It was decisive in nature, and it should have eliminated the policy inconsistencies and legal uncertainties that occurred during the governments before Megawati's Presidency. Nevertheless, it was not readily attainable in the practical sense and did not cover many matters outside of the administration.[548]

One thing is for certain, the Presidential Instruction did not establish any obligations upon the legislature and the judiciary, or the laymen on the street, or the powerful political opportunists and activists, or even the banks' shareholders themselves. It was just an executive order from President Megawati to her subordinates within her administration, which might not have functioned effectively without the appropriate supporting strategy and infrastructure. As was evident, IBRA had launched a series of measures and campaigns to support the Shareholder Settlement Program. Two of them are as follows:

a) All-embracing Harmonization

There were circumstances under which IBRA was also compelled to establish working relationships with other government agencies and state institutions, which were not covered by Presidential Instruction No. 8 of 2002. The Shareholder Settlement Program had become a sensitive socio-political issue, and the settlement agreements contained a number of a-typical features that were relatively novel to the prevailing legal tradition. IBRA was of the opinion that there were

548 During the dark period in the implementation of the Shareholder Settlement Program in 2000-2002, there had been growing concerns regarding the legitimacy of the Program and IBRA's credibility in carrying it out. Most of these concerns were caused by an ineffective strategy of public relations that had in turn generated a high level of ignorance among the public. As a government agency that carried out one of the most important tasks in the banking-financial history of Indonesia, IBRA had to establish and maintain the appropriate level of public confidence. Nevertheless, this was not the responsibility of IBRA alone. The government in its entirety had to make sure that the people and all of the interested parties were aware of the relevant policy decisions and implementations, and it was therefore important to have an effective public relation program ("PR") to educate and inform the public about the Program. In addition, there was a need to inform the public about the background, the progress, and the completion of the policy decisions and their implementations that were part of the government's accountability to the public. After the fall of President Soeharto in May 1998, the socio-political constellation and structure in Indonesia had been transformed considerably during and after the official period of President Habibie. The public had become more open and critical. The media was enjoying its freedom of press and speech euphorically, which in many instances had made the line between facts and illusions severely blurred. If the said condition was not managed properly, it would have been dreadful for the effective execution of the policy decisions and implementations regarding the Shareholder Settlement Program. There were several improvements made on the then prevailing PR strategy and program of IBRA and the administration, particularly after the decision of the cabinet on March 7, 2002 and the issuance of Presidential Instruction No. 8 of 2002, which consisted of many technical instruments and media.

Now that IBRA had more administrative and political constituents to deal with, both officially and unofficially, the decision making process in regard to the Shareholder Settlement Program had also become more dynamic and intensive, which in turn required the improvement of IBRA's PR strategy and program both quantitatively and qualitatively. The pronouncement of the government's policy decisions and their implementations regarding the Shareholder Settlement Program as contained in the cabinet decision of March 7, 2002, and executed by the Presidential Instruction were the most influential guidelines for IBRA. The executive orders were not only tactical, but also crystal clear, which made them the ultimate instruments of IBRA's PR strategy and program. The PR strategy and program of IBRA could basically be classified into: 1) basic routines and 2) supporting undertakings. These routines were undertaken by IBRA alone, mainly in relation to the periodic meetings of IBRA's Executive Committee, or by IBRA in conjunction with other constituents. After the Executive Committee's meetings, IBRA would usually make the basic contents of the said meetings known publicly by issuing written official statements through both non-electronic and electronic media. If permissible, IBRA would also conduct a press release on the spot after the periodic meetings of the cabinet, the FSPC, the IBRA Oversight Committee, and after parliamentary hearings. The basic purpose was to make the people at large know about the progress of the relevant policy decisions and their implementations, including any adjustments, failures as well as successes thereof, and to give interested parties the opportunity to dissent, support, and comment on the way the Program was carried out. This public disclosure usually contained clarifications on general or specific matters, as well as educational messages to improve the awareness of the people regarding the policy decisions and their implementation.

The efforts to improve the awareness of the people regarding the Shareholder Settlement Program and related policy decisions and their implementation, were supportive in nature. IBRA had been keen to regularly visit the chief editors of many important newspapers and magazines, or to invite the media community to informal media gatherings, in order to explain, discuss, and take notes on many IBRA-related matters, including the Shareholder Settlement Program. IBRA had to improve the working relationship with the mass media, both formally and casually, because it was an important avenue towards communicating with the public and also to encourage a more balanced reporting outlook. IBRA was also open to discussion with many non-government institutions and mass organizations, which at that time controlled large masses of participants and supporters. IBRA would frequently attend public debates and talk shows on matters that were within its jurisdiction. IBRA would encourage well-known experts and observers to opine and to give intellectual defenses on many strategic issues regarding the execution of the Program on behalf of the interests of IBRA and the government. IBRA often persuaded the FSPC and the IBRA's Oversight Committee to explain or to confirm many important IBRA-related issues, which were beyond IBRA's jurisdiction and yet important to be made known publicly. The indispensable foundation to improve the awareness of and the acceptance by the people regarding the Shareholder Settlement Program was for IBRA and the administration to provide the public continuously and systematically with pertinent and proportional information and data, and to be receptive towards any feedback or oscillation related to the Program. It was not necessary to hide anything from the public, and yet it was important to manage the flow of information to prevent an overload that could be counter-productive. During the early stage of the Shareholder Settlement Program, IBRA was pretty proactive publicly although without a properly designed PR strategy and program. During the dark period in the implementation of the said Program, IBRA was basically silent about anything related to the Program, as there had been ongoing policy inconsistencies and legal uncertainties at higher levels. It was not until the cabinet decision of March 7, 2002, that IBRA was given a refreshed mandate to involve and inform the public on every aspect regarding the policy decisions and the implementations of the Program. Now that the guidelines and the mechanism were clear and decisive, IBRA should have been more commanding and communicative regarding the Program. In fact, clippings from the mass media could explain in detail the implementation and the completion of the Shareholder Settlement Program as it was being carried out by IBRA.

other agencies and programs within the administration that must also be involved to make the implementation and the completion of the Shareholder Settlement Program more successful.[549]

Meanwhile, IBRA had been proactive in establishing and maintaining a more conducive relationship with the judiciary. It was not an intervention by the executive branch into the power of the judiciary, but at the time IBRA was of the opinion that the Supreme Court and the judiciaries were also entitled to be informed about its task and function, its vision and mission, and legal-related-matters surrounding IBRA's affairs. IBRA must also maintain and improve relationships with the legislature, because it was in command of the budgetary power and at that time was transforming to become a more powerful constitutional body than the executive branch. During Megawati's administration, IBRA attended a series of parliamentary hearings with various parliamentary commissions, in which one of the regular agendas was the Shareholder Settlement Program.[550]

In conclusion, the actual delivery by the government of cooperative obligors from alleged criminal wrongdoings related to the Shareholder Settlement Program, in accordance with Presidential Instruction No. 8 of 2002, must be construed as the end result of thorough analyses and severe scrutiny of many important elements collectively within and outside the administration. Was it not economically desirable? This study is preordained to remind any government that the matter in question had been concluded, and that the new paradigm surrounding the Shareholder Settlement Program as carried out by Megawati's administration, was the best under the circumstances.

b) Deterrent Effect of Legal Certainty

When Megawati's cabinet rendered its decision on March 7, 2002, after the issuance of Presidential Instruction No. 8 of 2002, there was a comprehensible awareness that the policy decision was triggered mainly by policy inconsistencies and legal uncertainties surrounding the inception, the implementation, and the completion of the Shareholder Settlement Program by IBRA. At this point in time, both IBRA and the IBRA banks' shareholders were unable to do anything fruitful for the effective implementation and completion of the Program.[551]

549 Following the cabinet's decision on March 7, 2002, a team from IBRA was touring in and out of the law enforcement agencies, i.e. the police, the public prosecutor, and the Supreme Court, to explain the nature of the cabinet's decision as well as the probable impact on their duties and functions. The responses were surprisingly positive and supportive. This way the law enforcement agencies would be able to follow the progress that took place within IBRA, and would have been prepared to take over the handling of the obligors if IBRA was unable to preserve the out-of-court methodology. IBRA had to work closely and continuously with the Ministry of Finance, despite the fact that IBRA's direct person in command was the Minister of State-owned Enterprise, the reasoning being, aside from budgetary reasons, that by the operation of law, all of IBRA's rights and obligations would be handed over to the Minister of Finance when IBRA was officially terminated. This would include the handling of the obligors who did not or were unable to complete their contractual obligations during IBRA's official term. Government Regulation No. 63 of 2001 concerning the Transfer of Position, Task and Authority of the Minister of Finance to the Minister of State-owned Enterprises in regard to the Indonesia Banking Restructuring Agency. This was a lengthy ongoing rivalry and partnership between the Ministry of Finance and the Ministry of State-owned Enterprise, which resulted in divisions of duties and responsibilities in the handling of state-owned companies/enterprises between the said ministries, both financial and non-financial institutions. Let us not forget the influential factor of Bank Indonesia, acting both as the national central bank and as the banking supervisory agency.

Likewise, IBRA must also coordinate with officials from the Ministry of Justice and Human Rights. Especially for their inputs concerning many legal aspects and administrative supports, and in the delivery of the government's warranty of legal certainty relating to the Shareholder Settlement Program. IBRA was also advised to maintain and improve working relationships with officials from the Ministry of State-owned Enterprise, because the Minister was holding a stand-alone veto for the actual delivery of the warranty of legal certainty as stipulated in Presidential Instruction No. 8 of 2002. IBRA was obliged to submit regular reports to the Minister, but the Chairman of IBRA was appointed and discharged by the President. IBRA had also worked with the National Archives, especially to establish, maintain, and preserve documentations and records relating to all of IBRA's affairs, in accordance with the applicable national standard. The story of IBRA was too important not to be preserved and publicized. The aforementioned are only some examples to show that there were unmistakably many important constituents in Megawati's administration who were not mentioned in the Presidential Instruction and yet influenced the successful completion of the Shareholder Settlement Program.

550 Documents on the hearings and records of important reasoning, empirical data, and actual exchanges of views regarding the said Program need to be preserved. It would confirm that the execution of the Program had become a state issue, rather than a mere government affair.

551 IBRA was helpless and uncertain, because it was the one who in the first place had promoted the warranty of legal certainty in regard to the Program, and it was also IBRA that could not guarantee that such a warranty could eventually be delivered. The banks' shareholders took a wait-and-see attitude in the fulfillment of their contractual obligations, which generated almost no benefits for the Program and revealed the lower than standard contractual compliance and enforceability. Megawati's administration was of the opinion that legal certainty was the key element, and that legal certainty would cover many empirical components. On the one hand, the warranty of legal certainty would mean that the government was actually delivering the promissory obligation as embedded in the settlement agreements, by which the cooperative banks' shareholders would actually be released and discharged from any criminal implications relating to the Program.

For this very reason, IBRA had put more emphasis on the improvement of the compliance level of the banks' shareholders, and to do that the government had to make a serious breakthrough. The higher the compliance level, the higher the probability would be for the completion of the settlement agreements by the banks' shareholders. Equally important was the need to take decisive and concrete legal actions against uncooperative obligors. If the uncooperative were able to go unpunished, it would have made no sense at all for other obligors to comply with the contractual terms and conditions. Undoubtedly, it was one of the most important preconditions to improve the compliance level of the banks' shareholders, and the efforts to achieve that end had actually been initiated many times by IBRA even before the issuance of the Presidential Instruction.[552]

Based on the cabinet decision of March 7, 2002, and according to Presidential Instruction No. 8 of 2002, IBRA could no longer decide on its own, which obligors were uncooperative or which were not in compliance with the contractual terms and conditions.[553] In the same way, the delivery of the warranty of legal certainty was gradually accepted and had been executed by the relevant government agencies in accordance with the Presidential Instruction, at least during Megawati's administration. The warranty of legal certainty as stipulated in the Presidential Instruction contained two sides of the same coin. This helped the efforts to improve the contractual compliance among the obligors.

As of the writing of this study,[554] the controlling shareholders of 23 IBRA banks did not or were unwilling to complete their contractual obligations, which should become the focus of the present administration. In its entirety, the implementation of the Shareholder Settlement Program by IBRA and/or by the government must be, and had been, carried out evenhandedly in order to maintain the appropriate balance between the warranty of legal certainty for cooperative obligors and concrete legal actions against uncooperative obligors.

5. Promising Signal of Contractual Compliance

As explained in the previous Chapter, the report on the compliance level of the shareholder settlement obligors clearly states that not one of the obligors had complied 100 percent with the con-

552 For instance, during Gus Dur's presidency, IBRA had handed over to the Office of Attorney General several IBRA banks' shareholders who refused to sign the settlement agreements. Probably due to the indecisive handling of the said obligors by the said agency and because of the fact that there were other obligors who had signed settlement agreements but were also summoned for questioning, the earlier effort of IBRA to boost the compliance of the banks' shareholders practically had no impact. In the meantime, the questioning of IBRA's officials by the law enforcement apparatus had downgraded the necessary mentality of these officials in the implementation of the Shareholder Settlement Program. The uncoordinated legal action coupled with the mentality of IBRA's officials had caused low levels of compliance among the banks' shareholders which hampered the effective implementation of the Program.

553 At the first instance, IBRA had to explain its intention to pronounce obligors uncooperative with the Steering Committee for Legal-Aid and IBRA's Oversight Committee, and thereafter had to submit a proposal to the FSPC for a decision. Against the guidelines and the time frame that had been determined by the FSPC, and also taking into account the recommendations of the said committees, the FSPC would then accept and agree with IBRA's proposal. IBRA would announce to the public which obligors were uncooperative and also the plan to hand over the said obligors to the law enforcement agencies. Before actually transferring the handling of the said obligors to the law enforcement agencies, IBRA would prepare all relevant documents and a brief description about the failure of each of the obligors to comply with and fulfill their contractual obligations. At the initial stage, the transfer of the uncooperative obligors to the law enforcement agencies was primarily aimed to give psychological pressure with the hope that the obligors would eventually comply with and fulfill their contractual obligations. During the handling of the obligors by the law enforcement agencies, officials from IBRA were to accompany the law enforcement apparatus at all time. If this did not work out, the law enforcement agencies were expected to change the strategy and to initiate decisive and concrete legal action against the said obligors as indicated in the said Presidential Instruction. This strategy had never been used before and, as was evident, a number of previously uncooperative obligors ultimately agreed to comply with and fulfill their contractual obligations.

In addition to the controlling shareholders of eight IBRA banks who refused to sign the settlement agreements and who had been handed over to the office of the Attorney General during the administration before Megawati, there were fifteen more obligors who could not complete their contractual obligations in accordance with the guidelines and within the time frame as determined by the FSPC. Eight of them were transferred to the police. It was not about the quantity *per se*, but there were supposed to be many aspects regarding the handling of uncooperative obligors. One thing is certain, IBRA and the administration at that time were putting more emphasize on commercial recovery rather than anything else. The transfer of uncooperative obligors to the law enforcement agencies, coupled with sufficient documentation and special envoys appointed by IBRA to accompany the law enforcement apparatus in the handling of the said obligors was intended both to optimize commercial recovery and to generate a deterrent effect of the stick and carrot principles as entrenched in Presidential Instruction No. 8 of 2002.

554 In the period after IBRA, the aforesaid policy implementation of legal certainty should be still relevant. In consideration of all the efforts that had been devoted to improve the effective execution of the Shareholder Settlement Program by IBRA, and the fact that there are some obligors who did not or were unable to complete their contractual obligations, the justification for the present government to preserve and continue the policy decisions and their implementations as stipulated in Presidential Instruction No. 8 of 2002 should have been sufficient.

tractual terms and conditions as stipulated in the settlement agreements. In his letter to President Megawati,[555] the Coordinating Minister for the Economy, acting as the Chairman of the FSPC, reported that the Salim Group[556] was the only obligor who had complied with almost all of the contractual terms and conditions. In other words, substantially all of the obligors were not in full compliance with the settlement agreements.

The number of obligors who had complied with their contractual obligations represented only 7.7 percent of the total number of obligors. On the other hand, not one of the obligors had been granted the warranty of legal certainty as pictured in the settlement agreements. The low level of contractual compliance had caused the cash proceeds obtained by IBRA from the Shareholder Settlement Program to be much below expectations. From mid 1999 until the first quarter of 2002, the total cash proceeds obtained by IBRA from the Program was only Rp. 17 trillion and was generated mainly from the disposal of assets of mainly one obligor.

The stick and carrot approach as contained in Presidential Instruction No. 8 of 2002 was crucial in determining which obligors were cooperative and which were not, and in turn this would simplify the execution of the warranty of legal certainty as embedded in the shareholder settlement agreements. A balanced combination between the award granted to cooperative obligors and the punishment imposed upon uncooperative obligors was the key factor in the effort to improve the compliance level of the obligors, and this would be achieved only if there were clear policy decisions and implementing guidelines supported by a check-and-balance mechanism in the decision making process.

Even though out of a total of 44 IBRA banks' shareholders who signed settlement agreements there were 10 uncooperative and 6 incomplete obligors, the ratio of contractual compliance at the end of IBRA's official term, had increased up to 63.6 percent as compared with the previous 7.7 percent. During 2002-2004 (in only exactly two years), IBRA had received paymentfrom the Shareholder Settlement Program at the amount of Rp. 14.5 trillion, or equivalent to Rp. 7.2 trillion a year.[557] In total, there were 28 obligors who managed to fulfill all of their contractual obligations, and IBRA had issued evidence of completion for 23 of them in accordance with Presidential Instruction No. 8 of 2002. Nevertheless, not all of these 23 obligors received confirmation from the law enforcement agencies regarding the discontinuance of ongoing pre-trial investigations and prosecutions against them. This should be understandable, since not all of the 23 obligors had been determined beforehand as suspects of criminal offences relating to the Shareholder Settlement Program.

Based on the aforesaid statistic, it would be unmistaken to be of the opinion that there was a positive correlation between a higher level of contractual compliance among the banks shareholders and a more effective implementation of the Shareholder Settlement Program as carried out by IBRA. The higher level of compliance, the more efficient the Program, and accordingly the more economically desirable would it be. The end result of the Shareholder Settlement Program may not be as optimal as was initially expected, but it was quite successful in solving a substantial part of the problems that resulted from the systemic financial and banking crisis, and in allowing the present government to enjoy a stronger platform for economic recovery in years to come. Nevertheless, the said policy decisions and their implementations need to be viewed in

555 Letter No. S-8/K/KKSK/10/2002 dated October 14, 2002, concerning the Report on the Handling of the Shareholder Settlement Program to the Cabinet Meeting/Limited Cabinet Meeting.

556 Salim Group was previously a business conglomerate well connected with former President Soeharto. It was the controlling shareholder of *PT Bank Central Asia* (BCA) that received trillions of BLBI and it was the signatory of the MSAA with the highest settlement amount. There have been mixed perceptions among the public in general regarding this business conglomerate, which among others had become both the trigger and the victim of the policy inconsistencies and the legal uncertainties that occurred surrounding the Shareholder Settlement Program. The Salim Group is now in control of multi-million money making enterprises in a variety of industries and lines of businesses and in recent years has been expanding its investment and business resources primarily to China and India.

557 In aggregate, this was almost twice as much as the proceeds received by IBRA during the previous administration.

their entirety, and therefore it is crucial for this study to elaborate the stage of the completion of the Shareholder Settlement Program.

D. THE COMPLETION OF THE PROGRAM

1. The Closure of IBRA

IBRA was established solely as an ad hoc institution to overcome the cause and the impact of the systemic banking crisis that had almost wiped out the domestic financial sector and endangered the national economy.[558] The establishment of IBRA, the introduction of the government guarantee scheme, and the launching of the private sector debt restructuring initiatives, were all part of the efforts to rehabilitate the banking system and to revitalize the national economy. Among the ad hoc measures and institutions, IBRA probably carried out the utmost important duties and responsibilities.[559] As IBRA was a temporary government agency, so were all of the programs it carried out. According to the prevailing laws and legislations,[560] the official-term of IBRA was from January 27, 1998 until February 27, 2004, but in reality was extended to April 30, 2004.

When the Ministry of Finance received IBRA's left-overs, the existing structural infrastructure was ill equipped and there was an actual need for transitional measures before all of IBRA's outstanding tasks and assets could be managed smoothly and entirely by the Ministry. To that end, the government established three new compartments to handle IBRA's left-overs: (1) IBRA's Receivership Team, (2) the Government Guarantee Management Unit, and (3) the Asset Management Company.[561] The closure of IBRA had left several unresolved matters. Why did the government terminate IBRA if there were pending matters to resolve? Why could not the government continue IBRA's existence until all of the matters were resolved?

The termination of IBRA corresponded more with the actual condition of the banking system and the national economy. Based on the 1998 Banking Law, the government is allowed to establish a temporary special agency to rehabilitate the banking system if according to Bank

558 When IBRA and other *ad hoc* measures were established and launched in 1998, the national economy was about to arrive at the bottom of a pit. Economic growth was minus 18 percent, and the inflation rate was soaring from 20 percent up to 60 percent. The stock exchange index had plunged a great deal, and the Rupiah exchange rate fluctuated significantly against the major world currencies. The interest rate on bank deposits had reached 60 percent per year, and the business sector experienced a liquidity squeeze and further had to bear the unprecedented high interest rates. Business undertakings came to a sudden halt, because they had suffered both from exchange rate fluctuation and high interest rates. Many business enterprises were unable to service their debts, and the majority of them were technically bankrupt. The banking system was also suffering from exchange rate fluctuations and from the inability of the bank's obligors to repay their loans fully and within the required time frames. The average net interest margins of the banks was minus 13 percent, and the return on the assets ratio of the banks had plunged to minus 19 percent per year. The ratio of the banks' total non-performing loans reached 50 percent per year, and the capital adequacy ratio of the banking system was reaching minus 16 percent per year in average. The governance of the financial sector was far from prudent, and the banking industry was unable to carry out its vital function effectively as financial intermediary. The banking system first had to be isolated from the ongoing epidemic, while the public confidence in the banking sector needed to be restored accordingly.

559 IBRA was to undertake the government's recapitalization program for certain failing but viable banks, and to ensure that during the time of the transition the banks were in compliance with banking prudential rules. IBRA was to deal with the banks' non-performing loans and to administer the government guarantee scheme in an effort to recuperate public confidence in the banking system.

560 IBRA was established by Presidential Decree No. 27 of 1998 ("Keppres 27"), while IBRA's tasks and authorities were regulated under Presidential Decree No. 34 of 1998 ("Keppres 34"). The Presidential Decrees were both grandfathered by Government Regulation No. 17 of 1999 ("PP-17") and the 1998 Banking Law. The last chapter of (Chapter VI regarding Closing Provision) PP-17 clearly stated that the Indonesia Bank Restructuring Agency as regulated in PP-17 was the very agency that was established under Keppres 27 and all of the legal actions as previously undertaken by the Agency in accordance with Keppres 34 were valid and legally binding.

561 The IBRA's Receivership Team was chaired by the Minister of Finance, and was responsible for dealing with many matters, such as the archives, the handling of the State's court-related-assets and other legal issues, the management of the financial administration aspects and the audit accompaniment in the termination of IBRA. This function was later institutionalized by the establishment of new Directorate General of State's Assets which, together with other units under the Ministry of Finance, was responsible for administering IBRA's remaining assets, managing all data, information and documentary, as well as to handle any unresolved legal matters. The Government Guarantee Management Unit was a working team under the Minister of Finance, which was responsible for taking over, temporarily, the administration of the government guarantee scheme from IBRA. Now, it is the function of the Deposit Guarantee Institution. The establishment of the Deposit Guarantee Institution as mandated by the 1998 Banking Law, Article 37 B, was intended to replace the "blanket" guarantee scheme as regulated under Presidential Decree No. 26 of 1998. The blanket guarantee was inevitable, as it was part of the effort to bring the banking system out of the crisis and to recover public confidence in the system, and was meant to be temporary. The blanket guarantee has been replaced by a limited deposit insurance scheme under the auspices of the aforesaid Institution. Meanwhile, the Asset Management Company is a state-owned business unit, and in practice functions as the selling agent of IBRA's remaining assets. It consisted of former IBRA employees who have wide experience in asset management and restructuring, as well as in assets disposal. All of the aforesaid were established and in operation since February 27, 2004.

Indonesia the banking system was in such a serious condition that it endangered the national economy. If such "a condition" did not exist anymore, there was no more need for the government to preserve a special super agency. When IBRA was terminated, the macro condition of the banking system and the national economy was different from the condition at the time IBRA was created. The exchange rates of the Rupiah had been relatively stabilized, the interest rates decreased significantly, the annual inflation rate had declined and stabilized, the rates of economic growth had improved, and the stock market composite index had been showing promising growth.[562]

On the other hand, there were also reasons not to continue the operation of IBRA. One thing was for certain. The fact that IBRA was still operating would psychologically have given the impression that the crisis was not yet over. This would be disturbing, especially when the macroeconomic indicators had shown some improvement but was not yet able to achieve a stable condition. The mere existence of IBRA would only slow down the process of economic recovery, because everyone knew that IBRA was created to confront and to overcome the systemic banking crisis. The closure of IBRA would give a strong signal that such a crisis no longer existed. Meanwhile, the decision to discontinue IBRA's operation was also based on the reality that since its inception in 1998 IBRA had become the most attractive play tool of the elite politics and government bureaucracies.[563] 2004 was the year of the general election, and IBRA could have been a potential cash cow.

From the Shareholders Settlement Program's perspective, the closure of IBRA was the termination of a special mechanism in the execution of the government's warranty of legal certainty as stipulated in Presidential Instruction No. 8 of 2002. The Shareholder Settlement Program was probably IBRA's most complicated and controversial duty, because it involved the restructuring of the IBRA banks' affiliated bad assets, the endeavor to recover the state funds that had been injected into the banking system, and the government's particular warranty of legal certainty for cooperative obligors. As it turned out, the termination of IBRA had left certain unfinished business related to the Program. There were 18 uncooperative obligors that consisted of 8 IBRA banks' shareholders who refused to sign the settlement agreements and 10 banks' shareholders who signed the settlement agreements but were unable or unwilling to complete their contractual obligations as stipulated in the settlement agreements.[564]

The focus of the handling of the 8 obligors who did not sign the settlement agreements

562 The loan to deposit ratio of the banking system had grown considerably and reached 42 percent per annum in November 2003, and the return on asset ratio had been stabilized at 2.4 percent per annum since December 2000. The capital adequacy ratio of the banking system had improved and stabilized at 20 percent per annum in 2002-2003, and the average net interest margin of banks increased significantly from -13 percent per annum in 1998 to 3 percent in 2001, and had further stabilized since 2002 at 4 percent per annum. In early 2004, the banking system was technically safe and sound, and the national economy was no longer troubled by the condition of the banking system in particular. There were no more reasons not to terminate IBRA, which was effective on April 30, 2004, and the unresolved matters were in fact manageable and could be handled by the normal infrastructure and mechanism.

The recapitalized banks had been put back under the supervision of Bank Indonesia, as the banking supervisory agency, and the remaining of IBRA's assets could have been liquidated or utilized for the interest of many government's affairs. The legal cases did not depend on the survival of IBRA, and IBRA did not have the legal power to supersede the judiciary in the true sense. The Ministry of Finance can work together with the Office of the Attorney General in handling the legal cases, whether as public prosecutor or government's attorney in fact.

563 During the years of its existence, IBRA had seen 7 different Chairmen, 6 different Ministers of Finance, and 5 different Coordinating Ministers for the Economy, and each of these leaderships had brought a different color to the way and the pace of IBRA in carrying out its tasks and function. The year of 2004 was the time in which Indonesia was preparing to experience the first Presidential direct election. This was a period when all focus including the necessary resources would be dedicated for the euphoric democratic atmosphere, which would have put IBRA in a vulnerable position. This was politics, and politics needed lots of money. As it turned out, the new elected President was not from the incumbent political elite. It indicated that the termination of IBRA was neutral. There were pros and cons of course, regarding the decision to terminate IBRA, and yet the closure of IBRA by Megawati's administration on April 30, 2004 was the correct decision under the circumstances.

564 There are 8 IBRA banks' shareholders who did not sign the settlement agreements, 10 obligors who were unwilling to comply with the contractual obligations, and 7 obligors who were cooperative but unable to finish the settlement agreements by April 30, 2004. Potentially, the government had contractual claims up to Rp. 22 trillion against 17 IBRA banks' shareholders who had signed the settlement agreements. After IBRA, the handling of shareholder settlement obligors was conducted temporarily by the IBRA Receivership Team, and now became the responsibility of the Directorate General of State's Asset of the Ministry of Finance. Based on the FSPC decision, the handling of the 7 unfinished obligors was to be undertaken by the IBRA Receivership Team.

However, the handling by the said Team had gone nowhere, until the Committee of State Receivables took over. Also, there was no concrete policy decision and implementation to conduct decisive legal actions against the uncooperative obligors after the termination of IBRA. In other words, the warranty of legal certainty has yet to be accomplished as was intrinsically pictured by Presidential Instruction No. 8 of 2002. If the present government was indecisive about the possibility of out-of-court settlements after the closure of IBRA, at the least the government should have undertaken legal actions against the uncooperative obligors.

should be to prove the allegations that there had been violations against the banking prudential regulations and/or the existence of corruption in the disbursement and usage of BLBI. The government did not have a civil legal standing against the obligors. Therefore it was not going to be easy to build criminal cases on the said topics, and there was no guarantee that the government would be able to recover as much of the state funds as under the Shareholder Settlement Program. The handling of the other 10 uncooperative obligors was no easier than the handling of the first group because the government was still a party to the settlement agreements and the obligors had fulfilled a small portion of their contractual obligations. Hence, they could not be treated like the first group of uncooperative obligors. However, will the present government handle these uncooperative obligors through the out-of-court method of dispute resolution?

2. The Closing Agreement

The shareholder settlement agreement was a civil law contract, and according to the Indonesian Civil Code, Article 1381, any promissory obligation arising from a civil law contract ceases to exist upon payment, or by means of debt release, among others. There is no such formality in the completion of an ordinary civil law contract. Nevertheless, the shareholder settlement agreement was not an ordinary contract. It was an a-typical contract, and therefore required special treatment and a special mechanism to make sure that the completion of the settlement agreement actually took place.

Based on the notion that the making of a contract is based on the existence of agreement between the contracting parties, it should have been also true that the termination of a contract is based on agreement of the contracting parties as well. Such an agreement was not mandatory, but it was not prohibited by the prevailing laws and legislations. In this context, the Financial Sector Policy Committee ("FSPC") insisted that IBRA and each of the cooperative obligors signed a closing agreement. This closing agreement had to reflect the initial agreement between IBRA and the obligors, the adjustments made to the agreement, and the final completion of the contractual obligations of the contracting parties. The closing agreement was meant to prevent multi-interpretation regarding the completion of contractual obligation as stipulated in the settlement agreements.

The closing agreement should be relevant to all types of settlement agreement, but it was particularly important for the MSAA type of settlement agreement. The MSAA contained certain clauses which survived the closing date.[565] Once they reached their closing dates, the obligors were deemed to have fulfilled their contractual obligations as aforesaid. However, the obligors were still responsible for the representation and the warranties they gave regarding the settlement assets, or the indemnification clause for any misrepresentation or breach of warranty, and the obligation to smooth down the disposal of the settlement assets. Under the MSAA and under other asset settlement hybrids, the settlement assets were the most important element, both in terms of value and legality.[566] In this regards, there would have been multi-interpretation regarding the completion of the MSAA, should there be no closing agreement.

The closing agreement contained a **release and discharge statement** liberating the contracting parties from further liability as stipulated in the settlement agreements. This would include the mechanism, process, and instruments that were to be used in the implementation,

565 The closing date, on the other hand, was due when the obligors had fulfilled their contractual terms and conditions to accomplish the settlement arrangement they had agreed upon to the satisfaction of IBRA. It included the requirement for the IBRA banks' shareholders to take over (*novatie*) or to become jointly but severally liable (*hoofdelijke verbintenis*) with the obligations of the IBRA banks' affiliated debtors and/or as incurred from the IBRA banks' losses. There were also requirements for the obligors (if any) to establish a holding company to pool and to sell their settlement assets, and for the company to issue acknowledgement of indebtedness for the interest of IBRA.

566 It determined the type of settlement agreement suitable for the contracting parties, the peculiar characteristics of each type of settlement agreement, and the final completion of the contract.

the execution, and the completion of the settlement agreements. This was rather a correction to the misperception prevalent at the initial stage of the Shareholder Settlement Program, when it had been mistakenly assumed that IBRA had the authority to the obligors from criminal charges. Based on Presidential Instruction No. 8 of 2002, it was not IBRA who possessed the authority to discontinue the ongoing pre-trial investigations or the prosecution of possible criminal offences which had allegedly been perpetrated by the IBRA banks' shareholders.[567]

The obligors would also hold IBRA harmless and indemnify IBRA and its employees, Chairman and members of the FSPC, Chairman and members of the Steering Committee for Legal Aid, Chairman and members of IBRA's Oversight Committee, and the Government of Indonesia, against possible claims of damages, demands for compensation, or legal actions as might be brought by any party on the basis of final and binding court decisions. This was a very important contractual obligation on the part of the obligors, which survived the completion of the settlement agreement, because it protected IBRA and its officials as well as other relevant decision makers within the government from possible third party liability claims that might be incurred from the completion of the settlement agreement by the obligors.[568]

The obligors were also to discard their legal rights as controlling shareholders of IBRA banks and to hold IBRA harmless if the government instructed IBRA to liquidate IBRA frozen banks. The obligors were also to indemnify IBRA against possible claims from other banks' shareholders who had minority stake-holdings but were not required to participate in the Shareholder Settlement Program. There were 50 IBRA frozen banks to be liquidated by IBRA,[569] and substantially all of the banks' assets had been collected, restructured, or disposed of by IBRA during its official term. The remaining task of IBRA was to complete the legal-administrative parts of the liquidation, both in terms of the prevailing company law as well as in terms of banking law.[570]

The closing agreement was essentially between IBRA and the shareholder settlement obligors, and it was limited to the contractual terms and conditions as stipulated in the settlement agreements. Based on Presidential Instruction No. 8 of 2002, IBRA was to inform the law enforcement agencies of the issuance of evidence of completion for the cooperative obligors. Based on such information, the law enforcement agencies would then carry out their part of the instructions. For the most part this was to discontinue pre-trial investigations and/or prosecutions (if any) against the cooperative obligors regarding the possible criminal aspects related to the Shareholder Settlement Program.

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567 The evidence of completion as was issued by IBRA as part of the closing agreement would give birth to an obligation on the part of the law enforcement apparatus to discontinue investigations and prosecutions. IBRA was relevant only with the of contractual matters as stipulated in the settlement agreements and the evidence of completion could only be rendered after the approval of the FSPC and the Minister of State-owned Enterprise. In principle, if an obligor had fulfilled his contractual obligation to IBRA's satisfaction, IBRA must then the said obligor from further contractual obligation by taking into account the decision of the FSPC and the Minister of State-owned Enterprise, but it was the President who instructed the law enforcement apparatus to discontinue related criminal investigations and prosecutions.

568 The government was in no condition to know the source of payment the obligors utilized to complete their contractual obligations, and therefore was in no position to accept any liability resulting from the act of the obligors. The obligors, on the other hand, might have borrowed money from any source or pledged promises to anybody in order to complete the settlement agreements and which could give birth to an obligation on the part of the obligors, and the government did not want to have any part in it. IBRA's main concern was to make sure that the payment by the obligors was secured in the interest of the state, and the obligors were to be held responsible for their own acts.

569 *See* IBRA's Transitional Activity Report, March-April 2004.

570 First, the banking licenses of the liquidated IBRA banks had to be revoked, and second, the legal status of the IBRA banks as legal entities had also to be terminated. During that time, Bank Indonesia already had the authority to revoke banking licenses, and IBRA was to submit a request with the central bank to revoke the IBRA banks' banking licenses (Law No. 10 of 1997 concerning Banking, in which the authority of banking licensing was dispatched from the Minister of Finance to Bank Indonesia). Furthermore, IBRA was to hold general shareholder meetings of the IBRA banks to terminate the corporate legal entity of the banks and to announce the liquidation process of the IBRA banks in the state gazette and in the mass media. After the termination of the legal entity by the corporate organ, IBRA had to register IBRA banks' liquidation with the Ministry of Industry and Trade, the Ministry of Justice and Human Rights, and the District Court. In response, Bank Indonesia issued letters of revocation of the banking licenses of 50 banks, representing the number of failing banks during the 1997-1998 financial crisis that were not eligible to participate in the government recapitalization program. Bookkeeping wise, the banks' total liabilities were much higher than the banks' assets, or in other words, the banks were basically insolvent and technically bankrupt. Many have suggested that the government and the parliament should have explicitly pronounced that the difference between assets and liabilities of the IBRA banks was among the costs of the crisis that inevitably were to be borne by the nation.

3. Publicly Sanctioned Release & Discharge

As aforementioned, the main thrusts of the shareholder settlement agreement as signed by IBRA and the IBRA banks' shareholders was the consideration that the government would not prosecute the obligors if they fulfilled their contractual obligations as stipulated in the agreements. It was not IBRA who had given the promise to the banks' shareholders, but the Indonesian government. Nevertheless, IBRA would trigger the execution of the said promise, in accordance with the contractual terms and conditions. Based on Presidential Instruction No. 8 of 2002, the public prosecutor and the police were to discontinue pre-trial investigations and/or prosecutions against the cooperative obligors upon IBRA's issuance of evidence of completion.[571]

As was portrayed by the Steering Committee for Legal-Aid of the FSPC,[572] there were two possible venues for the government in delivering the promise not to prosecute the cooperative obligors. **The first venue** was based on the authority that had been stipulated in the existing laws and regulations, in which the Attorney General is authorized to discontinue pre-trial prosecutions or to drop criminal charges for reason of public interest *(deponeren)*. **The second venue** was to involve parliament in the delivery of the said government promise, either through the enactment of a new law regarding "release and discharge", or by using the presidential judiciary power to granting "abolitie" as stipulated in the Constitution. Evidently, the second option was unwarranted and impractical at that time, and based on Presidential Instruction No. 8 of 2002, Megawati's administration seemed to move forward with the first alternative.

a) The Power of Deponeren

By definition,[573] deponeren means the waiver of criminal charge by the public prosecutor. Based on the Code of Criminal Proceeding,[574] the public prosecutor has the authority to discontinue the ongoing pre-trial prosecution against an alleged criminal offender on the basis that there is not enough legal evidence as required, or if the act does not constitute an offence, or if the case is closed by the operation of law.[575] These are the technical grounds to discontinue ongoing pre-trial prosecutions, in which criminal charges would be dropped, based on the evaluation of the criminal rule *(strafrechtelijk)* or on the law of evidence *(bewijsrechtelijk)*. On the other hand, based on the Law of Public Prosecutor,[576] the Attorney General has the authority to waive criminal charges for reasons of public interest. In this case, the juridical act is based on the Attorney General's discretionary authority.[577]

It should be noted that the power of the public prosecutor to discontinue pre-trial prosecution by the operation of law is different from the discretionary power of the Attorney General

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571 As was clearly written in the first batch of settlement agreements, i.e. the MSAAs and the MRNIAs, the Attorney General representing the government was supposed to the banks' shareholders and managements from possible criminal liability as might be incurred from alleged violations of prudential banking regulations, in particular the legal lending limit, and/or the misuse of the central bank liquidity supports. Although the APU type of settlement agreement did not explicitly mention similar government's promises, the essence of the Shareholder Settlement Program as an out-of-court method of dispute resolution had established the same principle of legal certainty towards the cooperative obligors who had fulfilled their obligations as stipulated in the APU type of settlement agreements. Clearly, Presidential Instruction No. 8 of 2002 was not discriminatory in nature as it covered the MSAA, the MRNIA and the APU, in which the actual delivery of the aforementioned government promise had to be based on the factual completion of their contractual obligations by the obligors.

572 Paper on "*Release & Discharge (R&D) Clause/Letter in the Effort to Recover the State Funds through the Shareholder Settlement Program*", The Steering Committee for Legal-Aid, The FSPC, Jakarta, April 17, 2002.

573 Martias Gelar Imam Radjo Mulano, SH, *Penjelasan Istilah-Istilah Hukum Belanda-Indonesia* (Ghalia Indonesia, 1969).

574 Law No. 8 of 1981, dated December 31, 1981, concerning the Code of Criminal Law Proceeding.

575 *Ibid*, Article 140 (2).

576 Law No. 16 of 2004 concerning The Public Prosecutor, Article 35 item (c).

577 All in all, the public prosecutor has the monopoly to discontinue pre-trail prosecution based on technical reasons, and the Attorney General holds the sole power to drop criminal charges based on policy discretion.

to drop criminal charges for reasons of public interest,[578] because the latter is the monopoly of the Attorney General alone and the basis for such a discretionary power should have been much broader than the former one.[579] The power of the public prosecutor to discontinue pre-trial prosecution by the operation of law is not discretionary in nature, and it is confined by principles in the criminal law such as *ne bis in idem*, or if the alleged suspect dies during the investigation, or if the State's legal standing to prosecute expires due to statutory limitation.[580]

In regard to Presidential Instruction No. 8 of 2002, it was the opinion of the Steering Committee for Legal-Aid of the FSPC that the power of the Attorney General to waive criminal charges for reason of public interest was the most appropriate method to carry out the warranty of legal certainty as embedded in the Shareholder Settlement Program. Unlike the power to discontinue pre-trial prosecution on the basis of technical grounds, the execution of this discretionary power of the Attorney General was much more sensitive and hence required more diligent ground work. According to a report prepared by the National Legal Reform Agency of the Ministry of Justice and Human Rights in 2006,[581] the power of the public prosecutor to waive a criminal charge on the basis of the *opportunity principle* has in fact, and in history, been part of the Indonesian legal tradition.

The prosecution system in Indonesia long acknowledged the existence of the *opportunity principle* since the Dutch colonial administration and it reaffirmed as a national positive law in 1961,[582] notwithstanding the controversies surrounding Article 179 R.O.[583] Based on the opportunity principle, the Attorney General is authorized to waive a criminal charge for reason of public interest, even though there is sufficient legal evidence to send a criminal wrongdoer to imprisonment. The power of deponeren was instituted on the premise that the public prosecutor should not view a criminal conduct independently from the causes and consequences of such a conduct to society, and should not simply match the said conduct with certain applicable criminal rules per se, but rather the public prosecutor should try to position the alleged criminal act into a relevant perspective and attempt to resolve the matter in question well within the legitimate authority.[584]

The use of such a discretionary power by the Attorney General is closely related to the meaning of "public interest". As is clearly stipulated in the elucidation of Article 35 item (c) of Law No. 16 of 2004 concerning the Public Prosecutor, the meaning of "public interest" shall not be limited only to legal reasoning but also to other reasoning, such as the interest of the public at large, the need to protect the interest of the nation and the country during a situation of clear and present danger, and under other circumstances that can be characterized as policy decision of,

578 *See also*, The Code of Criminal Proceeding, elucidation to Article 77.

579 According to Prof. Dr. Andi Hamzah, SH, in Indonesia the power of the Attorney General to waive criminal cases for the purpose of public interest encompassed small cases, old-aged defendants, and damages that had been corrected, which one way or another are related to the payment of fines as agreed upon by the defendant and the Office of Attorney General. Concrete records regarding the use of such power are not readily available at the moment, and therefore it is difficult to have an accurate statistic about the matter in question. *See Infra, The Final Report on Analysis and Evaluation of the Law concerning the Opportunity Principle in the Law of Criminal Proceeding*, Dr Andi Hamzah (2006), p. 61.

580 Andi Hamzah, SH, Introduction to the Indonesian Code of Criminal Proceeding (Ghalia Indonesia, 1983).

581 The Final Report on Analysis and Evaluation of the Law concerning the Opportunity Principle in the Law of Criminal Proceeding (Law No. 8 of 1981), as prepared by a Working Team led by Prof. Dr. Andi Hamzah, under the auspices of the National Legal Reform Agency – the Ministry of Justice and Human Rights, Jakarta, 2006. *See also*, Prof. Dr. R. Soepomo, SH, *The Indonesian Legal System before World War II* (Pradnya Paramita, 7th edition, 1953)

582 Law No. 15 of 1961 concerning The Principle Laws of Public Prosecutor (*State Gazette* 1961 No. 254). After Law No. 15 of 1961, the opportunity principle was regulated in Law No. 5 of 1991 concerning The Public Prosecutor of the Republic of Indonesia, which was also the replacement of Law No. 15 of 1961.

583 *Reglement op de Rechtelijke Organisatie en het Beleid der Justitie* (*State Gazette* 1847 No. 23). The controversies surrounding the Article 179 R.O. was the legal debate regarding whether based on the said Article the prosecution system in the Netherland-Indie was implementing the principle of legality or the opportunity principle in the prevailing prosecution system. *See* Prof. Dr. R. Soepomo, SH, *Sistem Hukum di Indonesia sebelum Perang Dunia II* (PT Pradnya Paramita, 17th edition, 2004), p. 137.

584 *Supra,* The Final Report on Analysis and Evaluation of the Law concerning the Opportunity Principle in the Law of Criminal Proceeding, Prof. Dr. Andi Hamzah (2006), p. 7-9.

and its implementation by, the State *(Staatsbeleid)*.[585] In this context, the policy decision and the implementation concerning the Shareholder Settlement Program, as pronounced in the Cabinet decision of March 7, 2002 and reaffirmed by Presidential Instruction No. 8 of 2002, was definitely *Staatsbeleid* because in accordance with a number of decisions of the People's Consultative Assembly and the laws as enacted by Parliament,[586] was not unconstitutional.

The execution of the Attorney General's power of deponeren in accordance with Presidential Instruction No. 8 of 2002 was in reality the implementation of the *opportunity principle* based on the discretionary power as bestowed by the Law of Public Prosecutor upon the Attorney General. It was *"overheidsbeleid"*, which in a particular situation and under certain conditions would become the functioning authority to make decisions to overcome the problems as confronted, as long as the use of the *opportunity principle* was in accordance with the ultimate goal and the interest of the people at large.[587] It was a very subjective notion, and the decision would have become ill-famed if it had failed to provide a proper and astute reasoning as to the meaning of "public interest".

Presidential Instruction No. 8 of 2002 reflected the "public interest" relating to the warranty of legal certainty as embedded in the Shareholder Settlement Program, and the Attorney General would exercise his discretionary power to waive criminal charges against the cooperative obligors in accordance with the instructions given by the President. Unlike the case of discontinuance of criminal charge for technical reasons, the discontinuance of pre-trial prosecution for purpose of public interest by the Attorney General was supposed to be definitive in nature. In other words, prosecution could not start again regardless of the abundance of legal evidences to the contrary, or the existence of pressure from certain political constituents or non-government institutions.[588] It was a solid structural scheme, and it should have met the requirements as stipulated in the prevailing Law of Public Prosecutor. [589]

In reality, out of the 22 cooperative obligors who had signed closing agreements and who received evidence of completion from IBRA, only 6 obligors from 6 IBRA banks received notification from the Office of the Attorney General that the pre-trial investigation and/or prosecution against them had been discontinued. It should be noted that there was a strong perception among the public prosecutors that the decision to discontinue pre-trial prosecution could only be taken if there were an ongoing legal proceeding and an alleged criminal offender, particularly at the time Presidential Instruction No. 8 of 2002 was put in force.[590]

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585 *Ibid*, pp. 84-85. The law itself uses a considerably limited criterion of "public interest", which only includes the interest of the nation, and the State and/or the interest of the people at large. This of course, could be interpreted and judged in many different ways. The fact that the Attorney General has a monopoly to *deponeren* a criminal case, combined with such a limited criterion of public interest, the use of the power of *deponeren* by the Attorney General has been very rare. The most recent event in the use of such power was the decision of the Attorney General to temporarily stop the prosecution against former President Soeharto, until the defendant was sufficiently physically healthy to face the ongoing court proceeding on the allegation of corruption and misuse of power involving a number of foundations (*stichting*). *See also* Andi Hamzah (1983), pp. 60-63.

586 *See generally* Law No. 25 of 2000 concerning The National Development Program.

587 *Supra,* The Final Report on Analysis and Evaluation of the Law concerning the Opportunity Principle in the Law of Criminal Proceeding, Prof. Dr. Andi Hamzah (2006).

588 *Supra* The Final Report on Analysis and Evaluation of the Law concerning the Opportunity Principle in the Law of Criminal Proceeding, Prof. Dr. Andi Hamzah (2006), p. 66.

589 The Supreme Court in 2007 denied the request for judicial review on the validity and enforceability of Presidential Instruction No. 8 of 2002, based on the reasoning that the Presidential Instruction was not an object of judicial review and the government has the lawful right to undertake policy decisions and implementations (*beleidsregel*) as it feels necessary in order to carry out its tasks and functions. Law No. 16 of 2004, Law No. 5 of 1991, and Law No. 15 of 1961 in principle required that the implementation of the Attorney General's power of *deponeren* must be for reason of public interest and must first be consulted with the relevant state authorities.

590 Actually these were all technical and undisputed, and yet there remained some inquiries as to whether or not the Office of the Attorney General would instigate criminal investigations and/or prosecutions against other cooperative obligors who were not suspects or affiliates of suspects, in a criminal proceeding at that time and therefore did not get any confirmation from the office of the Attorney General, or whether the present government would review and reopen the existing executive order as issued by the former Attorney General to discontinue pre-trial investigations/prosecutions. This brings us to the point that it is very important for any interested party to understand the actual conditions when the Shareholder Settlement Program was first introduced by the government and also to be able to see the clear picture regarding contract enforceability in the Indonesian legal tradition.

b) The Power of Inquisition

Based on the prevailing laws and regulations, both the police and the public prosecutor[591] are empowered to undertake criminal investigation. The power to instigate criminal investigation is presumed to include also the power to discontinue pre-trial investigations mainly on the basis that there is not enough legal evidence as required, or if the act does not constitute an offence, or if the case is closed by the operation of law.[592] The police and the public prosecutor do not have the discretionary authority to waive criminal charges for the reason of public interest, like the *ex officio* authority of the Attorney General.[593] The authority to discontinue pre-trial examination and investigation can be reviewed and reopened, if there was new legal evidence.

What was the significance of this power to investigate/interrogate in the implementation of the Presidential Instruction No. 8 of 2002?[594] As a rule of thumb, the authority of the police and the public prosecutor is much less significant than that of the Attorney General who is authorized to drop a criminal charge for reason of public interest, because the decision of the former can be reviewed and cases can be reopened if new evidence is produced, and therefore the decision of the former is much less compelling in nature. In practice, the authority of the public prosecutor to discontinue pre-trial investigations is in principle more significant than the similar power of the police, particularly in regard to specific criminal undertakings. Based on the prevailing laws and regulations, the ultimate premise is whether or not the government is in the position to continue or discontinue pre-trial prosecution, and that power belongs to the public prosecutor.[595]

c) Legal Ramification and Possible Invalidation

The issuance of Presidential Instruction No. 8 of 2002 was intended in part to put an end to the ongoing policy inconsistencies and legal uncertainties surrounding the inception, the implementation, and the completion of the Shareholder Settlement Program, and in part to authorize the mechanism in which the delivery of legal certainty as had been agreed by the government and the IBRA banks' shareholders was to be executed.[596] In light of the Shareholder Settlement Agreement, it was the main thrust of Presidential Instruction No. 8 of 2002 to ensure the warranty of

591 The power of investigation as attached to the public prosecutor is confined to certain criminal undertakings, such as crimes against intellectual property rights and corruption.

592 *Supra,* Law No. 8 of 1981, dated December 31, 1981, concerning Code of Criminal Law Proceeding, Article 109 (2).

593 Besides the power to undertake a criminal investigation, the police also has the authority to undertake pre-investigatory examinations in order to look for and to find circumstances that can be classified as criminal in order to determine whether or not a criminal investigation should be undertaken. [Law No. 8 of 1981, dated December 31, 1981, concerning Code of Criminal Law Proceeding, Article 1 item (5)]. In practice, the public prosecutor also exercises the authority to undertake pre-investigatory examinations regarding certain criminal undertakings as aforementioned. In any case, the authority of the police and the public prosecutor to discontinue criminal examinations or investigations is not discretionary in nature, and yet under certain circumstances it might become the police or the public prosecutor's obligation to exercise such power.

594 Presidential Instruction No. 8 of 2002 clearly instructed the police and the public prosecutor to discontinue pre-trial examinations, investigations and/or the prosecution of criminal aspects related to the Shareholder Settlement Program on the basis of evidence of completion as issued by IBRA. So far, there has been no executive order issued by the police to discontinue pre-trial examinations or investigations regarding cooperative obligors who received evidence of completion from IBRA. Perhaps at the time there were no ongoing legal proceedings against these obligors to be discontinued, like the case of the Office of Attorney General as discussed in the previous section. One thing is for certain, before its dissolution IBRA had handed over several uncooperative obligors to the police. In regard to the public prosecutor, there has been a new development in the handling of both the cooperative and the uncooperative shareholder settlement obligors by the present Attorney General, which will be discussed in the next paragraph.

595 On the other hand, Presidential Instruction No. 8 of 2002 seemed to have stronger implications. The Presidential Instruction treated the authority of the police and of the public prosecutor to discontinue pre-trial examinations, investigations and prosecutions on the same level, notwithstanding the various technical requirements as stipulated in the relevant laws and regulations. In other words, once a cooperative obligor obtained the evidence of contractual completion from IBRA, the discontinuance of pre-trial examinations, investigations and prosecutions by the police and the public prosecutor ought to have been definitive. All the same, Presidential Instruction No. 8 of 2002 was only an executive order rendered by President Megawati to her cabinet members, including the Head of Police and the Attorney General, which seemed to be very personal in nature and somehow limited to specific circumstances and a definitive time frame. The question remains, however, whether or not Presidential Instruction No. 8 of 2002 has achieved the expected legal ramification, and what the level of probability was that the present government would not unravel the relevant policy decisions and implementations.

596 It should also be noted that the Presidential Instruction did not contain newly invented policy decisions and implementations. On the contrary it was designed mainly to carry out the policy decisions that had been taken by previous governments and had been reaffirmed by the People's Consultative Assembly and Parliament.

legal certainty both to the cooperative and to uncooperative obligors.[597]

It was only logical to expect that when IBRA issued evidence of completion to the cooperative obligors who had completed their contractual obligation as stipulated in the settlement agreements to IBRA's satisfaction, the FSPC and the Minister of State-owned Enterprise, the police and the public prosecutor would close the case whether or not there were ongoing legal proceedings against the obligors or even if there was new evidence that did not justify the discontinuation of the ongoing pre-trial prosecution. It was also the expectation of the cooperative obligors that all of the criminal aspects relating to the Shareholder Settlement Program would be closed upon the obtainment of evidence of completion from IBRA.[598]

As has been elaborated above, the Indonesian prosecution system acknowledges the employment of the opportunity principle, in which the Attorney General is authorized to drop criminal charges for reason of public interest. It had also been the understanding that the policy decision and its implementation in regard to the Shareholder Settlement Program was in the interest of the State. It was also the expectation that these policy decisions and their implementations were in line with the legal requirements to exercise the power of *deponeren*, and that the warranty of legal certainty would be delivered accordingly. Based on the aforesaid premises, it is the opinion of this study that the warranty of legal certainty as acclaimed in Presidential Instruction No. 8 of 2002 should be executed evenhandedly and should survive the changes in government and in the socio-political conditions.

The Attorney General was expected to drop any criminal charges related to the Shareholder Settlement Program against the cooperative obligors, based on the policy decision as was pronounced in the said Cabinet decision and Presidential Instructions. At the same time, the Attorney General is also expected to start undertaking legal actions against uncooperative obligors, and maximize the efforts to recover the state funds that had been injected into the banking system, through the judiciary mechanism. As aforementioned, however, Presidential Instruction No. 8 of 2002 was an executive order issued by President Megawati to her cabinet's members, and now that Megawati was no longer the Head of Government, it is unclear whether the new Attorney General was bound to follow her Presidential Instruction.[599]

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597 If an obligor managed to fulfill all of his/her contractual obligations as stipulated in the settlement agreements, according to the Presidential Instruction, he/she deserved to receive evidence of completion from IBRA and, based on this, the police and the public prosecutor were instructed to discontinue pre-trial examinations, investigations and prosecutions on criminal aspect relating to the Shareholder Settlement Program. On the other hand, the police and the public prosecutor were also required to undertake decisive and concrete legal actions against shareholder settlement obligors who did not or were unwilling to complete their contractual obligations as stipulated in the settlement agreements. This was the true meaning of warranty of legal certainty as employed in Presidential Instruction No. 8 of 2002, and it was based on the policy decision to handle the matter in question through a stick and carrot approach.

598 As was evident, the Attorney General had issued several confirmations regarding the discontinuation of pre-trial prosecutions against certain cooperative obligors on the basis of Presidential Instruction No. 8 of 2002. The question still remained however, whether or not the present Attorney General was bound by the Presidential Instruction, and whether or not the present Attorney General would disregard presidential Instruction and instigate criminal legal proceedings against the cooperative obligors on the criminal aspects related to the Shareholder Settlement Program based on the prevailing criminal rules and legislations. Meanwhile, there were also inquiries as to whether or not the present Attorney General would de-prioritize the handling of uncooperative obligors. This is an example where a policy decision is unnecessarily in conflict with the prevailing legal obligations of the police and the public prosecutor, which one way or another reflected the dichotomy between the legalistic principle and the opportunity principle in the prosecution system.

599 Legally speaking, the present Attorney General has the authority to instigate pre-trial investigations and/or prosecutions against the obligors who had received evidence of completion from IBRA. The Attorney General can also reopen criminal cases against the cooperative obligors who had received evidence of completion from IBRA as well as confirmation from the previous Attorney General regarding the discontinuation of pre-trial investigations and/or prosecutions against the said obligors on the criminal aspect related to the Shareholder Settlement Program. According to the Code of Criminal Law Proceeding, Article 77, the District Court is authorized to examine and decide on the validity of the decision by the police or the public prosecutor to discontinue pre-trial investigations and/or prosecutions. The authority of the District Court's judge as aforesaid is probably similar to the institution of the *rechter-commissaris* in the Netherlands or the *juge d'instruction* in France, but with much more limited power. Could the present Attorney General instigate pre-trial investigations and/or prosecutions against the cooperative obligors on the allegation that the obligors had violated the banking prudential regulations and/or had misused the central bank liquidity support? Are not these the very reason that the previous governments decided to settle the matters by means of an out-of-court mechanism? It is the opinion of this study that the present Attorney General has no strong justification to instigate pre-trial investigations and/or prosecutions against the cooperative obligors who had received evidence of completion from IBRA in regard to the criminal aspect related to the Shareholder Settlement Program, because it would be contrary to the policy decisions and their implementations as taken by the previous governments to promote policy consistency and legal certainty in the inception, the implementation, the and completion of the Program.

The present Attorney General should not launch new law enforcement initiatives against the cooperative obligors in contradiction with the policy decision of the previous administrations just because of the changes in government. As aforementioned, the spirit as embedded in Presidential Instruction No. 8 of 2002 should have applied regardless of the changes in government because the Presidential Instruction was designed and formulated by a legitimate government within the framework of the prevailing laws and regulations. Moreover, many cabinet members of the previous government are now decision-makers in the present government, such as President Yudhoyono and Vice President Jusuf Kalla who were respectively the Coordinating Minister for Political and Security Affairs

4. New Paradigm in Law Enforcement Undertaking

In the 2004 presidential election, Susilo Bambang Yudhoyono was elected the sixth President of the Republic Indonesia and Jusuf Kalla was appointed as his Vice President.[600] It was the first democratic general election since 1955, and the Indonesian people were very excited about it. President Yudhoyono had been the rising star among the participants. He was seen as a person of integrity, sufficient competency and his military background was seen more as an asset than a liability.[601] Notwithstanding the accusation that President Yudhoyono never takes sides and is rather indecisive,[602] the public voters' dissatisfaction with Megawati caused them to vote "anyone else but Megawati".

Unlike when Megawati took the presidency in 2001, the socio-political and economic conditions when Yudhoyono was elected as president had much improved, which gave President Yudhoyono ample room to carry out the national development program. The economy had grown at 3.7 percent in 2002, and 4.5 percent in 2003. The inflation rate had been down from 12.6 percent in 2001 to 10.0 percent in 2002, and 5.1 percent in 2003. The Rupiah had been strengthening from Rp. 10,450 to the US dollar in December 2001 to about Rp. 8,500 in December 2003, and the interest rate, measured with one-month central bank rates, had declined from 17.6 percent in December 2001 to 13,0 percent in December 2002 and 8.3 percent in December 2003. Similarly, the political situation was relatively stable.[603]

One of the main thrusts in Yudhoyono's presidential campaign before he became the sixth President of the Republic Indonesia was his strong intention to fight the corruption, collusion, and nepotism that had plagued the nation for many years.[604] President Yudhoyono acknowledged that the ordinary Indonesians have long learned the hard way that the law sides with the powerful rather than with them. It has been the priority of his administration to be equally vigilant in anti-corruption efforts and enforcements, as well as in strengthening the power of anti-corruption authorities and regulations. Needless to say, we need to support President Yudhoyono's prioritized efforts to overcome corruption, collusion, and nepotism accordingly and so do his subordinates who are in charge of law enforcement affairs.[605]

The new paradigm has triggered the encouragement for individuals and non-government organizations that had been exceptionally vocal in their criticism against the many injustices that especially occurred during President Soeharto's era, to resume and reiterate their disagreement regarding the policy decision surrounding the inception, the implementation, and the completion of the Shareholder Settlement Program.[606] As a matter of fact, they have never stopped protesting

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and the Coordinating Minister for People's Welfare Affairs under Megawati's administration. If not properly designed and carried out, the initiative as recently launched by the present Attorney General would only create new policy inconsistencies and legal uncertainties surrounding the Shareholder Settlement Program. But how should one draw the line?

600 The direct presidential election somewhat benefited President Yudhoyono, given that his party only garnered 7.5 percent in the parliamentary election, because in reality the voters had put more emphasized on his individual value rather than on organizational and ideological uniqueness.

601 *See generally Emerging Democracy in Indonesia* (Aris Ananta et al., Institute of Southeast Asian Studies, Singapore, 2005).

602 Lance Castle, *PEMILU 2004: Dalam Konteks Komparatif and Historis* (Pustaka Pelajar Offset, 2004).

603 *Supra,* Aris Ananta, pp. 90-91.

604 *See generally* Susilo Bambang Yudhoyono*, Indonesia 2004-2009: Vision for Change* (Brighten Press, 2004). *See also* Susilo Bambang Yudhoyono, *Revitalisasi Ekonomi Indonesia* (Brighten Press*,* 3rd edition, July 2004).

605 The police and the public prosecutor would be the front runners in the implementation of the new paradigm, but it should always be carried out in a way that would assure the proper manifestation of the principle of the rule of law. On the other hand, the new paradigm also required that the Office of the Attorney General and the Police undertake internal upgrading and cleanings up, because there was no way the law enforcement agencies could clean up social dirt with contaminated brooms.

606 From the beginning, the individuals and organizations that had been against the government policy regarding the Shareholder Settlement Program. They were of the opinion that the government should seize the asset of the banks' shareholders, and at the same time send them to imprisonment. Among others, they had submitted a request with the Supreme Court to undertake judicial review regarding Government Regulation No. 17 of 1999 and Presidential Instruction No. 8 of 2002. Both requests were denied by the Supreme Court.

against the said government's policy. Now with the new paradigm against corruption, collusion, and nepotism, the pressure upon the law enforcement agencies once again grew stronger and more extensive. In response to this pressure, the present Attorney General announced the establishment of a special task force in charge of the central bank liquidity support (BLBI).

The task force consists of 35 newly recruited public prosecutors from different parts of the country, who had never been exposed to the matter in question and are instructed to focus on the asset settlement process between the IBRA banks' shareholders and IBRA under the auspices of the Shareholder Settlement Program. It should be noted that this was not the first time the Office of the Attorney General had a special task force on BLBI, and in fact as a result of the previous task force, a number of Bank Indonesia's directors had been punished and sent to jail for corruption related to the disbursement of BLBI during the systemic banking crisis in 1997-1998.[607] This was to a certain extent in line with the State Supreme Audit's 2001 audit report that there had been possible criminal conduct in the disbursement and the use of BLBI.

Unlike the previous task force, however, the present task force seemed to have a rather unclear focus and work program. At the moment, the task force is working within a very tight time frame and under lots of pressure to come up with a conclusion whether or not there was criminal conduct in the settlement process of their contractual obligations by the shareholder settlement obligors, and it has focused on three main obligors representing the highest settlement amounts who had received evidence of completion from IBRA. So far, the said task force has interrogated more than 50 people. How does this legal proceeding fit into the warranty of legal certainty as stipulated in Presidential Instruction No. 8 of 2002?

When the Attorney General announced the establishment of the task force in the middle of 2007, he specifically underlined that the law enforcement initiative would not invalidate the policy decisions and their implementations that had been taken by the previous government regarding the warranty of legal certainty surrounding the Shareholder Settlement Program as stipulated in Presidential Instruction No. 8 of 2002. In other words, the newly established task force would not question the legitimacy of the evidence of completion as issued by IBRA to cooperative obligors, nor would the task force evaluate the decision of the previous Attorney General to discontinue pre-trial investigations and/or prosecutions in regard to a number of cooperative obligors. However, this is where things started to become tricky.[608]

Basically the task force was investigating the process by which IBRA had issued the evidence of completion to cooperative obligors, and seems to disregard the State Supreme Audit's 2006 audit report. As a result, the task force has been experiencing difficulties in finding any wrongdoings regarding the process by which IBRA had issued evidence of completion to cooperative obligors, which might cause the legal proceedings to become a loose cannon ball. As aforementioned, since March 2002, the mechanism under which the shareholder settlement obligors had to fulfill their contractual obligations involved not only IBRA but also the FSPC and the Steering Committee for Legal-Aid. It was a better check-and-balance mechanism, under which the government's decision to determine which obligors were cooperative and which were not had been tested through a stricter parameter and by many trustworthy constituents.

Meanwhile, the task force had not done anything concrete to undertake legal actions against uncooperative obligors. This condition has generated uneasy feelings among cooperative

607 On June 23, 2005, the Supreme Court confirmed that 3 of Bank Indonesia's directors, i.e. Heru Supraptomo, Hendrobudianto and Paul Sutopo, were guilty of corruption in the misuse of the central bank's liquidity support (BLBI). They had caused losses to the state, respectively Rp. 6 trillion, Rp. 9 trillion and Rp. 2 trillion, and each of them was sentenced to 1.5 years of imprisonment.

608 The said task force has been questioning the soundness of the settlement amount as well as the value of the settlement assets as agreed between IBRA and the obligors under the asset settlement type of agreements. Similar inquiries, as a matter of fact, had been made by the State Supreme Audit long before the task force was established and there seemed to be an understanding on the part of the State Supreme Audit that, notwithstanding the said inquiry and any disagreement thereof, IBRA and the obligors had reached an agreement on the matters in question and that such an agreement was valid and legally binding. As was evident, the task force has been asking questions regarding many matters related to the contractual terms and conditions as was stipulated in the settlement agreements, which the cooperative obligors had completed to IBRA's satisfaction and on which IBRA had issued evidence of completion.

obligors as well as those who had been employed by IBRA to be in charge for the Shareholder Settlement Program, while uncooperative obligors have been enjoying their life unpunished. This is not what Presidential Instruction No. 8 of 2002 had intended to happen, and thus it may generate new policy inconsistencies and legal uncertainties surrounding the inception, the implementation, and the completion of the Program that Megawati's administration was trying to end. At the moment, the law enforcement initiative has been accused by many to be politically motivated in light of the next presidential election in 2009. It is unclear whether or not such an accusation is legitimate. It remains to be seen.[609]

It is the opinion of the study that the Indonesian people would praise and support President Yudhoyono's effort to fight corruption, collusion, and nepotism, provided it is carried out on the basis of the principle of the rule of law and good corporate governance. Otherwise, the law enforcement initiative as recently launched by the Attorney General would be accused of being politically motivated and become a boomerang against President Yudhoyono himself. In this context, the Attorney General should direct the initiative instead to go after the uncooperative rather than the cooperative obligors, because they are the ones who caused losses to the State and they were apparently unwilling to remedy their wrongdoings. However, it is also acceptable for the Attorney General to be discreet regarding the process by which IBRA had issued to the cooperative obligors, and at the same time prevent any undertaking that would go against the warranty of legal certainty as stipulated in Presidential Instruction No. 8 of 2002.

E. INTERIM CLOSING REMARKS

1. The Final Result

It is hard, if not impossible, to measure exactly whether or not the Shareholder Settlement Program that was carried out by IBRA, and the decision of the Government of Indonesia to introduce the out-of-court settlement mechanism for the IBRA banks' shareholders to share the costs that had been incurred from the systemic banking crisis in the form of shareholder settlement agreements, was a success story. It is difficult, because there has been no consensus regarding the level of expectation among the relevant constituents and also due to the fact that there has been a faction among the Indonesian people who apparently disagreed with the policy decision and its implementation. The reason this became complicated was because it was the first of its kind and hence there were no comparable benchmarks.

On the other hand, it is even more difficult to envision the outcome had the government decided not to introduce the Shareholder Settlement Program, and instead had undertaken legal action against all IBRA banks' shareholders on the basis of the allegations that they had violated the prudential banking regulations and/or dishonored the corruption law in relation to the misuse of the central bank liquidity support. It is even more complicated to presume the level of success on the part of the government to rely on the court system in its effort to recover the state funds that had been injected into the banking system and/or to imprison alleged wrongdoers. One thing was certain, just like with the decision to establish IBRA, the introduction of the Shareholder

609 From a more optimistic point of view, the legal proceedings initiated by the Attorney General can be seen as a strong confirmation that the delivery of legal certainty as carried out by IBRA in accordance with Presidential Instruction No. 8 of 2002 was indeed warranted. While announcing the establishment of the new task force, the Attorney General has also indicated that the end result of the law enforcement initiative in regard to the settlement of the obligors' contractual obligations under the auspices of the Shareholder Settlement Program could be done by using three possible scenarios. *First*, there was unlawful act as well as losses that had to be incurred by the State. In this regard, the legal proceeding will move to criminal prosecution on allegation of corruption. *Second*, there was no unlawful act but there were losses to be incurred by the State. In this context, the matter would be left to the government to decide on the proper remedy. *Third*, there was only a civil-commercial issue involved, which would become the basis to discontinue legal proceedings. Notwithstanding these scenarios, it would still be difficult for the task force to carry out its task and its function without a sufficient understanding as to the background and progress surrounding the Shareholder Settlement Program as carried out by IBRA as well as clear guidelines as to the ultimate goal of the law enforcement initiative. One thing for certain, the State Supreme Audit has audited IBRA's performance in regard to the Program, and it is imperative for the task force to work closely with the auditors who directly undertook the auditing in order to prevent unnecessary blundering.

Settlement Program by the government was mainly caused by the unavailability of adequate institutional resources and infrastructures. As clearly indicated in the 1998 Banking Law,[610] the preceding laws and regulations were ill equipped to confront and overcome the systemic banking crisis that had occurred in 1997-1998.

As explained in the previous Chapter, the prevailing laws and regulations on the banking industry were only designed to handle one failing bank at the time and it was the responsibility of Bank Indonesia to deal with the said bank.[611] To confront the systemic crisis in the banking system, the government established the Indonesia Bank Restructuring Agency ("IBRA"), together with the introduction of the Government Guarantee Scheme and the special mechanism to restructure corporate debts. As is stipulated in Article 37A of the 1998 Banking Law, the establishment of IBRA was based on Bank Indonesia's assessment that the ongoing banking crisis had endangered the economic system. In other words, the absence of an adequate institutional infrastructure and the potential adverse impact of the crisis justified IBRA's establishment. Similarly, the government's decision to introduce the Shareholder Settlement Program to the IBRA banks' shareholders who allegedly had been violating the banking prudential regulations and/or misusing the central bank liquidity support was based on the fact that the legal system and the enforcement mechanism were dysfunctional. At the time, the out-of-court method of dispute resolution was considered to be the best alternative.

One may assess IBRA's performance regarding the Shareholder Settlement Program on the basis of the audit report that had been produced by the State Supreme Audit in 2006. On November 30, 2006, the State Supreme Audit issued a final audit on IBRA's Accountability Report, including an audit report on the Shareholder Settlement Program. The audit report also covered other aspects regarding IBRA's tasks and functions, namely the administration of BLBI's collaterals, the procurement of consultants, major debt restructuring undertakings, the recapitalization of IBRA banks, and the administration of the Government Guarantee Program. In regard to the Shareholder Settlement Program,[612] the audit report focused on two main issues: 1) the compliance with the prevailing regulation and relevant policy and 2) IBRA's performance in carrying out its tasks.

Regarding *the first matter*, the State Supreme Audit was of the opinion that the implementation of the Program by IBRA had been in accordance with the applicable laws and regulations as well as with the relevant government's policies and the agreement between IBRA and the banks' shareholders. As to the second matter, the State Supreme Audit was of the opinion that the calculation of the settlement amount and the surrender of the settlement asset by the obligors had been carried out effectively. Moreover, the valuation of the settlement assets had been done by independent appraisers on the basis of an acceptable method.[613] It is fair to say that according the audit report, IBRA's performance in the inception, the implementation, and the completion of the Program was satisfactory in light of the adjoining complexities and peculiarities.

Besides the report, the level of success regarding the inception, the implementation, and the completion of the Shareholder Settlement Agreement as carried out by IBRA can also be assessed from three different perspectives. ***First***, from the commercial perspective, that is, with the effort to recover the state funds that were injected into the banking system and/or to minimize the costs as incurred from the systemic banking crisis. ***Second***, in regard to the prevailing legal tradi-

610 Law No. 10 of 1998 concerning the Amendment to Law No. 7 of 1992 concerning Banking.

611 As a central bank, Bank Indonesia was not prepared to undertake the revitalization of the failing banking system, because its main task was primarily to manage the monetary system.

612 The State Supreme Audit's Audit Repot No. 34G/XII/11/2006, dated November 30, 2006.

613 Looking at the MRNIA, for the most part all of the obligors had failed to fulfill most of their contractual obligations, and were beyond the control of IBRA. In regard to the APU type of settlement agreement, the State Supreme Audit was of the opinion that IBRA had complied with all relevant government policies regarding the said settlement agreements, including the policy to provide more reasonable contractual terms and conditions.

tion, where there was a strong need to develop, to maintain, and to improve contractual enforceability in the midst of the dysfunctional legal and court system. ***Third***, being an example of good governance practice in the handling of one of the most complicated government undertakings, in light of one of the most difficult periods as experienced by the nation.

a) From Commercial Perspective

When the government decided to introduce the Shareholder Settlement Program, it must have assumed that a commercial approach was better than following the legal mechanism in optimizing the effort to recover the state funds that had been injected into the banking system and/or to minimize the costs as incurred from the systemic banking crisis. Frankly speaking, it seemed to be an overtly optimistic presumption, and yet it was not without rationalization. As elaborated in an earlier Chapter, to confront and to overcome the systemic banking crisis the government had undertaken: 1) to inject central bank liquidity supports ("BLBI") into the banking system amounting to Rp. 144.5 trillion, 2) to recapitalize selected IBRA banks at the cost of Rp. 425.5 trillion, 3) to provide funds for the implementation of the Government Guarantee Program up to Rp. 73.8 trillion, and 4) to furnish the operating cost for the IBRA banks amounting to Rp. 4.9 trillion. In total, the government had spent Rp. 648.7 trillion to confront and overcome the systemic banking crisis.[614]

From a broader angle, the government's decision to pursue the out-of-court method of dispute settlement was arguably more beneficial at least when seen from three different angles:

First, the shareholder settlement agreement contained personal pledges by IBRA banks' shareholders to take over the IBRA banks' non-performing affiliated loans, which according to the prevailing banking regulations were classified as bad assets. In other words, such non-performing loans were by nature uncollectible. The willingness of the obligors to take the responsibility to fulfill the IBRA banks affiliates' debts increased the probability of recovery.[615] Arguably, the settlement agreement gave IBRA better recourse than the source of payment from the original loans, particularly in the recovery of the state funds and/or to minimize the costs of the crisis.

Second, the government's decision to go ahead with the out-of-court settlement mechanism precluded the government to spend the additional costs that might be incurred from the court mechanism. As aforementioned, the prevailing court system and the law enforcement apparatus' capability were not prepared to undertake legal action against the IBRA banks shareholders and to deal with the many sophisticated financial schemes. Uncertainty in regard to the end result of the court mechanism was much more expensive than the out-of-court mechanism, and therefore economically it was not preferable.

Third, notwithstanding the actual recovery rate of the Shareholder Settlement Program, the proceeds as obtained by the Program from time to time did help IBRA significantly in meeting its mandatory contribution to the annual state budget. IBRA's contribution to the state budget had been used to finance much of the government's important task and function and had reduced the country's dependency on international financial assistance. During the period of chaos and uncertainty, no matter how small, these financial contributions did mean a lot. On the other hand,

614 Moreover, due to the nature of the sovereign bonds that were issued by the government to obtain the needed funds, the national budget is still required today to allot several trillions of Rupiah every month to pay for the accrued interests to the recapitalized banks. It is estimated that the government bonds, both in terms of principal and interest, would be fully redeemed by 2030.

Meanwhile, the total government claim to the IBRA banks' shareholders as established under the auspices of the Shareholder Settlement Program was Rp. 128.9 trillion, and according to the State Supreme Audit, the recovery rate of the Program was 27.13 percent. From this viewpoint, the actual contribution of the said Program in the effort to recover the state funds and/or to minimize the cost of crisis was apparently trivial. However, one cannot make a simple conclusion just like that, without first examining the whole picture.

615 Take for instance the APU type of settlement agreement in which both the banks' shareholders and the banks' affiliated debtors were jointly and severally obligated to fulfill the agreed settlement amount. As was evident, this type of settlement agreements reached a recovery rate of almost 100 percent. Another example are the MSAA type of agreements, in which the value of the settlement assets had been appraised by international reputable financial consultants and agreed upon by IBRA. At the onset, these settlement assets would have given a higher recovery rate than the original non-performing affiliated loans

many factors had influenced the recovery rate that had been achieved by the Program.[616]

It is the opinion of this study that the Shareholder Settlement Program contributed significantly, particularly in the effort to recover the state funds that had been injected into the banking system and/or to minimize the cost as incurred by the systemic banking crisis. Nevertheless, many still argue about the actual recovery rate that had been achieved by the Shareholder Settlement Program and by IBRA in general,[617] and unfortunately this matter was also used to accomplish various political goals. It was further the result of indecisiveness on the part of the government and many influential decision makers in Indonesia to accept as a fact and to acknowledge the costs of the crisis that had to be borne by the nation and by the country.[618]

b) The Impact on Legal Tradition

Lack of contract enforceability has been one of the main predicaments in the Indonesian legal tradition. There have been too many examples where the making of a contract was not followed by the fulfillment of the contractual obligations by the contracting parties in good faith. As if the principle of *pacta sunt servanda* does not apply in the prevailing legal tradition. A contract has become the ultimate destination rather than a means to accomplish the specific goal that has been agreed upon. The causes are multidimensional.[619] One thing for certain was that contract enforceability is very much depended on the adequacy of the law enforcement machinery within the prevailing legal corridor, and the reliability of the court system as the last bastion of legal order.[620]

Unfortunately, this is where the problem began. Recalcitrant contracting parties had no incentive to fulfill their contractual obligations, as they knew that they could probably get away with their action in light of the dysfunctional law enforcement system. The victimized parties, on the other hand, were not inclined to trust the court system and instead were prepared to use other practical measures outside the judiciary to protect their interests. One thing led to another, and public confidence in the legal and court system diminished over time, while the use of non-recommended alternatives had been increasing to a level that made the legal tradition unhealthy and the court system more and more incompetent.

The Shareholder Settlement Program as carried out by IBRA was not only triggered by the dysfunctional law enforcement mechanisms and the failing court system. It returned a glimpse of light into the darkness. Certainly the Program did not revolutionize the dysfunctional mechanism and system over night, but it did open our eyes to a recommendable alternative within the prevailing legal order and yet was pretty decisive compared to a usual judiciary verdict.[621] As

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616 Take for instance the MSAA type of agreement in which the obligors agreed to pay the contractual obligations by means of asset settlement and where the disposal value of the settlement assets was mostly below the settlement value. As was evident, nothing was wrong with the settlement value, for both the IBRA and the obligors had agreed on the type, number, and price of the settlement assets. However, IBRA was practically forced to dispose of these assets regardless of the market condition at any given point in time, because IBRA had to meet the targeted contribution to the annual budget.

617 According to Law No. 25 of 2000 concerning the national Development Program, IBRA was to do its utmost to achieve a recovery rate of 70 percent from the disposal of assets that were managed by the Agency. It is unclear as to what the basis of that assumption was that was applied by the Law, because there was no country in the world that had been wiped out by the 1997-1998 financial crises that would have been able to accomplish a recovery rate of 70 percent from the financial bad assets.

618 It is not logical to expect IBRA to reach a recovery rate of 70 percent, let alone 100 percent, out of the banking bad assets as had been caused by the 1997-1998 financial crises. It does not make any sense why not to admit the fact that the multidimensional crisis as was being confronted and the costs as incurred thereof were also the result of mismanagement of the financial and banking system by the previous administration, but instead everyone seemed to blame IBRA for its inability to accomplish the unreasonable recovery rate as indicated. It is depressing to discover that the nation had been trapped in a vicious circle created by its own ignorance and arrogance.

619 For one thing, it could be the result of the incapability of the contracting parties to formulate their exact agreements into writing. It could also be due to the existence of bad faith on the part of one or more contracting parties, in which there was no intention from the start to fulfill their contractual obligations. It could also be caused by ambiguous legal norms or changes in the government's policy that regulates the very matter that the parties were initially agreed to contract one with another.

620 *See generally* Charles Himawan, Law as The Commander (Penerbit Buku Kompas, Abum Sand (ed.), 2006).

621 As aforementioned, the government was confronted with the choice whether to undertake legal action against the IBRA banks' shareholders who were alleged to have caused their banks to fail or to optimize the effort in recovering the state funds that had been injected into those banks that in turn would

was evident, the program had not gone as smooth as expected and had caused many policy inconsistencies and legal uncertainties along the way. The Shareholder Settlement Program had to a degree stumbled upon the ongoing predicament of lack of contract enforceability, whereby both the government and the banks' shareholders had not been consistent in fulfilling their contractual obligations.[622]

In an effort to end the ongoing policy inconsistency and the legal uncertainties surrounding the implementation and the completion of the Shareholder Settlement Program, President Megawati issued Presidential Instruction No. 8 of 2002. The Presidential Instruction not only reaffirmed the government's commitment to honor the settlement agreements as signed by IBRA, but also had laid down the mechanism for the treatment of cooperative and uncooperative obligors proportionally. This certainly had given the principle of contract enforceability an opportunity to regain its authority, in which the cooperative obligors deserved to obtain the warranty of legal certainty that had been promised to them, while the uncooperative obligors would face decisive and concrete legal actions.[623] In a way, contract enforceability contained a stick and carrot machinery, in which the cooperative parties deserved to be protected by the legal system and the recalcitrant parties ought to be punished accordingly.

The Shareholder Settlement Program acclaimed the importance of the out-of-court method of dispute resolution, and Presidential Instruction No. 8 of 2002 emphasized the significance of contract enforceability. Indeed the court system is the last bastion of legal order, but it is not the only way to preserve legal order. If the parties to a civil law contract had fulfilled their contractual obligations in good faith, it would not have been necessary for the parties to refer any matter to the judiciary. The contracting parties are expected to fulfill their contractual obligations in good faith, and many times it requires more than mere commitment from the contracting parties to complete a contract.[624]

Clearly the Shareholder Settlement Program had contributed positively to the legal tradition, by honoring contract enforceability of the shareholder settlement agreements. It is hoped that the experience as encountered from the inception, the implementation, and the completion of the said Program would establish good precedence to the sanctity of a civil law contract in many ways, in which it would help to enable the legal system and tradition to function better in the coming years.

c) Practicing Good Governance

The Shareholder Settlement Program was perhaps the better policy decision among the poorest available alternatives undertaken by the government under unprecedented chaotic circumstances,

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have minimized the costs of the crisis. As was clearly evident, the government chose to go along with the second option, in which the government offered the banks' shareholders to settle their obligations through an out-of-court mechanism that put emphasis on a commercial approach and in return the government would dismiss all the criminal wrongdoings that had been allegedly conducted by the banks shareholders in relation to the failure of their banks.

622 Notwithstanding the promise to discontinue ongoing prosecutions against the banks' shareholders who had signed the settlement agreements, the Office of the Attorney General had been interrogating and prosecuting a number of the IBRA banks' shareholders and managements on the basis of the allegations that they had violated the prevailing corruption law in regard to the misuse of the central bank liquidity support. Witnessing the said maneuver, substantially all of the shareholder settlement obligors ceased to fulfill their contractual obligations. This condition took place between mid 1998 until early 2002, and no one had benefited from the said condition except perhaps the uncooperative obligors.

623 The Presidential Instruction clearly promoted the sanctity of a civil law contract, as stipulated in Article 1338 of the Indonesian Civil Code, in which not only a valid contract shall apply as the law between the parties thereto, but a contract must be performed in good faith. Cooperative obligors were IBRA banks who signed the settlement agreements and fulfilled all their contractual obligations to IBRA's satisfaction, and by doing so they had shared the burden caused by the systemic banking crisis. Meanwhile, the uncooperative obligors were not only reluctant to share the aforesaid burden just like the cooperative obligors, but they also aggravated the already dysfunctional legal order. Needless to say, they did not deserve to be classified as cooperative, let alone to obtain the warranty of legal certainty that the government promised. Those who did not sign the settlement agreement were not cooperative even from the very beginning, and those who signed but were unwilling or unable to complete the settlement agreements had basically failed to show any sufficient sign of good will.

624 The issuance of Presidential Instruction No. 8 of 2002 was a token of good faith as well as the concrete materialization on the part of the government to fulfill its promissory obligations as embedded in the settlement agreements, but the warranty of legal certainty would only be delivered to the cooperative obligors who had completed their contractual obligations.

in which the available resources and the prevailing institutional infrastructure were inadequate to confront and overcome the difficulties originating from the multidimensional crises. The 1997 regional currency crises combined with the internal structural imbalances had adversely impacted the stability of the Indonesian financial sector and the banking system, which in turn endangered the national economy and affected the capacity of the government and the private sector to conduct business as usual.

The crisis was multidimensional in nature because it consisted of many intertwined causal factors and it was not easy for the government to decide where to begin and how to handle the crisis and to contain its negative impacts.[625] IBRA's establishment and the launching of the government's banking revitalization program took place in this chaotic condition, where the initial implementation of the Program somewhat reflected the disorganized circumstances. This also included the inception, the implementation, and the completion of the Shareholder Settlement Program, which from the governance point of view, could be distinguish into the two following different periods:

The first period took place from mid 1998 until the first quarter of 2002, and was comprised of the stage in which the Shareholder Settlement Program was initially introduced and the dark period in its implementation and its completion. Despite the good intentions and the hard work of the people who formulated and carried it out, the implementation of the Program during this period was comparatively ill prepared,not well coordinated,[626] and unproductive.[627]

The second period was from the second quarter of 2002 until the end of the first quarter of 2004, during which there was a completely new platform. IBRA was no longer the sole decision maker and policy executor in regard to the Shareholder Settlement Program.[628] In fact, the Program was put under direct supervision of President Megawati herself.[629] The new structure of the decision making process was also associated with a clear action plan, which provided IBRA and the IBRA banks' shareholders with better guidelines in the implementation and the completion of the Program.

Since "governance" is the process of decision making and the process by which decisions are carried out, the implementation and the completion of the Shareholder Settlement Program during the second period reflected major characteristics of good governance.[630] The decision to uphold the enforceability of the settlement agreements by Megawati's administration

625 Arguably, the impact of the 1997 crisis was more devastating than the crisis that took place in Indonesia in 1965, as things in the 1990s were much more complex, massive, and instantaneous.

626 There was hardly any adequate coordinated effort among the relevant government agencies to make the Program rewarding, and it seemed that IBRA was working on its own. At first there was clear government support for what IBRA was doing with the Program, but over time this support began to lose ground. The IBRA's Oversight Committee and the Financial Sector Policy Committee were not functioning as they should and thus put IBRA out on a limb without any clear guidelines or proper supervision. The socio-political atmosphere was far from conducive, in which the executive branch and the legislative branch were quarrelling about so many unimportant or irrelevant issues too often and the judiciary was in a state of withdrawal.

627 The law enforcement agencies were going after the IBRA banks' shareholders and managements, regardless of whether or not they had signed settlement agreements with IBRA. IBRA's officials were under pressure from questioning by public prosecutors, and thus were unable to carry out the Shareholder Settlement Program appropriately. The obligors who signed the settlement agreements ceased to fulfill their contractual obligations, and IBRA was unable to carry out the disposal of settlement assets gainfully. The uncooperative obligors had not been handled accordingly. As a result IBRA and the government were unable to get the utmost out of the Program.

628 To manage the day-to-day affairs of the Program, the President had redefined and re-empowered the role and function of the Financial Sector Policy Committee ("FSPC") and IBRA's Oversight Committee to establish guidelines for and to oversee IBRA in carrying out the Program. In addition, the government also established the Steering Committee for Legal-Aid to assist the FSPC on any legal matters relating the Program, which included making recommendations on the basis of a compliance review that was delivered by independent legal counsel with regards to the fulfillment of the obligors' contractual obligations. The reinforcement of the FSPC and the IBRA's Oversight Committee, and the establishment of the Steering Committee for Legal-Aid enriched and strengthened the mechanism of the decision making process in regard to the Shareholder Settlement Program. The policy decisions and the new structure of the decision making process had given a better platform to govern the implementation and the completion of the Program.

629 During Megawati's presidency, the government was determined to uphold the enforceability of the settlement agreements that were signed by IBRA and the IBRA banks' shareholders, while at the same time reaffirmed its position to deliver warranty of legal certainty to cooperative obligors and to undertake legal actions against uncooperative obligors.

630 According to the Economic and Social Commission for Asia and the Pacific, the United Nations, Good Governance has 8 major characteristics, namely consensus oriented, participation, accountability, transparency, responsiveness, effective and efficient, equitable and inclusive, and follows the rule of law.

as stipulated in the cabinet decision of March 7, 2002, was the results of mediation from parties with different interests within society, i.e. the government, parliament, the People's Consultative Assembly, and the obligors, to reach a concrete consensus on what was in the best interest of the whole community and how this interest could be served.[631]

The warranty of legal certainty that was declared in Presidential Instruction No. 8 of 2002 was formulated and carried out in the form of fair legal frameworks that were enforced impartially. The way Megawati's administration implemented the Shareholder Settlement Program was much more accountable than the previous administrations, in which the relevant policy decisions and their implementations were often communicated to the public through various types of media, were consulted periodically with relevant parliamentary commissions, and ultimately were audited by the State Supreme Audit, ensuring that members of society would feel that they also had a stake in it and did not feel excluded from the mainstream.

It is amazing to note that even during these chaotic conditions, the implementation and the completion of the Shareholder Settlement Program could teach us something about good governance. The two different periods mentioned above clearly reiterate that it was important for the government to ensure good governance practices in every government policy decision and its implementation, let alone in issues as important as the Program, because it would produce the ideal solution to every problem encountered even within the most unfavorable of situations. What had been done with the Shareholder Settlement Program during the Megawati's administration was certainly not perfect, but it had met the key features of good governance practices.

2. Certain Unfinished Homework

The Shareholder Settlement Program ceased to exist along with the termination of IBRA, and yet the spirit as embedded in the policy decision and its implementation as declared in the Cabinet's decision of March 7, 2002 and pronounced in Presidential Instruction No. 8 of 2002, should have survived. In other words, the government's decision in 2002 to uphold the enforceability of the settlement agreements as signed by IBRA and the IBRA banks' shareholders and the warranty of legal certainty in regard to the obligors who had fulfilled their contractual obligations, should have remained in force even though IBRA no longer existed.[632] The said premise is still relevant in the handling of the remaining shareholder settlement obligors, who were unable or unwilling to complete their contractual obligations, or who refused to sign the settlement agreements.

As of April 30, 2002, there were 23 shareholders from 20 IBRA banks Category B who had obtained evidence of completion from IBRA and 6 of them had been notified by the Office of the Attorney General that the relevant pre-trial criminal investigations and/or prosecutions against them had been discontinued.[633] As was suggested, the present government and its relevant

631 As was evident, the policy inconsistencies and the legal uncertainties during the governments before Megawati were detrimental in the effort to recover from the crisis. The making and implementation of the policy decision involved the participation of relevant constituents through legitimate intermediate institutions or representatives and was done in a manner that followed the rules and the regulations, and the relevant information was freely available and accessible to those who would be affected by these decisions and their enforcement.

632 As of April 30, 2004, there were 72 banks that were put under IBRA's management and consisted of 65 nursed banks and 7 recapitalized banks. The 65 IBRA banks consisted of 42 IBRA frozen banks and 13 IBRA nursed/take-over banks, which were based on the legal due diligence and financial due diligence as conducted under the auspices of the Shareholder Settlement Program, was further classified as follows:

Category A, which consisted of 16 IBRA banks that were free from any indication of regulatory violation and/or irregularities that benefited the bank's shareholders or affiliates in which the controlling shareholders were not required to participate in the Program;

Category B, which consisted of 24 IBRA banks that were indicated to have been involved in regulatory violation and/or irregularities that benefited the banks' shareholders or affiliates in which it was mandatory for the controlling shareholders to participate in the Program and the shareholders signed settlement agreements with IBRA;

Category C, which consisted of 8 IBRA banks that were indicated to have been involved in regulatory violations and/or irregularities that benefited the banks' shareholders or affiliates in which it was mandatory for the controlling shareholders to participate in the Program but the said shareholders refused to sign settlement agreements with IBRA.

633 The banks' shareholders of the remaining IBRA banks Category B were unable or unwilling to complete their contractual obligations as stipulated in the settlement agreements. They can be further a classified as those who were uncooperative and those who had shown a substantial level of cooperativeness

instrumentalities should honor the warranty of legal certainty IBRA had delivered to the cooperative obligors during Megawati's administration, because every decision of such kind had been filtered through the most diligent mechanism and had been reviewed by legitimate constituents.

Any effort to review the previous government's policy decision and its implementation in the matter in question unjustifiably would only trigger unnecessary new policy inconsistencies and legal uncertainties. Meanwhile, the present government should also consider to encouraging the out-of-court settlement approach in the handling of the cooperative obligors, who were unable to complete their contractual obligations, as it could become an additional source of income for the government in its effort to recover the state funds and minimize the costs of the crisis. On the other hand, the current government should be firm in handling uncooperative obligors, namely those who had refused to sign settlement agreements from the beginning and those who were unwilling to complete their contractual obligations as stipulated in the settlement agreements that they had signed.

Concrete and decisive legal actions against these uncooperative obligors should be construed as one side of the same coin having the delivery of warranty of legal certainty to cooperative obligors on the other side, and this would determine the level of seriousness of the government in the impartial implementation of the rule of law. There should be no hesitation on the part of the present government to undertake legal actions against the remaining uncooperative obligors, because it would be in line with the priority as acclaimed by President Yudhoyono, and it would improve the image of the national law enforcement undertaking as well as enhance public confidence in the legal system. The uncooperative obligors deserve to be handled decisively and concretely, because they refuse to pay back the benefits they obtained from their banks disgracefully and they are unwilling to participate in the effort to recover from the crisis. They have no sense of social responsibility, and should be punished accordingly.

but were unable to complete the settlement agreement before the termination of IBRA.