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Foreign Investment in Indonesia

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Robert N. Hornick and Mark A. Nelson

Abstract

The purpose of this Article is to describe the principal laws and regulations currently applicable to foreign investment in Indonesia, including the investment approval process, local incorporation rules, reporting requirements, investment incentives, foreign employee guidelines, investment guaranties, and protection of intellectual property rights.

FOREIGN INVESTMENT IN INDONESIA

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INTRODUCTION

The government of the Republic of Indonesia has encouraged direct foreign investment in Indonesia since 1967, when it enacted the foreign capital investment law that, in amended form, governs foreign investment in Indonesia to this day. During the past twenty years foreign investment has played an important role in the Indonesian economy, with more than 800 approved projects involving total foreign investment commitments of US\$16.2 billion.¹ The role of foreign investment in the economy has never been more important for Indonesia than it is today.

In recent years, Indonesian policymakers have looked increasingly to foreign investment to provide the capital and technological inputs needed to strengthen Indonesia's manufacturing capabilities, to modernize its infrastructure, and to provide jobs to the millions of young adults entering the Indonesian work force each year. Reflecting its desire to attract foreign investment, the Indonesian government has introduced six packages of legislation in the last three years aimed at deregulating the Indonesian economy and enhancing Indonesia's attractiveness to foreign investors.²

The purpose of this Article is to describe the principal laws and regulations currently applicable to foreign investment in Indonesia, including the investment approval process, local incorporation rules, reporting requirements, investment incen-

1. Speech by Samuel Tiwow, Director, Investment Promotion Bureau of the Indonesian Capital Investment Coordinating Body ("BKPM"), in New York City (Oct. 21, 1987). The figures do not include investments in oil, natural gas, and financial services, and would be substantially higher if such excluded sectors were included. As of the beginning of January 1986, the principal sources of investment were Japan (US\$4,980.2 million), Hong Kong (US\$1,930.6 million), the United States (US\$1,142.7 million), the Netherlands (US\$685.3 million), Great Britain (US\$664 million), India (US\$537.6 million), West Germany (US\$486.2 million), Malaysia (US\$436.2 million) and Australia (US\$323.7 million). The principal categories of investment were basic metals (24%), metal goods (16%), chemicals (15%), mining (10%), textiles (8%), nonferrous minerals (5%), housing (4%), food products (4%), paper products (3%), wood products (1%), others (10%). Jakarta Post, Jan. 11, 1986. Not all investment commitments have been realized, but realization percentages have not been reported. One earlier estimate placed unrealized investment as high as 50%. See 12 EKONOMI INDONESIA 8 (May 16-31, 1982).

2. Vatikiotis, *Liberalisation at Work*, FAR E. ECON. REV., Jan. 7, 1988, at 48; Speech by Janus J. Pitoy, Consul General of the Republic of Indonesia, in New York City (Mar. 8, 1988).

tives, foreign employee guidelines, investment guaranties, and protection of intellectual property rights.

I. FOREIGN INVESTMENT LAW

Most direct foreign capital investments in Indonesia are governed by the Foreign Capital Investment Law of 1967, as amended most recently in 1970³ (the "Foreign Investment Law"), and by various presidential decrees, implementing regulations, and rules. The Foreign Investment Law defines foreign capital,⁴ establishes investment incentives and investment protections,⁵ and prescribes procedures for making an investment.⁶ In general, foreigners are permitted under the Foreign Investment Law to make capital investments in any sector of the economy that has not been explicitly closed to foreign investment, provided the particular investment project is approved by the Indonesian government, and provided the investment is made through a limited-liability company established under Indonesian law.⁷

The Foreign Investment Law does not prohibit foreign investments from being made outside its framework. In theory, therefore, it is possible for a foreigner to establish a new company in Indonesia, or to purchase the shares of an existing company, without going through the investment approval process prescribed by the Foreign Investment Law, provided (in the case of a new company) that the Minister of Justice approves the articles of association of the new company or (in the case of an existing company) that the articles of association do not prohibit transfers of shares to foreigners. However, in practice, the Minister of Justice must approve the articles of all Indonesian companies, whatever the nationality of the founders.⁸ Usually he will not approve the incorporation of any company by foreign founders unless the investment has been approved under the Foreign Investment Law and will not approve any articles of association of Indonesian founders unless

3. Law No. 1 of 1967, amended by Law No. 11 of 1970.

4. Foreign Investment Law art. 2.

5. *Id.* arts. 15-17, 21-22.

6. *Id.* arts. 1-31.

7. *Id.* art. 3; see *infra* note 25.

8. COMMERCIAL CODE [COMM. C.] art. 36, K.U.H.D. 14 (R. Subekti & R. Tji-trosudibio trans. 1985).

the deed prohibits share transfers to foreigners.⁹

The principal exception is for foreign-owned financial institutions such as banks and insurance companies, which are usually established outside the Foreign Investment Law under the auspices of the Minister of Finance; once approval by the Minister of Finance is obtained for such foreign-owned financial institutions, the Minister of Justice will normally approve their articles of association. There are also several instances of foreigners having acquired minority shareholdings in companies established under the Domestic Capital Investment Law (a separate statutory scheme for encouraging certain kinds of domestic capital investment), and there are a few other cases from the late 1960s and early 1970s where foreigners acquired shareholdings in local companies outside the framework of the Foreign Investment Law.¹⁰ But these instances of foreign investment outside the framework of the Foreign Investment Law are rare and isolated, and there are no recent examples of which we are aware.

A. Capital Investment Coordinating Body

The foreign investment process under the Foreign Investment Law is at present administered by the Capital Investment Coordinating Body (*Badan Koordinasi Penanaman Modal*—"BKPM"), a non-departmental Indonesian government agency established by and responsible to the President of Indonesia, with authority to assist the President in making capital investment policy, approve and license investments, and supervise the implementation of approved investments.¹¹ There are also Regional Capital Investment Coordinating Bodies ("BKPM D")

9. A recent decree of the Chairman of BKPM seems designed to facilitate the investment by foreigners in existing Indonesian enterprises. Chairman of BKPM Decree No. 5/SK/1987 (Dec. 23, 1987) re persyaratan pemilikan saham nasional dalam perusahaan penanaman modal asing. Pursuant to this decree, foreign investors may buy up to 80% of the stock in an Indonesian company. Presumably the Minister of Justice will now permit the articles of association of Indonesian founders to allow share transfer to foreigners. See also Minister of Finance Decree No. 859/KMK.01/1987 (Dec. 23, 1987) re emisi efek melalui bursa.

10. E. RAJAGUKGUK, *INDONESIANISASI SAHAM* 66 (1985).

11. Presidential Decree No. 35/1985 (Mar. 13, 1985) re kedudukan, fungsi dan susunan organisasi BKPM, 33 *Warta Cafi* 111 (May 15, 1985) as amended by Presidential Decree No. 29/1987 (July 28, 1987), 35 *Warta Cafi* 209 (Sept. 14, 1987); see also Presidential Decree No. 33/1981 (July 27, 1981) re BKPM, 29 *Warta Cafi* 189 (Aug. 14, 1981), as amended by Presidential Decree No. 78/1982 (Sept. 13, 1982), 30 *Warta*

in the various provinces, which are subdivisions of the national organization.

B. *What Constitutes Foreign Investment*

Foreign investment is the direct investment of foreign capital in Indonesia to establish an enterprise there. The Foreign Investment Law defines "foreign capital" broadly to mean (i) any foreign exchange that is not part of Indonesia's reserves, (ii) imported goods and services that are not financed from such reserves, and (iii) reinvested earnings.¹²

1. Foreign Exchange

Foreign exchange encompasses not only foreign equity capital but also foreign loans.¹³ The general rule is that foreign loans, to be counted as foreign capital, may not exceed fifty percent of approved equity capital. However, BKPM has established separate debt-equity guidelines for different industries, and the precise debt-equity ratio should be specified in the Investment Application and approved by the Government.

2. Imported Goods

Foreign goods that are not financed with local exchange may count as foreign capital.¹⁴ In principle, even foreign know-how and services can be capitalized and counted as part of an investor's foreign capital investment, provided the valuations are approved by BKPM or its designee. But in practice capitalization of know-how and services is not normally approved.

3. Reinvested Earnings

The earnings of a foreign investment company that are permitted under the Foreign Investment Law to be transferred abroad (*e.g.*, after-tax profits), but that instead are reinvested in the enterprise, also constitute foreign capital investment.¹⁵

Caf 244 (Oct. 25, 1982). These decrees supersede earlier decrees on the same subject.

12. Foreign Investment Law art. 2.

13. Decree of State Minister of Economy, Finance and Industry No. KEP/21/ME KUIIN/4/1970 (Apr. 13, 1970).

14. Foreign Investment Law art. 2.

15. *Id.*

C. *Investment Priorities*

Foreign investment under the Foreign Investment Law is permitted in any field listed in the Priority List for Foreign Investment (*Daftar Skala Prioritas*—"DSP") as open for investment. The Priority List is a list published and revised from time to time, formerly by BKPM but more recently as an appendix to a Presidential Decree. The current list, promulgated in May 1987, is organized according to business sectors and sub-sectors.¹⁶ ISIC numbers (International Standard for Industrial Classification) and Indonesian Departmental Codes (identifying the department with jurisdiction over the activity) are given for each permitted activity, and, where relevant, special restrictions are explained (*e.g.*, whether investment is restricted to a specified geographic area).

The Priority List has been used to encourage investment patterns consonant with long-term national economic goals and to protect certain domestic groups from foreign competition. Fields that are not listed in the Priority List are presumptively closed to foreign investment, although BKPM will occasionally permit investment in a non-listed field. Foreign investment in critical national defense industries, such as arms production, ammunition, and explosives, is prohibited by statute.¹⁷

D. *Investment Approval Process*

All foreign investments must be approved by the President of Indonesia. In addition to Presidential approval, various other approvals and licenses must be obtained. The investment approval process is administered by BKPM in accordance with procedures established by the President of Indonesia and by the Chairman of BKPM.¹⁸

16. See Presidential Decree No. 15 (May 25, 1987). The Priority List, in English, has been published by the government of Indonesia.

17. Foreign Investment Law art. 6.

18. Presidential Decree No. 54 (Oct. 3, 1977) re ketentuan pokok tata cara penanaman modal, 25 *Warta Cafi* 236 (Oct. 13, 1977); Presidential Decree No. 35/1985 (Mar. 13, 1985), 33 *Warta Cafi* 111 (May 14, 1985), as amended by Presidential Decree No. 29/1987 (July 28, 1987), 35 *Warta Cafi* 209 (Sept. 14, 1987); Chairman of BKPM Decree No. 10/SK/1985 (Apr. 27, 1985) re tata cara permohonan persetujuan dan fasilitas penanaman modal dalam negeri dan penanaman modal asing, 33 *Warta Cafi* 121-25 (May 27-31, 1985), as amended by Chairman of BKPM Decrees No. 11/SK/1986 (May 6, 1986), 34 *Warta Cafi* 155 (July 9, 1986), No.

1. Presidential Approval

To obtain Presidential approval, prospective investors must submit to BKPM seven copies of a duly completed Investment Application Under Foreign Investment Law Model I/PMA (the "Application"). The Application calls for detailed information concerning the prospective investors, proposed project, production and marketing program, location and land area requirements, construction schedule, funding program, proposed capitalization and divestiture program, and requested incentives. The Application should be accompanied by a power of attorney in favor of the person acting on behalf of the investors vis-à-vis BKPM, an annual report of the investors, articles of association of the investors, a tax registration code number for the Indonesian joint venture partner, a draft joint venture agreement (to be followed by a final agreement), a description of the production process and flow chart for the project, a description of pollution control measures, and bank references.

The Application is reviewed by BKPM to determine whether, in principle, the proposed investment accords with governmental policies and priorities. If the proposed investment is acceptable in principle, BKPM will issue a provisional letter approval (*Surat Persetujuan Sementara*—"SPS") together with any request for supplemental data. The SPS is supposed to be issued within four weeks of receipt of the Application. It is valid for one year, during which time the prospective investors must submit seven copies of any supplemental data requested. An SPS may be extended one time for six months upon application to BKPM. The supplemental data are reviewed by BKPM, usually within one month after receipt. If the information is complete and the proposed project is acceptable, BKPM will forward the original Application and supplemental data to the President with its recommendation that the investment be approved.

13/SK/1986 (June 4, 1986), 34 *Warta Cafi* 191 (Aug. 21, 1986), and No. 6/SK/1987 (Dec. 23, 1987); see also Presidential Decree No. 33/1981 (July 27, 1981), 29 *Warta Cafi* 189 (Aug. 14, 1981), as amended by Presidential Decree No. 78/1982 (Sept. 13, 1982), 30 *Warta Cafi* 244 (Oct. 25, 1982); Chairman of BKPM Decree No. 68/SK/1983 (Nov. 18, 1983) re tata cara penyelesaian masalah dan penganan sanksi terhadap perusahaan PMDN dan PMA yang melakukan penyimpangan/pelanggaran, 32 *Warta Cafi* 18 (Jan. 21, 1984).

The President then issues his approval in the form of a Presidential Decree, normally within two weeks of receipt of BKPM's recommendation. Within one week after issuance of the Presidential approval, BKPM itself issues a permanent approval letter (*Surat Pemberitahuan Persetujuan Presiden*—"SPP Presiden") to the prospective investors, notifying them of the Presidential approval, any fiscal or other incentives approved in principle for the project, and any special conditions applicable to the project. The SPP Presiden is valid for three years unless otherwise specified, during which time the project should be completed. Current regulations provide that this period for completion may not be extended, and that the right to complete the project terminates automatically at the end of the period unless the chairman of BKPM determines otherwise.

2. Temporary Operating Permit

At the time it notifies the investors of Presidential approval of the investment, BKPM also issues a temporary operating permit (*Izin Usaha Sementara*—"IUS") on behalf of the Minister having jurisdiction over the project business. This temporary permit is valid until the estimated date on which commercial production of the project is scheduled to begin. The temporary operating permit entitles the investors to commence construction and pre-production testing. A permanent operating permit must be obtained prior to commencement of commercial production.

3. Permanent Operating Permit

To begin commercial production, the foreign investment company must obtain a Permanent Operating Permit (*Izin Usaha Tetap*—"IUT") from the Department having jurisdiction over the field of activity of the investment project. This permit is issued by BKPM on behalf of the relevant Minister, following an inspection of the project facilities. The IUT normally specifies the field of activity in which the foreign investment company may operate, as well as its production capacity and other operating conditions. It is supposed to be issued by BKPM within two weeks of receiving notification from the investors of the proposed date of commencing production.

4. Import Duty Facilities

Within two weeks of issuing the SPP Presiden, BKPM also issues, on behalf of the Minister of Finance, final approval of any import duty concessions being granted to the project.

5. Limited Import Permit

To import capital goods and raw materials for the project directly, rather than through an agent, the foreign investment company must obtain an import permit (*Angka Pengenal Importir Terbatas*—"APIT"). Application is made through BKPM and the permit is issued by BKPM on behalf of the Minister of Trade.

6. Work Permits

To employ foreign nationals, the foreign investment company must obtain visas from the Department of Immigration as well as work permits (*Izin Kerja Tenaga Asing*—"IKTA") for such foreign nationals from the Department of Manpower. Such work permits are issued by BKPM on behalf of the Minister of Manpower. To obtain work permits for its expatriate personnel, the new foreign investment company must file and obtain approval for a Manpower Plan, which identifies *inter alia* the number and types of jobs to be filled by foreigners and plans for replacing foreign employees with Indonesian nationals.¹⁹ The Chairman of BKPM has delegated authority for issuing permits to the Chairman of the Regional Capital Investment Coordinating Body having local jurisdiction at the place of investment.

7. Other Approvals

Depending on the project, various other approvals may be necessary. For example, it is usually necessary to obtain title for the land where the project will be located (*hak atas tanah*), as well as a site permit (*izin lokasi*), building permit (*izin bangunan*), and zoning variance (*izin gangguan*) for the project.

19. Pursuant to Minister of Manpower Decree No. KEP-1902/MEN/1987 (Dec. 23, 1987) re keleluasaan menggunakan tenaga kerja warga negara asing pendatang bagi perusahaan sebagian besar hasil produksinya diekspor, a company that exports the majority of its production may now employ an unlimited number of foreign employees.

Such title and permits are issued by the Regional Capital Investment Coordinating Body in the area where the project is located, acting on behalf of the relevant local official.²⁰

It should be noted that until the enactment in late 1987 of regulations designed to streamline the investment application process, a foreign investment company was also required to obtain a limited domestic procurement permit (*Izin Perdagangan Dalam Negeri Terbatas*—"IPDNT") and a limited exporter permit number (*Angka Pengenal Exportir Terbatas*—"APET").²¹ Under prior regulations the IPDNT was required for a foreign investment company to purchase domestically produced goods and services for construction and operation of its project. Similarly, the APET was required for a foreign investment company to export its domestically produced goods directly, rather than through an agent. However, recently enacted laws and regulations permit certain foreign investment companies to purchase goods and services on the local market and to export domestically produced goods directly, without employing an agent.²²

8. Special Procedures

In the case of investments in petroleum, hard minerals, and forestry, certain special rules and procedures apply.²³ Special rules and procedures also apply to investments in financial institutions.²⁴

In addition, for certain special projects of very high priority, which involve huge capital outlays and in which the government expects to participate as a joint venture partner, the government will often set up a special Cabinet-level committee to oversee the establishment and implementation of the project. This committee is normally chaired by a Minister, and the potential foreign investor deals in the first instance directly with

20. See Minister of Internal Affairs Regulation No. 3/1984 (Apr. 19, 1984) re tata cara penyediaan tanah dsb., 32 *Warta Cafi* 187 (Aug. 13, 1984).

21. Chairman of BKPM Decree No. 10/SK/1985 (Apr. 27, 1985), 33 *Warta Cafi* 121-25 (May 27-31, 1985), as amended by Chairman of BKPM Decree No. 6/SK/1987 (Dec. 23, 1987).

22. Government Regulation No. 24/1987 (Dec. 22, 1987); 1987 L.N. 53; Minister of Trade Decree No. 331/Kp/XII/87 (Dec. 23, 1987); Minister of Trade Decree No. 335/Kp/XII/87 (Dec. 23, 1987); Chairman of BKPM Decree No. 6/SK/1987, *supra*.

23. See *infra* text accompanying notes 97-99.

24. See *infra* accompanying note 100.

representatives of the special committee rather than with BKPM. The terms and conditions of the investment must be approved by this committee before BKPM will act.

E. Use of Indonesian Company

Foreign investments are generally required to be made in the form of an Indonesian limited-liability company (*perseroan terbatas*, also called a "P.T."), which is a type of Indonesian corporation analogous to the French *société anonyme* and the Dutch *naamloze vennootschap*.²⁵ A P.T. is established pursuant to the Indonesian Commercial Code by means of a notarial deed ("Articles of Incorporation") drawn up in the Indonesian language by an Indonesian notary. The Articles must be approved by the Department of Justice, registered with the Indonesian District Court having jurisdiction at the P.T.'s place of domicile, and published in the Companies' Supplement to the State Gazette (*Tambahan Berita Negara—Perseroan Terbatas*). As a practical matter, the Department of Justice never approves Articles for companies that will have foreign shareholders until Presidential approval of the investment project has been obtained. It is nevertheless advisable to submit draft Articles to the Department ahead of time for informal review and approval, as the Department will normally scrutinize the Articles carefully before issuing any formal approval.

A P.T. becomes a legal entity, and its shareholders/subscribers cease to be personally liable for obligations contracted beforehand in the name of the P.T., at the moment the P.T.'s Articles are approved by the Minister of Justice. However, the P.T.'s directors continue to be jointly and severally liable until the date of publication in the Companies' Supplement to the State Gazette.²⁶ Because publication can be delayed for as long as two years, some foreign investors have

25. Technically, the Foreign Investment Law permits the investment to be made not just as a P.T. but in any form that is organized under Indonesian law and constitutes a "legal entity" (for example, a partnership). Foreign Investment Law art. 3. However, in practice, the only form permitted is a P.T.

26. Supreme Court Decision No. 297K/Sip/1974 (Dec. 21, 1976), 1978-I *Yurisprudensi Indonesia* 204; Surabaya District Court Decision No. 224/1950/Perdata (Mar. 17, 1951), C. ALI, *HIMPUNAN YURISPRUDENSI HUKUM DAGANG DI INDONESIA* 115 (1982); COMM. C. art. 39, K.U.H.D. 15 (R. Subekti & R. Tjitrosudibio trans. 1985); E. RAJAGUKGUK, *INDONESIANISASI SAHAM* 34 (1985).

attempted to minimize the period of exposure by having the notary who prepares the Articles arrange directly with the State Publishing Office to issue a notice of publication in which the date that the Articles will be published is specified. While it is not clear that mere issuance of the notice can relieve the directors of liability, the procedure can have the effect of accelerating the date of publication, which is itself a benefit.

There is no formal requirement as to minimum authorized capital of a P.T., but the amount of authorized capital must be negotiated with BKPM as part of the investment application. Normally, BKPM will not approve capital investments of less than \$1 million. At least twenty percent of the authorized capital must be issued and at least ten percent fully paid upon establishment of the company. BKPM now usually requires that the entire authorized capital be issued and fully paid prior to commencement of plant operations.

Every P.T. has at least two organs of management: the general meeting of shareholders and the board of directors. In addition, the P.T.'s Articles of Association may, but need not, provide for a board of supervisors (sometimes also translated as "board of commissioners"), although it is common practice to do so.²⁷ The only statutory provisions respecting these management organs are set forth in articles 44, 45, 47, 52, 54, 55, and 56 of the Commercial Code.²⁸ These articles deal only in a summary way with the management of the P.T., and it has been left to practice and commentators to fill in the gaps.

1. General Meeting of Shareholders

Although the Commercial Code does not specifically say so, it is generally accepted doctrine that the general meeting of shareholders is the supreme organ within the P.T. and that it has all capacities not otherwise delegated by the Code or the Articles of Association to other organs of the P.T. The only capacity expressly awarded by the Code to the general meeting is the capacity to elect directors and (when there is a board of supervisors) supervisors. In practice, the Articles also always specify (and the Department of Justice will not approve the Articles unless they do so specify) that dividends may be de-

27. COMM. C. art 44, K.U.H.D. 16 (R. Subekti & R. Tjitrosudibio trans. 1985).

28. K.U.H.D. 15-18 (R. Subekti & R. Tjitrosudibio trans. 1985).

clared, and that amendments to the Articles may be adopted, only by the general meeting of shareholders (subject in the case of dividends to any dividend policy that may, but need not, be set forth in the Articles). Any amendment to the Articles adopted by the general meeting must, like the Articles themselves, be drawn up in the form of a notarial deed, approved by the Department of Justice, registered with the District Court at the place of domicile of the P.T., and published in the Companies' Supplement to the State Gazette.²⁹

The Code contains no express requirement as to the frequency or type of shareholder meetings or the manner of holding such meetings. In practice, the Articles always require an annual general meeting, permit extraordinary general meetings, and set forth requirements as to place, notice, and quorum. The Department of Justice will not approve the Articles unless they specify that general meetings must be held in Indonesia. The Articles must specify the method of voting and may provide for one vote per share.³⁰ Decisions are made by a majority of votes cast unless the Articles otherwise specify. Proxy voting is permitted if authorized by the Articles, but the Code prohibits a director or supervisor from acting as proxy, and it is customary that other employees of the P.T. not act as proxies.

The Articles may in practice include provisions limiting in some respects the exercise of voting rights (for example, where each shareholder is entitled to nominate a director, provisions obligating all shareholders to vote in favor of the nominees of the respective shareholders—the so-called “oligarchy clause”). However, the law is at present unclear as to whether separate shareholder agreements or voting trusts respecting the exercise of voting rights are enforceable. In the only case construing a voting trust arrangement, a Jakarta District Court held that the voting trust there at issue was enforceable, but the judgment was later reversed on other grounds.³¹

29. COMM. C. art. 36, K.U.H.D. 14 (R. Subekti & R. Tjitrosudibio trans. 1985).

30. If the Articles do not provide for one vote per share, the method of voting must comply with the following rule set forth in Article 54 of the Commercial Code: if there are fewer than 100 shares outstanding, a shareholder may not cast more than three votes irrespective of the number of shares he holds; if there are 100 or more shares outstanding, he may not cast more than six votes. Supreme Court Decision No. 928K/Sip/1974 (June 4, 1976), 2 Rangkuman Yurisprudensi Mahkamah Agung Indonesia 157.

31. P.T. Kebun Bunga v. Australian Dairy Corp., Jakarta District Court Decision

In the few reported cases dealing with the rights and obligations of shareholders, Indonesian courts have been very literal in interpreting and applying a company's Articles. For example, in one case where an extraordinary meeting of shareholders had been called by persons representing less than twenty-five percent of the outstanding shares, the Supreme Court invalidated shareholder actions taken at such meeting even though *all* shareholders attended, because the Articles required that the notice of meeting be given by persons holding more than twenty-five percent.³²

2. Board of Directors

Directors are appointed and dismissed by the general meeting of shareholders. A director may be appointed for a term longer than one year, but not indefinitely. Unless the Articles provide otherwise, directors may be individuals and/or companies,³³ Indonesian residents, and/or non-residents. Though there are no statutory restrictions as to the nationality of directors, the Department of Justice will usually insist that the Articles limit directorships to Indonesian nationals, unless the P.T. has foreign shareholders. If there are both foreign and Indonesian shareholders, then some, but not all, of the directors may be foreign nationals. However, it is Indonesian Government policy that any foreign national who is appointed managing director must reside in Indonesia.

The Code states that the directors shall manage the P.T. and that their responsibilities shall not be greater than those commensurate with good management.³⁴ The only additional duties with which directors are specifically charged are to report annually to the shareholders respecting the profits and losses of the enterprise and to publish in the State Gazette the

Nos. 144/JT/1982 G and 204/JT/1982 G (1983), *rev'd on other grounds*, Jakarta High Court Decision No. 599/1983/P.T. Perdata. The voting trust at issue in this case provided that the local joint venture partner would vote its shares as instructed by the foreign partner, subject to the condition that the local partner was not obligated to vote as instructed in connection with any matter that would "change, damage or limit" the rights and privileges of the local partner.

32. Supreme Court Decision No. 878 K/Sip/1974 (Mar. 23, 1976), 1977-I *Yurisprudensi Indonesia* 452.

33. However, recently the Minister of Justice has refused to approve articles permitting companies to act as directors.

34. COMM. C. art. 45, K.U.H.D. 16 (R. Subekti & R. Tjitrosudibio trans. 1985).

occurrence of accumulated net losses that equal or exceed fifty percent of capital.³⁵

In theory each director is entitled to represent the P.T. vis-à-vis third parties and to bind the P.T.³⁶ In practice the Articles may, and usually do, provide that the day-to-day management of the P.T., and the power to represent the P.T. and to bind it, shall be exercised by a managing director.

The Articles also frequently provide that for certain specified acts (for example, borrowing money in excess of a specified amount or for more than a specified term, encumbering assets of the P.T. as security, and selling or otherwise disposing of P.T. property other than inventory) the directors must have the consent of another organ (the general meeting of shareholders or the board of supervisors). It is sometimes said that an act performed by the directors without such consent is not binding on the P.T., although there are no reported cases exactly on point. If true, this principle would contrast with current Dutch law, where the limited company would be bound but would have a claim against the directors for non-compliance with the Articles.³⁷

The relationship of a director and a P.T. is legally that of an employee and employer. Most labor-law provisions applicable to ordinary employees are applicable as well to directors, except that, unlike ordinary employees, directors can be dismissed, with or without cause, at any time as provided in the Articles. In addition, a director may have fiduciary duties that an ordinary employee does not, but the concept of fiduciary duty is still developing.

A director is not ordinarily liable to third parties for obligations of the P.T.³⁸ However, if the negative retained earn-

35. *Id.* arts. 47, 55, K.U.H.D. 16, 18 (R. Subekti & R. Tjitrosudibio trans. 1985).

36. *But see* Supreme Court Decision No. 70 K/Sip/1954 (Dec. 24, 1954), C. ALI, HIMPUNAN YURISPRUDENSI HUKUM DAGANG DI INDONESIA 121 (1982) (where articles of association provide that the directors shall have authority to represent the company in court, and the company has two directors and only one director signs a request for appeal, the request must be rejected because it is not signed by all directors).

37. Lowensteyn, *Commercial Law*, in INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS 175, 188 (D. C. Fokkema, J.M.J. Chorus, E.H. Hondius & E.Ch. Lisser eds. 1978).

38. Supreme Court Decision No. 436K/Sip/1973 (Oct. 3, 1973), C. ALI, YURISPRUDENSI HUKUM DAGANG 334 (1982). However, as discussed *supra* in text accompa-

ings of a P.T. reach seventy-five percent of the par value of the P.T.'s issued capital, the directors are supposed to be personally liable for all obligations of the company incurred after the directors come to know, or should have known, about such diminution of capital.³⁹ Some lawyers and academics argue that the directors' personal liability will not be engaged if the third party has notice of the capital diminution. In any event, if additional capital is thereafter invested in the company sufficient to reduce the negative retained earnings to less than seventy-five percent of capital, then the personal liability of the directors is cut off.

Recently enacted changes in the Indonesian tax laws can be construed as making directors personally liable to the government for a P.T.'s non-payment of taxes.⁴⁰ In addition, a director is personally liable to third parties for losses arising out of acts that are outside the scope of his authority as set forth in the Articles of the company.

There is no generally accepted basis on which a director can be held liable to the P.T. or its shareholders for mere mismanagement. However, as will be noted below, a director can be criminally liable for gross mismanagement, and it may be that a director convicted of gross mismanagement would also be liable in tort for damages to the P.T., its shareholders, or even third parties arising from such gross mismanagement.⁴¹

A director of a P.T. that has been adjudicated bankrupt or ordered dissolved can be imprisoned for up to sixteen months if (a) he assisted in committing or authorized the commission of acts that were contrary to the P.T.'s Articles and all or a substantial portion of the losses suffered by the P.T. and that resulted in bankruptcy or dissolution were caused by such acts; or (b) with intent to avoid bankruptcy or dissolution, and knowing that his actions could not avoid bankruptcy or disso-

nying notes 25-26, prior to completion of the last step in forming a P.T. (publication of a P.T.'s Articles), directors are jointly and severally liable to third parties for all obligations contracted in the name of the P.T.

39. COMM. C. art. 47, K.U.H.D. 16 (R. Subekti & R. Tjitrosudibio trans. 1985).

40. See Law No. 6 of 1983, art. 32.

41. Article 1365 of the Civil Code, which is the basis of most tort claims under Indonesian law, provides that, "Every wrongful act which causes injury to another shall be the responsibility of the wrongdoer and the wrongdoer shall be liable for damages arising therefrom." CIVIL C. art. 1365, K.U.H.P. 310 (R. Subekti & R. Tjitrosudibio trans. 1985).

lution, he assisted in or authorized the borrowing of money by the P.T. on onerous conditions; or (c) he failed to satisfy the requirements of article 6 of the Commercial Code (having to do with the keeping of adequate books and records).⁴² In addition, the director can be fined up to Rp.150,000 (a large amount at the time of enactment, but today only approximately US\$90)⁴³ for having assisted in or authorized the commission of acts that were contrary to the P.T.'s Articles if as a result of such acts the P.T. was unable to fulfill its obligations or was forced to dissolve.⁴⁴

A director of a P.T. that has been adjudicated bankrupt or ordered dissolved can be imprisoned for up to seven years if with intent to defraud creditors of the P.T. (a) he recorded nonexistent expenses on the P.T.'s books or failed to record profits or deleted assets of the P.T.; or (b) he transferred an asset of the P.T. without receiving value therefor or for less than its market value; or (c) at the time of bankruptcy or dissolution, or at a time when he knew that bankruptcy or dissolution could not be avoided, he preferred one creditor over another; or (d) he failed to satisfy the requirements of the Commercial Code having to do with proper bookkeeping.⁴⁵

We are not aware of any prosecutions or convictions of directors of a P.T. under these criminal provisions or of any tort recoveries against directors based on mismanagement.

3. Board of Supervisors

As noted above, a P.T. may, but need not, have a board of supervisors.⁴⁶ In practice, most P.T.s do have such a board. The Code states only that the board of supervisors, if there is one, shall have the duty of supervising the directors.⁴⁷ The custom is for the Articles to provide that the supervisors shall have access to all books and records of the P.T., that the directors must obtain the prior approval of the supervisors for certain acts specified by the Articles, and that the supervisors may

42. CRIMINAL CODE art. 398, K.U.H.Pid. 155 (BPHN trans. 1983).

43. There are at present 1669 Rupiah to the U.S. dollar; each Rupiah is worth US\$0.000599. N.Y. Times, May 18, 1988, at D15, col. 2.

44. CRIMINAL CODE art. 403, K.U.H.Pid. 157 (BPHN trans. 1983).

45. *Id.* art. 399, K.U.H.Pid. 156 (BPHN trans. 1983).

46. *See supra* text accompanying note 27.

47. COMM. C. art. 52, K.U.H.D. 17 (R. Subekti & R. Tjitrosudibio trans. 1985).

suspend directors where there is evidence of mismanagement (pending a general meeting of shareholders).⁴⁸ If, as is usually the case, the Articles limit the supervisors to a supervisory role and prohibit their participation in day-to-day management, the Articles may also authorize the supervisors acting on behalf of the shareholders to approve the annual accounts. But if the supervisors are authorized by the Articles to participate in day-to-day management, they may not approve the annual accounts.

The Code contains no provisions as to the election of supervisors or the manner of holding meetings. In practice, the supervisors are usually specified in the original Articles and can be dismissed and elected by the general meeting of shareholders. The manner of holding meetings is also normally regulated in the Articles. Often, the Articles authorize the board of supervisors to delegate responsibilities to one of its members—usually the president supervisor.

The Code contains no guidance as to the liability of supervisors. It is accepted doctrine, however, that supervisors have no personal liability for acts committed within the scope of their authority. There is no consensus as to the personal liability of supervisors who are negligent or grossly negligent in the discharge of their supervisory functions. However, a supervisor is subject to the Criminal Code provisions discussed above with reference to directors.

4. Joint Venture Requirement

As a general rule, a foreign investment P.T. must have a minimum Indonesian equity participation of twenty percent, and Indonesian participation must be increased to fifty-one percent within fifteen years of the start of commercial production.⁴⁹ The joint venture partner may be either a private Indo-

48. *But see* Supreme Court Decision No. 227/K/Sip/1961 (Feb. 12, 1962), *rev'g* Makassar High Court Decision No. 94/P.N./1958/Pdt (Mar. 16, 1961), C. ALI, *HIMPUNAN YURISPRUDENSI HUKUM DAGANG DI INDONESIA* 150 (1982). The District Court (Mataram-Lombok) had ordered defendant supervisors to transfer control of the company to plaintiff director, which they had refused to do despite an earlier District Court decision confirming that plaintiff director had been reelected. The High Court reversed, holding that under the company's Articles the supervisors had discretion to suspend the directors for cause. The Supreme Court reversed the High Court and affirmed the District Court decision, without explanation.

49. Chairman of BKPM Decree No. 5/SK/1987 (Dec. 23, 1987), *re persyaratan*

nesian individual or company or the Indonesian government. The Indonesian government has indicated a willingness in principle to waive the twenty percent Indonesian participation requirement in certain special cases (*e.g.*, for investment companies that produce at least sixty-five percent for export or are located in more remote areas) and to consider allowing foreign investors to retain majority ownership for more than fifteen years in special cases.⁵⁰ In addition, foreign investors operating in bonded zones and exporting all of their output may be entitled to establish their investments with only five percent Indonesian participation, and are not required to increase such Indonesian participation above five percent.⁵¹

The divestiture program is now normally fixed in the investment application and approval. Prior to December 1987, when the period for Indonesianization was ten rather than fifteen years, the policy was to require that transfer begin at the end of year five and proceed gradually thereafter year by year until the end of year ten, at which time fifty-one percent of the shares should be owned by Indonesian nationals.⁵² The procedure under the new rules has not been clarified.

There are no special guidelines for determining who should be offered the shares or at what price.⁵³ A 1969 government Circular seems to require local shareholder approval of any share transfer by the foreign shareholder.⁵⁴ In practice BKPM, which must approve all share transfers of foreign investment companies, will usually not approve the transfer without local partner approval of the transferee. Often, the Articles of Association grant a right of first refusal in the shares to

pemilikan saham nasional dalam perusahaan penanaman modal asing. Prior to the issuance of this decree the relevant period for Indonesianization was ten years. BKPM Internal Guideline (July 1, 1981); Presidential Instruction to BKPM Chairman (Jan. 21, 1974); BKPM Chairman Circular No. B-109/A/BKPM/II/1975 (Feb. 21, 1975); BKPM Chairman Circular No. B-1195/A/BKPM/X/1974 (Oct. 11, 1974), 22 *Warta Cafi* 250 (Oct. 30, 1974).

50. Chairman of BKPM Decree No. 5/SK/1987 (Dec. 23, 1987), *supra* note 49.

51. *Id.*

52. *See supra* note 49.

53. A 1987 decree specifies that the parties should mutually agree on the share price, or, in the alternative, designate a third party to assist in reaching an agreement on share price. Chairman of BKPM Decree No. 5/SK/1987 (Dec. 23, 1987), *supra* note 49.

54. Capital Investment Technical Committee Circular No. 430/PTPM/VI/ED/1969.

the then-existing Indonesian shareholders, and it has been argued, based in part on the above-referenced Circular, that there exists a kind of common-law right of first refusal even in the absence of any express provision in the Articles. However, the only court to consider this issue ruled that there can be no right of first refusal unless the Articles so provide.⁵⁵ There is also a small capital market now operating in Indonesia, and a few foreign investment companies have satisfied divestiture requirements through the sale of shares on the stock exchange. Recent regulations seem designed to encourage greater use of the capital markets in meeting divestiture requirements.⁵⁶

Joint ventures with the Indonesian government have become increasingly frequent and important over the years. Typically the government acts either through its state corporations, their subsidiaries, or government-related cooperatives.⁵⁷ Originally these government joint ventures were confined largely to mining, forestry, and real estate, but in recent years they have been extended to a variety of large industrial projects as well.

F. Reporting Requirements

Every foreign investment company is required to file periodic reports with BKPM and other governmental departments respecting various aspects of the investment.⁵⁸ In the case of BKPM reporting requirements, special forms must be used: Report Form A-1 and Report Form A-2.⁵⁹ Various other re-

55. P.T. Kebun Bunga v. Australian Dairy Corp., Jakarta District Court Decision Nos. 144/JT/1982 G and 204/JT/1982 G (1983), *rev'd on other grounds*, Jakarta High Court Decision No. 599/1983/P.T. Perdata.

56. *See, e.g.*, Minister of Finance Decrees Nos. 859-865/KMK.01/1987 (Dec. 23, 1987); Chairman of BAPEPAM Decrees Nos. KEP.011-014/PM/1987 (Dec. 23, 1987).

57. *See* Robinson, *The Structure of Business in Indonesia*, E. ASIAN EXECUTIVE REP., Dec. 1983, at 2, 20-23.

58. Chairman of BKPM Decree No. 10/SK/1985 (Apr. 27, 1985), 33 *Warta Cafi* 121-25 (May 27-31, 1985), *as amended by* Chairman of BKPM Decrees No. 11/SK/1986 (May 6, 1986), 34 *Warta Cafi* 155 (July 9, 1986), No. 13/SK/1986 (June 4, 1986), 34 *Warta Cafi* 191 (Aug. 21, 1986), and No. 6/SK/1987 (Dec. 23, 1987).

59. *Id.* Report A-1 must be filed semi-annually on May 1 and November 1 of each year during the period of construction. Report A-2 must be filed annually thereafter on each May 1. The original is filed with the Regional Capital Investment Coordinating Body where the project is located, with copies to BKPM, the national technical department of the government (usually a Directorate General) having jurisdiction over the business of the project, and the provincial technical department. The Re-

ports must also be filed from time to time with other governmental departments, depending on the type of project involved. For example, periodic reports must be filed with the Department of Manpower regarding employees and employment conditions.

G. *Modifications and Amendments*

Material modifications of the approved investment scheme must be approved by BKPM.⁶⁰ There has been some uncertainty over the years as to what kinds of modifications require prior BKPM approval, but current regulations do provide guidelines. Modifications that require prior BKPM approval include increases in production capacity and/or types of production, change of name of company, change of location, change in shareholders, change in amount of investment, market modifications, and changes in anticipated completion of construction.⁶¹ Failure to obtain requisite approvals can be prejudicial. For example, the Indonesian Supreme Court has held that an unapproved sale of shares in a joint venture company is invalid.⁶²

Special forms must be used when applying for changes to the approved investment scheme. Model Form IIA should be used for name changes, Model IIB for location changes, Model IID for investment amount changes, Model IIE for production changes, Model IIF for project completion changes, Model IIG for market changes, and Model IIIA for shareholder changes.⁶³

H. *Tax Incentives*

Prior to January 1, 1984, the Indonesian government offered various tax incentives to encourage foreign investment, including company tax holidays, dividend tax holidays, reduced tax rates, accelerated depreciation, loss carry forward, capital stamp duty exemption, import duty exemption, and im-

gional Capital Investment Coordinating Body is supposed to verify the accuracy of the report within 14 days of receipt.

60. *Id.*; Investment Board Circular No. 430/PTPM/VI/ED/1969 (July 26, 1969).

61. *See supra* note 58.

62. Supreme Court Decision No. 556K/Sip/1979 (Apr. 7, 1981), 1982-I *Yurisprudensi Indonesia* 64.

63. *See supra* note 58.

port sales tax exemption.⁶⁴ The availability of the incentives and their duration depended on the level of priority assigned to the investment. Incentives were requested in the investment application. However, new tax laws enacted at the end of 1983 eliminated most of these incentives, including company tax holidays, dividend tax holidays, accelerated depreciation, and special loss carry forwards.⁶⁵

Since the new tax laws of 1983, foreign investment companies are still eligible for exemption from or reduction of import duties on the importation of machinery and equipment for the project, initial stock of spare parts, two years' worth of raw materials, office equipment, and personal effects (other than cars) of approved foreign personnel.

I. *Land*

The Foreign Investment Law provides that foreign investment companies may, contrary to the general rule forbidding foreign ownership of land,⁶⁶ own land in Indonesia with right of building title (*hak guna bangunan*) or right of cultivation title (*hak guna usaha*).⁶⁷ Right of building title is used for industrial and real estate projects, right of cultivation title for agricultural projects. These forms of ownership are complete in most respects; for example, they are mortgageable. However, they are limited in duration to thirty years in the case of right of building and thirty-five years in the case of right of cultivation, subject to renewal. In addition, since 1980 the government has prohibited the granting of right of cultivation titles to foreign investment companies.⁶⁸ Instead, such title is issued to the local joint venture partner, which in turn may rent (but not sell) the land to the joint venture foreign investment company.

Any foreign investment company may also acquire a lesser

64. Foreign Investment Law arts. 15-17; Government Regulation No. 2 (Feb. 7, 1981) re pemberian tambahan kelonggaran perpajakan dalam rangka penanaman modal asing, 29 *Warta Cah* 43 (Feb. 20, 1981).

65. Law No. 7/1983 (Dec. 31, 1983), L.N. 50/1983, T.L.N. 3263.

66. Law No. 5/1960 (Sept. 24, 1960) re peraturan dasar pokok-pokok agraria, L.N. 104/1960.

67. Foreign Investment Law art. 14. For a discussion of these titles, see S. GAUTAMA & R. HORNICK, *AN INTRODUCTION TO INDONESIAN LAW* 82-87 (rev. ed. 1974).

68. Presidential Decree No. 23/1980 (Mar. 20, 1980) re pemanfaatan tanah hak guna usaha dan hak guna bangunan untuk usaha patungan dalam rangka penanaman modal asing.

right-of-use title (*hak pakai*), which can be unlimited in duration but which is not mortgageable. It may also rent land (*hak sewa*).⁶⁹

J. *Foreign Manpower*

The Foreign Investment Law provides that foreign investment companies may employ foreign nationals in any managerial or technical position for which there are not qualified Indonesian nationals available.⁷⁰ In practice, the investors must file and obtain approval for a Manpower Plan indicating the number of foreign nationals to be employed by category of employment, and the foreign investment company is required to train Indonesian nationals to take over these positions in time. Often, investors must commit to a specific timetable for transferring jobs from foreign to Indonesian nationals, and the government controls the Indonesianization of employment through annual renewal of foreign personnel work permits.

K. *Investment Protections*

The Foreign Investment Law and other legislation provide special protections for foreign investments, including capital repatriation guaranties, nationalization protection, and international arbitration of investment disputes.

1. Foreign Exchange and Repatriation Guaranty

The Foreign Investment Law guarantees that after-tax profits, depreciation of capital assets, and proceeds from the sale of shares to Indonesian persons may be repatriated in the original currency of investment at rates of exchange prevailing at the time of repatriation.⁷¹

It also guarantees the availability of, and right to transfer, foreign exchange to pay the expenses of foreign personnel employed by the foreign investment company, to pay the costs of training Indonesian employees abroad, and to pay royalties and technical fees, if any. And it guarantees the availability

69. Foreign Investment Law art. 14.

70. *Id.* arts. 9-13; see Minister of Manpower Decree No. KEP-1902/MEN/1987 (Dec. 23, 1987) (a company that exports the majority of its products may employ an unlimited number of foreign employees).

71. Foreign Investment Law arts. 19-20.

and free transfer of foreign currency for principal and interest on foreign loans that are part of the approved capital investment. (Loans that are obtained outside the framework of the approved foreign investment are not so protected, although currently there are no applicable exchange restrictions.)

Further, foreign investors are guaranteed the right to repatriate invested capital upon liquidation of the company, although it is unclear whether the applicable rate of exchange is that in effect at the time of investment or at the time of repatriation. Because foreign share capital is stated in the Articles of Incorporation in the currency of investment as well as in Rupiahs (using the rate of exchange applicable at the time of investment), and because auditors are permitted to state foreign share capital on a company's balance sheet in the currency of investment as well as in Rupiahs (also using the rate at the time of investment), there should be a presumption that Bank Indonesia uses the time of investment rate when it sells foreign exchange for purposes of capital repatriation upon liquidation. Some investors specify in their investment application that the rate at the time of investment should be used.

2. Nationalization Protection

The Foreign Investment Law provides that the government may not nationalize the ownership of a foreign investment company or otherwise restrict the foreign control and management of such company except by statute in the national interest, and guarantees compensation for any such nationalization or restriction "in accordance with principles of international law."⁷²

3. Investment Protection Agreements

Indonesia has concluded investment guaranty agreements with several nations, including Belgium, Canada, Denmark, France, West Germany, the Netherlands, Norway, Switzerland, the United Kingdom, and the United States.⁷³ There is also an

72. *Id.* arts. 21-22.

73. Belgium: L.N. 23/1972; Canada: L.N. 40/1973; Denmark: L.N. 12/1968; France: L.N. 14/1975; West Germany: L.N. 3/1969; the Netherlands: I.L.W. 1:40 at 315; Norway: L.N. 5/1970; Switzerland: L.N. 11/1976; United Kingdom: L.N. 9/1977; United States: Agreement Relating to Investment Guaranties, Jan. 7, 1967, 18 U.S.T. 1850, T.I.A.S. No. 6330, 692 U.N.T.S. 109.

investment treaty with the Islamic Conference nations.⁷⁴ These agreements take the form either of agreements for the encouragement and reciprocal protection of investments or agreements for foreign investment insurance. The agreements for encouragement and reciprocal protection of investments, which apply to nationals of the countries that are parties thereto, usually include a guaranty against expropriation that is independent of the Foreign Investment Law. For example, article 7 of the Netherlands Agreement provides that Indonesia shall not deprive Dutch nationals, directly or indirectly, of their investments in Indonesia except in the public interest, under due process of law, and accompanied by the payment of just compensation. The agreements respecting investment insurance do not provide the investor with any independent guaranty against expropriation, but do enable the investor to obtain expropriation insurance from its home government. Under the U.S. agreement, for example, the United States offers investment insurance against currency inconvertibility, expropriation, war, revolution, and insurrection. The program is administered by the Overseas Private Investment Corporation.⁷⁵

4. International Arbitration

a. *ICSID*

Since 1968 Indonesia has been a party to the Convention for the Settlement of Investment Disputes Between States and Nationals of Other States.⁷⁶ Under the Convention, disputes between a foreign investor or locally incorporated foreign investment company and the host government arising out of an investment may, with the consent of the parties, be submitted to arbitration under the auspices of the International Centre for Settlement of Investment Disputes in Washington, D.C. ("ICSID" or "the Centre"). In the past, Indonesia has always consented to the jurisdiction of the Centre with respect to a particular investment at the time it approves the relevant investment application. Typically, the investment application contains a request from the investor that disputes between the

74. L.N. 45/1983.

75. 18 U.S.T. 1850, T.I.A.S. No. 6330, 692 U.N.T.S. 109.

76. Law No. 5/1968 (June 29, 1968), L.N. 32/1968, T.L.N. 2852.

foreign investment company and the government of Indonesia, other than disputes respecting tax matters, be settled under the rules of the Centre. By its approval of the investment application, the government consents to the items requested in the application, including jurisdiction of the Centre over such disputes.⁷⁷

For many years the following arbitration clause has been included in the government's model investment application form:

D. *Arbitration.* With the explicit preclusion of disputes concerning tax matters, it is requested that in all disputes arising between the Joint Venture Company and the Government of the Republic of Indonesia regarding the interpretation or the implementation of this investment application (project proposal) approved by the Government of the Republic of Indonesia, which cannot be settled amicably, shall be settled under the Rule of the Settlement of Investment Disputes between States and Nationals of Other States, to which the Republic of Indonesia is a member.⁷⁸

Although this form of arbitration clause does not clearly refer to disputes between the foreign investors and the government, but only to disputes between the locally incorporated foreign investment company and the government, foreign investors have assumed that the ICSID arbitration clause in their application covers them as well as their Indonesian subsidiary. This position was adopted by the arbitral tribunal in *Amco Asia v. Indonesia*, the only ICSID arbitration to date involving Indonesia.⁷⁹ There, an ICSID tribunal determined that it had jurisdiction over a claim by two foreign companies and their wholly-owned Indonesian subsidiary against the Indonesian government for compensation arising out of an alleged taking of a hotel investment, based on an ICSID arbitration clause in an investment application that was similar in substance to the

77. H. SUNARJATI, BEBERAPA MASALAH TRANSNASIONAL DALAM PENANAMAN MODAL ASING DI INDONESIA 162, 217 (1972); Suraputra, *Yurisdiksi dan Pelaksanaan Konvensi Bank Dunia di Indonesia*, V/4-5 HUKUM DAN KEADILAN 19, 23-24 (1974); see, e.g., *Amco Asia v. Indonesia* (Sept. 25, 1983) (Award on Jurisdiction), reprinted in 23 I.L.M. 351 (1984).

78. See, e.g., BKPM, INDONESIA: A GUIDE FOR INVESTORS—1984 app. B (1984).

79. *Amco Asia v. Indonesia* (Sept. 25, 1983) (Award on Jurisdiction), reprinted in 23 I.L.M. 351 (1984).

standard form investment application arbitration clause.⁸⁰ Indonesia denied that it had consented to ICSID arbitration with the foreign investors because the investors were not expressly named in the arbitration clause of the investment application.⁸¹ But the Tribunal held that the parties intended for the clause to apply to the foreign investors as well as to their Indonesian subsidiary.⁸²

In a marked departure from past practice, BKPM has not included any model ICSID arbitration clause in its current model form investment application.⁸³ Presumably, however, investors may still include an ICSID arbitration clause in their application if they wish.

b. *Investment Protection Agreements*

The Agreements for Encouragement and Reciprocal Protection of Investments (other than the Islamic Conference treaty), discussed above, also contain ICSID arbitration clauses in which Indonesia consents to ICSID arbitration of investment disputes with nationals of the countries party to such Agreements. The Netherlands Agreement, for example, provides in article 11 for ICSID arbitration of all investment disputes between Dutch nationals and Indonesia.⁸⁴

c. *Foreign Investment Law*

Independent of any ICSID arbitration clause in an investment application or guaranty agreement, the Foreign Investment Law also provides for the arbitration of disputes regarding compensation for nationalized investments by a board of arbitrators consisting of three persons, one appointed by the investor, one by the Government, and one jointly by both parties.⁸⁵ The Foreign Investment Law does not specify what

80. 23 I.L.M. at 351, 352, 355.

81. *Id.* at 354. Indonesia also denied it had consented to ICSID arbitration with the Indonesian subsidiary, arguing that the arbitration clause was invalid as to the local subsidiary because it did not expressly identify the foreign nationality of the subsidiary as allegedly required by the Convention. The Tribunal rejected this argument and held that the Convention did not require that the foreign nationality of the subsidiary be expressly identified in the clause.

82. *Id.* at 356-77.

83. BKPM, INDONESIA: A GUIDE FOR INVESTORS—1986 app. B (1986).

84. I.L.W. 1:40 at 315.

85. Foreign Investment Law art. 22.

rules should govern the arbitration, where the arbitration should be held, or how the third arbitrator should be chosen in the event of a deadlock. One commentator has argued that Law No. 5 of 1968, pursuant to which Indonesia became a party to the Convention for the Settlement of Investment Disputes Between States and Nationals of Other States, was intended *inter alia* to mandate the ICSID Rules for Foreign Investment Law arbitrations, and that therefore the arbitration guaranty in the Foreign Investment Law should itself be construed as a consent by Indonesia to ICSID arbitration, even though Indonesia was not yet a party to ICSID at the time the Foreign Investment Law was enacted.⁸⁶ However, this argument was rejected by the arbitral tribunal in *Amco Asia v. Indonesia*.⁸⁷

L. *Term of Investment*

A foreign investment may be approved for a period not exceeding thirty years.⁸⁸ The approved term is set forth in the Presidential approval and in practice is almost always the full thirty years. Although the Foreign Investment Law does not refer to extensions, the government has provided in regulations that BKPM may extend the operating license of a foreign investment company for an additional thirty years where such company makes certain additional investments in its venture.⁸⁹

The question whether an investment may be lawfully terminated prior to expiration of the approved period and, if so, upon what grounds, and pursuant to what procedures, has been the subject of some controversy. In his enabling decree establishing BKPM, the President of Indonesia has authorized BKPM to impose sanctions, including license revocation, if an investor fails to comply with its investment agreement and applicable investment regulations. The Chairman of BKPM has

86. Nasution, *Segi-Segi Hukum Internasional dari Undang-Undang Penanaman Modal Asing Sehubungan dengan Konvensi Washington Tahun 1965*, 9/V HUKUM DAN KEMASYARAKATAN 15 (1976); see also S. HARTONO, BEBERAPA MASALAH TRANSNASIONAL DALAM PENANAMAN MODAL ASING DI INDONESIA 200 (1972); C. HIMAWAN, THE FOREIGN INVESTMENT PROCESS IN INDONESIA 267 (1980).

87. See *supra* notes 79-82 and accompanying text.

88. Foreign Investment Law art. 18.

89. Government Regulation No. 24/1986 (May 6, 1986), 34 *Warta Cafi* 134 (June 14, 1986).

declared that license revocation is one available sanction, together with production suspension, revocation of tax and investment facilities, and/or revocation of other investment-related permits.⁹⁰ BKPM is required to give the investor three warnings at one-month intervals prior to the imposition of any sanction.⁹¹ BKPM has also established internal standards for evaluating the materiality of violations and the appropriateness of particular sanctions for particular violations.⁹²

In practice, the government has only occasionally cancelled the investment licenses of operating foreign investment companies for alleged violations of foreign investment regulations,⁹³ although in 1985 it reportedly cancelled some seventy-one licenses because the sponsors failed to implement their projects.⁹⁴ In the only litigated case to date involving cancellation of a license, *Amco Asia v. Indonesia*, an ICSID tribunal awarded the investors compensation in the amount of US\$3.2 million plus interest for wrongful cancellation.⁹⁵ An *ad hoc* Committee established at the request of Indonesia subsequently annulled the award, and the dispute has been resubmitted to a new tribunal.⁹⁶

M. Foreign Participation in Petroleum, Mining, and Forestry

Foreigners may not invest in oil and gas mining companies because the right to prospect for, and to mine, oil and gas is reserved to the state oil company, Pertamina. Foreigners may, however, participate in the exploration and development

90. Presidential Decree No. 54/1977, art. 6 (Oct. 3, 1977), 25 *Warta Cafi* 236 (Oct. 13, 1977); BKPM Chairman Decree No. 10/SK/1985 art. 20 (Apr. 27, 1985), 33 *Warta Cafi* 121-22 (May 27-28, 1985).

91. *Id.*

92. BKPM Chairman Decree No. 68/SK/1983 (Nov. 18, 1983) re tata cara penyelesaian masalah dan pengenaan sanksi terhadap perusahaan pmdn dan pma yang melakukan penyimpangan/pelenggaran, 32 *Warta Cafi* 18 (Jan. 21, 1984).

93. *See, e.g., Amco Asia v. Indonesia*, 24 I.L.M. 1022 (1985) (Award on the Merits).

94. *Jakarta Post*, Jan. 23, 1986; *Jakarta Post*, Dec. 27, 1985.

95. 24 I.L.M. 1022 (1985).

96. *See Amco Asia v. Indonesia*, 25 I.L.M. 1441, 1465 (1986) (Decision on the Application for Annulment); *see also* Feldman, *The Annulment Proceedings and the Function of ICSID Arbitral Awards*, 2 ICSID REVIEW—FOREIGN INVESTMENT L.J. 85 (1987); Redfern, *ICSID—Losing Its Appeal?*, 3 *ARB. INT'L* 98 (1987); Note, *Confidentiality in ICSID Arbitration After Amco Asia v. Indonesia: Watchword or White Elephant?*, 10 *FORDHAM INT'L L.J.* 93, 97-106 (1986).

of oil and gas as contractors to the state oil company under so-called "production sharing contracts" pursuant to which a foreign oil company, or an Indonesian subsidiary of a foreign oil company, is engaged by Pertamina to assist it in exploration and development.⁹⁷ Under a production sharing contract the foreign oil company is required to finance all exploration and development activities, subject to the management of Pertamina, and is compensated in the form of oil and gas production, if any.

In addition, foreigners may establish specialty Indonesian oil service companies (*e.g.*, drilling or diving companies) to perform special services as subcontractors for Pertamina and production sharing companies. The specialty service companies must be established in accordance with general procedures applicable to foreign investment.

In the case of non-petroleum mining, foreigners may establish Indonesian companies to engage directly in prospecting and mining. However, prior to filing any investment application with BKPM, the potential foreign investors must, on behalf of the to-be-formed foreign investment company, conclude a so-called "contract of work" with the Indonesian government in which are set forth the basic terms and conditions that will govern the mining operations of the foreign investment mining company. Once the contract of work has been negotiated, the investment application is processed by BKPM.

An alternative to the contract of work is a hard minerals "cooperation agreement" or "production sharing contract," in which the foreign investment company operates as a contractor to a state mining company. As in the case of a contract of work, the cooperation agreement or production sharing contract must be negotiated with the state mining company before the investors can file the investment application with BKPM.⁹⁸

In the case of forestry, foreigners are no longer permitted to establish Indonesian logging companies, although direct

97. For a thorough but dated discussion of production sharing contracts, see Fabrikant, *Production Sharing Contracts in the Indonesian Petroleum Industry*, 16 *HARV. INT'L L.J.* 303 (1975).

98. For a more detailed, though somewhat outdated, discussion of petroleum and mining regulations, see M. KUSUMAATMADJA, *SURVEY OF INDONESIAN ECONOMIC LAW: MINING LAW* (1974).

foreign investment in logging was permitted until the mid-1970s.⁹⁹ Now, however, foreigners may invest only in logging service companies to work as contractors to domestic logging companies, and in certain wood processing factories.

N. *Foreign Participation in Finance*

Foreign banks may establish branch offices in Indonesia to engage in commercial banking, subject to obtaining the prior approval of the Minister of Finance. At present, however, there are only ten foreign bank branches in Indonesia, all located in Jakarta, and it has been many years since any new branch license has been granted.

In addition, foreign banks can be licensed to establish commercial banks, development banks, investment banks, and lease financing companies in the form of locally incorporated joint venture companies. In each case, prior approval of the Ministry of Finance, rather than approval of the BKPM, is required to establish the local corporation.¹⁰⁰

Similar rules, requiring Ministry of Finance approval rather than BKPM approval, are applicable for the establishment of foreign and foreign-owned insurance companies in Indonesia.

O. *Nominee Arrangements*

To circumvent restrictions on foreign investment (*e.g.*, prohibitions on investment in particular sectors, joint venture requirements, and Indonesianization requirements) some foreigners have established nominee arrangements with local shareholders in which local shareholders hold one hundred percent (or some lesser agreed percentage) of shares in a local company as nominee for and on behalf of a foreigner. In the typical nominee arrangement, the foreign and Indonesian persons enter into a nominee agreement in which the local shareholder agrees to establish a limited company and to hold the shares of such company on behalf of the foreigner for the benefit of the foreigner. Usually the foreigner and Indonesian shareholder also enter into a loan agreement pursuant to

99. Presidential Decree No. 15 (May 25, 1987).

100. For a detailed discussion of Indonesian banking laws and regulations, see Hornick, *Foreign Banking in Indonesia*, 6 *Nw. J. INT'L L. & Bus.* 760 (1984).

which the foreigner lends the Indonesian shareholder money to make the investment and takes a pledge of shares as security for the loan, and the foreigner and Indonesian company enter into a management/technical services agreement in which the foreigner agrees to provide specified management and technical services for a fee.

Such nominee arrangements are expressly sanctioned by law only where the nominee is a so-called non-bank financial institution, the shares held in trust by such institution do not exceed twenty percent of the total shares of the company, and the nominee is obligated to sell the shares to a qualified Indonesian buyer within five years.¹⁰¹

Where the nominee arrangement does not satisfy the aforementioned criteria, its validity and enforceability are uncertain. Some Indonesian practitioners maintain that a nominee arrangement is unlawful to the extent it purports to do indirectly what is prohibited from being done directly; however, there are no reported cases. The BKPM acknowledged—and by implication sanctioned—nominee arrangements in its 1981 Guide for Investors, where nominee arrangements are briefly discussed without adverse comments.¹⁰² However, in the 1982, 1983, 1984/85, and 1986 editions of the Guide, the discussion of nominee arrangements is deleted, suggesting that upon reflection the BKPM, too, has questioned the validity of such arrangements.

P. Investment Disputes

While the Indonesian investment environment over the past twenty years has been generally favorable to foreign investors, some investment disputes have inevitably arisen, either directly with the government or with local joint venture partners. A number of these disputes have been settled informally, others have been referred to Indonesian courts or arbitral panels,¹⁰³ and one has been the subject of an arbitration at ICSID, in Washington, D.C.¹⁰⁴ Typically, these disputes have

101. See Bank Indonesia Letter No. 6/38/UPUM/DPU para. 3 (Dec. 4, 1973) re bidang usaha lembaga keuangan non-bank, Resjim, 3 HIMPUNAN PERATURAN PERBANKAN DI INDONESIA 143.

102. BKPM, INDONESIA: A GUIDE FOR INVESTORS—1981, at 72 (1981).

103. See sources cited *infra* notes 105–07 and accompanying text.

104. See *Amco Asia v. Indonesia* (Sept. 25, 1983) (Award on Jurisdiction), *re-*

involved Indonesianization of foreign shareholdings or management of joint venture companies.

1. *Flour Mill Dispute*¹⁰⁵

One of the most publicized disputes involved the forced sale in 1981 of the entire foreign shareholding in P.T. Prima Indonesia, a foreign investment company established in 1970 under the Foreign Investment Law to own and operate a flour mill at Ujung Pandang in South Sulawesi. The investment license was for thirty years, and obligated the Singapore shareholder to sell twenty-five percent of its shares to Indonesian nationals after ten years.

In 1979 the Singapore shareholder sold twenty-five percent of its shares to a private Indonesian buyer for a reported sales price of US\$7.9 million (US\$3.50 per share), subject to BKPM approval. The BKPM delayed acting for more than a year, during which time the government reportedly tried to persuade the foreign shareholder to cancel the sale and transfer the shares instead to a government corporation. Bulog, the government's food logistics board, which controls wheat allocations and flour-distribution licenses, gradually withdrew from P.T. Prima's licensed distribution territory all regions of Indonesia except the island of Sulawesi itself. It also gradually reduced P.T. Prima's duty-free wheat allocation until the mill was operating at only twenty to thirty percent of capacity.

The seller still did not repudiate the share sale, at which point BKPM acted and disapproved the sale. It declared flour a strategic commodity, mandated that the share sale could be made only to a government corporation, and advised that the twenty-five-percent divestiture requirement was being unilaterally increased by the government to fifty percent, notwithstanding the terms of the original investment approval. At this point the Singapore shareholder capitulated and agreed to sell its entire shareholding to P.T. Berdikari, a buyer designated by the government, for a reported sales price of US\$31.5 million

printed in 23 I.L.M. 351 (1984); Amco Asia v. Indonesia (Nov. 20, 1984), reprinted in 24 I.L.M. 1022 (1985) (Award on the Merits); Amco Asia v. Indonesia (May 16, 1986), reprinted in 25 I.L.M. 1441, 1465 (1986) (Decision on the Application for Annulment) (at time of writing, this case has been resubmitted to a new ICSID tribunal in accordance with ICSID procedures). See also supra notes 79-82 and accompanying text. 105. Asian Wall St. J., Nov. 25, 1981.

less US\$10 million for bank accounts, wheat stocks, flour inventory, and office, which were simultaneously repurchased by the foreign shareholder.

2. *Milk Dispute*

The extent to which a foreign investor is free to choose the buyer of his shares and the terms of sale was analyzed in a 1983 Jakarta court decision.¹⁰⁶ There, Australian Dairy Corporation ("ADC"), the foreign investor in a joint venture milk company called P.T. Indomilk, decided to sell its fifty-percent interest in P.T. Indomilk to a local milk company, P.T. Kebun Bunga, for US\$10 million, subject to BKPM approval. Pursuant to the terms of its joint venture agreement with its local partner, Marison N.V. ("Marison"), and the requirements of P.T. Indomilk's articles of association, ADC notified Marison of the intended sale and gave it two weeks to match the price. Marison did not match the price but instead obtained a court injunction against the sale. Reportedly at Marison's initiative, BKPM then advised it would not approve the sale to P.T. Kebun Bunga, whereupon ADC abandoned its contract with P.T. Kebun Bunga and sold its shares instead to Marison for US\$4.5 million.

P.T. Kebun Bunga then sued ADC for breach of the share sales contract. ADC's principal defense was that its sale to P.T. Kebun Bunga was conditioned, *inter alia*, on obtaining BKPM approval, and that because BKPM did not approve, the sale was cancelled and ADC was free to find another buyer. The Jakarta District Court rejected this defense and ordered ADC to transfer its shares to P.T. Kebun Bunga at the originally agreed price, holding that BKPM approval was merely an administrative requirement more in the nature of a reporting requirement, the mere withholding of which could not invalidate an otherwise lawful sale. The Jakarta Court also held that it was unjust to force ADC to sell its shares to a second buyer for US\$4.5 million when it had an original buyer ready, willing, and able to pay US\$10 million. However, the Jakarta High

106. P.T. Kebun Bunga v. Australian Dairy Corp., Jakarta District Court Decision Nos. 144/JT/1982 G and 204/JT/1982 G (1983), *rev'd on other grounds*, Jakarta High Court Decision No. 599/1983/P.T. Perdata; Singapore Business Times, Apr. 5, 1983, at 6. For a detailed discussion of the case, see E. RAJAGUKGUK, *INDONESIANISASI SAHAM* 17-25 (1985).

Court reversed on a technicality, holding that it was premature to order the share transfer because various internal corporate approvals for the sale and purchase had not yet been obtained. The High Court did not address the main issues in dispute or the substance of the Jakarta court's holding.

3. Forestry Dispute

One of the more widely publicized management disputes occurred between a local shareholder and a South Korean shareholder of an Indonesian joint venture company.¹⁰⁷ The joint venture company, P.T. Ahya Balapan Timber, was established in 1977 to do business in the forestry sector. A South Korean shareholder owned a majority of shares and controlled four of the five seats on the Board of Directors. A dispute between the shareholders arose in 1979 when the local partner demanded a more active role in the affairs of the joint venture company and wrote the government bank that held the company's bank account to insist that company checks be dishonored unless co-signed by the local partner. The local partner then wrote to the Director General of Forestry, the governmental department with jurisdiction over joint venture forestry projects, and demanded issuance of an administrative order giving the local partner a greater role in company affairs. Such an order was issued in January 1980 by the Director General and included a provision requiring co-signature on all checks. The local partner also petitioned BKPM to audit the joint venture's books and brought an action in a Jakarta court to rescind the joint venture agreement, divest the foreign partner of its shares, and transfer management of the joint venture company to the local shareholder. The Jakarta District Court issued a provisional order transferring management of the joint venture company to the local partner, pending determination of the merits of the dispute, and the Jakarta High Court affirmed. However, the Indonesian Supreme Court reversed, holding that the Indonesian court lacked jurisdiction of the disputes

107. *Sutomo v. Ahyu Forestry Co.*, North Jakarta District Court Decision No. 113/1980 G (Dec. 18, 1980), *aff'd*, Jakarta High Court Decision No. 57/1981 (May 7, 1981), *rev'd*, Supreme Court Decision No. 2924 K/Sip/1981 (Feb. 8, 1982), S. GAUTAMA, ANEKA MASALAH HUKUM PERDATA INTERNASIONAL 155 (1985).

because the parties' joint venture agreement provided for International Chamber of Commerce arbitration.

II. *PROTECTION OF INTELLECTUAL PROPERTY RIGHTS*

Indonesia has no comprehensive legislation governing intellectual property rights. There are administrative regulations, issued in 1953, providing for the provisional registration of patents;¹⁰⁸ the Trademark Law was enacted in 1961;¹⁰⁹ the Copyright Law was enacted in 1982 and recently amended.¹¹⁰ In addition, Indonesia is a party to the Convention of Paris for the Protection of Industrial Property (1934 London version with respect to Articles 1-12; 1967 Stockholm version with respect to other Articles) ("Paris Convention").¹¹¹

Indonesia has given high-level attention in recent years to strengthening protections available under its laws for intellectual property rights. In 1986 the Indonesian president formed a working team consisting of senior officials representing ten departments and agencies to examine problems in the implementation of the copyright and trademark laws and to draft a patent law.¹¹² The team played an important role in bringing about the 1987 amendments to the Copyright Law and is reportedly turning its attention now to trademark and patent.

A. *Patents*

Indonesia has no general legislation respecting the protection of patent rights.¹¹³ However, Indonesia is a party to the

108. Announcement of the Minister of Justice No. J.S.5/41/4 (Aug. 12, 1953); Announcement of the Minister of Justice No. J.G. 1/2/17 (Oct. 29, 1953).

109. Law No. 21 of Oct. 11, 1961.

110. Law No. 6 of Apr. 12, 1982 as amended by Law No. 7 of Sept. 17, 1987.

111. Convention of Paris for the Protection of Industrial Property of 20th March, 1883, revised, *opened for signature* Dec. 14, 1900, 13 U.S.T. 1, 27-28 (official English trans.), T.I.A.S. No. 4931, at 27-28 [hereinafter Paris Convention].

112. Presidential Decree No. 34/1986 (July 30, 1986), 34 *Warta Cafi* 203 (Sept. 4, 1986).

113. The old Dutch Patent Act, enacted in 1910, was made applicable to the Netherlands Indies by the terms of its article 58, and a Patent Office was established in Jakarta by the Dutch colonial government. However, patent rights for the Netherlands Indies, as well as Holland, were conferred by the Dutch government in Holland, which alone had authority to issue patents; the Jakarta Patent Office merely processed patent applications for forwarding to Holland. After Indonesia declared its independence from Holland in 1945, the Patent Act in effect lapsed because there was no official in the country with legislative authority to issue patents. S. GAUTAMA

1934 Paris Convention and does have regulations, promulgated by the Minister of Justice in 1953, providing for provisional registration of patents.¹¹⁴ The purpose of provisional registration is to establish a right of priority in the event that new patent legislation is enacted. Although there is no patent legislation now pending before the legislature, it is hoped that any new patent legislation, when finally enacted, will treat the date of provisional registration as the relevant date of filing under such new legislation. However, until such legislation is actually enacted, there can be no assurance that provisional registration will have the effect intended. Indonesians describe the provisional system as a kind of conditional promise by the government that does not yet, however, have the force of law. The provisional registration procedure may be utilized by foreigners as well as Indonesian nationals.

1. Provisional Patent Registration Procedure

To register a patent provisionally under existing regulations, the following procedures should be followed:

(i) An application for provisional registration should be duly completed in the Indonesian language and submitted to the Directorate of Patents, Department of Justice. Alternatively, the application may be completed in a foreign language, provided that it is accompanied by an Indonesian translation. The application should be signed by the applicant itself or its attorney-in-fact and should include the full name, address, and nationality of the applicant. If the application is signed by an attorney-in-fact, it should be accompanied by a power of attorney.

(ii) The application should be accompanied by the following additional items:

(a) Three copies of a description of the invention or process to be patented. The description should be in the Indonesian language or in a foreign language accompanied by an Indonesian translation. The description should include the name of the new invention or process together with a discussion of its type and purpose and why it is con-

& R. HORNICK, *supra* note 67, at 8 n. 24. At the time of independence there were some 18,000 patents in force for Indonesia.

114. See sources cited *supra* note 108 and accompanying text.

sidered new. It should also contain a short description of the way in which the invention or process is used, in language that can be understood clearly by an expert.

(b) Two copies of relevant designs or drawings, if any. There are special requirements as to the type of paper to be used, depending on the kind of design or drawing involved.

(c) If the invention has been patented abroad, or if an application for a foreign patent is pending, evidence of such foreign patent or pending foreign patent application should be provided.

(d) Registration fee in the amount of Rp.10,000-12,000 (approximately US\$7).

2. Duration of Provisional Patent Registration

There are no limitations on the duration of a provisional registration. However, any change in the registrant's name or address should be recorded at the Directorate of Patents, to preserve the registration. Also any cancellation or revocation of the provisionally registered patent should be recorded.

3. Transfer of Patent Rights

If any patent right that has been provisionally registered is transferred to a third party by way of assignment, it is customary to record such transfer at the Directorate of Patents and to file a copy of the instrument of transfer. Indonesian lawyers often advise that the transfer be effected by notarial deed, and that if the transfer is effected abroad, the instrument of transfer be legalized by an Indonesian consul at the place where the instrument is made.

4. Remedies for Patent Infringement

Although provisional registration does not itself confer any patent right or other right to exclusivity respecting the invention or process that is the subject of registration, some Indonesian lawyers have argued privately that a foreign patent that has been provisionally registered in Indonesia should be entitled to recognition in Indonesia, and that an Indonesian court could therefore award damages for infringement of a provisionally registered patent, based on article 1365 of the In-

donesian Civil Code. Article 1365, which is the basis for most tort actions under Indonesian law, provides generally that any "wrongful act" that causes injury to another is actionable and obligates the wrongdoer to pay compensation. "Wrongful acts" include any act that violates the rights of another person. If a foreign patent were recognized, then its infringement could be construed as a wrongful act within the meaning of article 1365. However, there are no reported Indonesian cases on this point.¹¹⁵

B. Trademarks

Matters respecting the protection of trademarks are governed by the Trademark Law, enacted in 1961.¹¹⁶ Under the Trademark Law, Indonesia adheres to a first-user concept. The rightful owner of a trademark is the person, Indonesian or foreign, who first uses the mark in Indonesia. This first user is entitled to exclusive use of the mark in Indonesia with respect to any goods of a like or similar nature to those in connection with which the mark was first used. Thus, although the Trademark Law provides for registration of marks, proof of first usage rather than first registration is the key to obtaining a valid right to a trademark in Indonesia. Registration creates a presumption, but a rebuttable presumption, that the registrant is the first user.

The first-user rule has been upheld and construed by the Indonesian Supreme Court in *P.T. Tancho Indonesia v. Wong A. Kiong*.¹¹⁷ The *Tancho* case involved rights to the cosmetics and perfume trademark "Tancho," which had been first registered in Indonesia in 1965 by Wong A. Kiong, owner of a local Indonesian firm called Firma Tancho Tokyo Osaka. "Tancho" products, however, had been previously manufactured in Japan and sold in Indonesia by Tancho Kabushiki Kaisha. In 1969, Tancho Kabushiki Kaisha formed an Indonesian joint venture (P.T. Tancho Indonesia) with N.V. City Factory of Jakarta. The Indonesian joint venture company sued Mr.

115. Some Indonesians have also tried to obtain compensation for stolen inventions on the basis of unfair competition law, but Indonesian courts have rejected such claims. *TEMPO*, July 7, 1984, at 59.

116. Law No. 21 of Oct. 11, 1961.

117. Supreme Court Decision No. 677K/SIP/1972 (Dec. 20, 1972), C. ALI, *YURISPRUDENSI HUKUM DAGANG DI INDONESIA* 413 (1982).

Wong for trademark infringement. The Supreme Court held that, even though the trademark was registered by Mr. Wong before P.T. Tancho Indonesia was created, P.T. Tancho Indonesia was the rightful owner of the trademark within the meaning of the Trademark Law because its foreign parent company, Tancho Kabushiki Kaisha, was the first user of the trademark in Indonesia. Moreover, the Court also held that none of Mr. Wong's products could carry the Tancho trademark, even though certain of Mr. Wong's products were quite different from those manufactured by the joint venture, and even though the Trademark Law protects only "similar products" using the same mark. The court said that it was the intention of the legislature to protect *bona fide* first users, but not *mala fide* first users.

Since *Tancho*, the Supreme Court and local courts have been inconsistent in protecting well-known foreign trademarks against "piracy" by Indonesian firms.¹¹⁸ However, a recent landmark case, *Nike International Ltd. v. Sasmito*,¹¹⁹ more fully discussed below, seems to indicate a determination in the Indonesian Supreme Court to protect the legitimate owners of foreign trademarks and to put a halt to product piracy.

1. Trademark Registration Procedure

Registration, which creates a rebuttable presumption that the registrant is the first user, may be effected by an individual or corporation, and by foreigners as well as Indonesian nationals. Any distinctive and lawful mark may be registered.

To register a trademark, the following procedure should be followed:

(i) An application for registration should be duly completed in the Indonesian language and submitted to the Direc-

118. See, e.g., *Christian Dior S. AR. L. v. Susiawati*, Jakarta District Court Decision No. 48/1982 PDT G (June 8, 1982) (where foreign trademark owner was unable to prove that goods on which mark was first used in Indonesia were imported in accordance with then applicable import regulations, the foreign owner was not entitled to trademark protection as first user because its first use of the mark in Indonesia was not a good faith first use), *dismissed on procedural grounds*, Supreme Court Decision Reg. No. 952K/Sip/1983 (Oct. 23, 1984).

119. Supreme Court Decision Reg. No. 220/Pdt/1986 (Dec. 16, 1986), *rev'g* Supreme Court Decision Reg. No. 294/Pdt/1984 (July 31, 1985); see also *Revlon v. Ng Tet Fah*, *Kompas*, Apr. 30, 1987, at 3.

torate of Patents and Copyrights,¹²⁰ Department of Justice, in Jakarta. If the application is signed by an attorney-in-fact, it should be accompanied by a power of attorney. In the case of a foreign applicant, the application should contain a designation of local domicile in Indonesia for purposes of notice and litigation (*e.g.*, the office of a Jakarta law firm) and the appointment of a legal representative in Indonesia (*e.g.*, a Jakarta law firm).

(ii) The application should be accompanied by the following additional items:

- (a) A sample of the product using the trademark.
- (b) Ten labels bearing the mark.
- (c) A film negative of the mark, conforming to prescribed lengths, widths, and thicknesses.
- (d) Registration fee.¹²¹

Each application is examined for its compliance with the documentary formalities of registration, the registrability of the mark, and the existence of prior conflicting registrations. If the registration is approved, the mark is published in the Supplement to the State Gazette (*Tambahan Berita Negara*). If registration is denied, the applicant is entitled to appeal to the Jakarta District Court within three months of the date of notification of denial.

If a third party desires to oppose a registration, such opposition is supposed to be filed with the District Court in Jakarta at any time "within the nine-month period following the publication" of the registration in the Supplement to the State Gazette.¹²² This cancellation provision has been susceptible of different interpretations.¹²³ The interpretation that prevailed until recent years had the effect of seriously vitiating the cancellation provision. Failure to file a claim for cancellation within the requisite time period can result in preclusion from the remedy of cancellation under the Trademark Law, although it would still in theory be possible to commence a civil action for damages under article 1365 of the Civil Code,

120. The Directorate of Patents and Copyrights is the successor office to the Office of Industrial Property (*Kantor Milik Perindustrian*).

121. Trademark Law art. 4.

122. *Id.* art. 10(1).

123. *See infra* notes 124-28.

based on unfair competition or tortious infringement. However, in practice, civil courts have shown reluctance to award civil damages unless the plaintiff first obtains cancellation of the wrongful registration in accordance with the Trademark Law.

Fortunately, a recent decision of the Supreme Court has removed a procedural impediment to obtaining cancellation of a counterfeit trademark and has reversed a trend in court decisions that made it effectively impossible for trademark holders to cancel unauthorized registrations of their trademarks.¹²⁴ Representative of the earlier line of cases was *Christian Dior S. AR. L. v. Susiawati*,¹²⁵ where the Supreme Court held that the requirement for bringing a cancellation action within nine months of the date of publication of a registration in the Supplement to the State Gazette meant that the action could not be brought until after publication was effected (*i.e.*, during the nine-month period commencing with the date of publication). Since there has recently been a lag between the time a mark is registered and the time it is published, often as long as six years, this decision meant that the rightful owner of a mark was unable to seek cancellation of a counterfeit mark until many years after the counterfeit mark had been registered.

The Supreme Court's decision in *Nike*, in which the court took the extraordinary step of reversing its own earlier decision, eliminated the serious procedural deficiency in the Trademark Law that was at issue in *Christian Dior* and established that an unauthorized registration may be challenged in an Indonesian court at any time. The *Nike* case arose in the late 1970s when Nike International, the American sports shoe manufacturer, discovered that an Indonesian company owned by Lucas Sasmito was manufacturing and selling shoes bearing the Nike name and logo. The Indonesian counterfeiter had even registered the Nike trademark in its own name with the Department of Justice in 1979.

In 1983 Nike sued in a Jakarta District Court to end the unauthorized use of its mark and to establish its right to its

124. *Nike Int'l Ltd. v. Sasmito*, Supreme Court Decision Reg. No. 220/Pdt/1986 (Dec. 16, 1986), *rev'g* Supreme Court Decision Reg. No. 294/Pdt/1984 (July 31, 1985).

125. Supreme Court Decision Reg. No. 952K/Sip/1983 (Oct. 23, 1984).

own trademark in Indonesia. Nike prevailed in the lower court, which held that Nike was the first user of the Nike mark and cancelled the registration of Mr. Sasmito.¹²⁶ The District Court cancelled Mr. Sasmito's registration despite the fact that the registration had not been announced in the Supplement to the State Gazette at the time Nike brought the case. On appeal, however, the Supreme Court overturned the lower court's decision, holding that Nike's claim was not yet ripe because the contested registration had not been published in the Supplement to the State Gazette. The Supreme Court interpreted the cancellation provision of the Trademark Law to read that a request for cancellation must be made "*during* the nine-month period following publication" rather than "*not later than* the nine-month period following publication," which would permit a cancellation action to proceed even if the gazette announcing the challenged registration had not yet appeared. Accordingly, because the contested registration had not yet been published in the Supplement to the State Gazette, the Supreme Court dismissed Nike's claim.

Approximately a year and a half later the Supreme Court took up the *Nike* case again under a provision of a new procedural law that permits rehearing of already decided cases in certain limited circumstances.¹²⁷ On rehearing the Court reversed its earlier decision, declared Nike the lawful first user of the Nike mark in Indonesia, and cancelled the registration of Mr. Sasmito. In reaching its decision on rehearing, the Supreme Court took note of the current situation in Indonesia, where publication of the Supplements to the State Gazettes announcing trademark registrations is up to six years in arrears. The Court observed that to require a request for cancellation to await publication of the gazette would nullify protection under the Trademark Law. The Court also remarked on the importance of protecting local consumers who may mistakenly purchase counterfeit goods and on Indonesia's duty to honor foreign trademarks and to discourage indigenous entrepreneurs from using well-known international marks even if such marks have not been registered in Indonesia.

126. Nike International Ltd. v. Sasmito, Central Jakarta District Court Decision No. 315/PDT.G./1983 (June 1, 1983).

127. Supreme Court Decision Reg. No. 220/Pdt/1986 (Dec. 16, 1986).

The *Nike* decision stands for the proposition that the lawful owner of a trademark may bring an action to cancel an unauthorized registration at any time, irrespective of whether the challenged mark has been announced in the Supplement to the State Gazette. Although Indonesia's legal system is based on civil law, not common law, and there is no principle of *stare decisis*, many Indonesian practitioners expect that the *Nike* decision will be followed in future litigation in Indonesian courts. A recent decision letter of the Minister of Justice underscores the decision in *Nike* and reflects a tougher government attitude toward trademark infringement: it instructs the Directorate of Patents and Trademarks to deny requests by Indonesians to register trademarks that are already used and well-known in Indonesia.¹²⁸

2. Prohibited Marks

The following marks are prohibited from being registered:

(i) Marks that have become part of the public domain (*e.g.*, the human skull with crossed bars as the sign for danger or poisoning).

(ii) Marks that are contrary to good morals or public order.

(iii) Representations of flags, emblems, or coats of arms of Indonesia or any foreign country.

(iv) The name or initials of international organizations or official marks of any government body.

(v) Marks that are not sufficiently distinctive, or that consist only of figures and/or letters, or that consist only of words describing the kind, time, or place of manufacturing, or the quantity, form, purpose, measurement, price, or weight of goods.¹²⁹

The prohibition against registering a mark in the form of letters was tested and construed in *P.T. Kuda Mas Jaya v. Yoshida Kogyo Kabushiki Kaisha*.¹³⁰ The *Yoshida* case involved

128. Minister of Justice Decision No. M.02-HC.01.01 Tahun 1987 (June 15, 1987) re penolakan permohonan pendaftaran merek yang mempunyai persamaan dengan merek terkenal milik orang lain, 35 *Warta Cafi* 156 (July 10, 1987).

129. Trademark Law art. 5.

130. Supreme Court Decision No. 217K/SIP/1972 (Nov. 15, 1972); C. ALI, *YURISPRUDENSI HUKUM DAGANG* 109 (1982).

rights to the zipper trademark "YKK," which was first used and registered by Yoshida in 1955. The mark as registered consisted only of the three letters "YKK." A similar mark, but with certain background in addition to the letters, was subsequently registered by P.T. Kuda Mas Jaya. When Yoshida sued Kuda Mas for trademark infringement, Kuda Mas defended on the ground that the Yoshida mark consisted merely of letters and was thus a prohibited form of mark under the Trademark Law, whereas the Kuda Mas mark was permissible because it contained certain background in addition to the letters. The Supreme Court upheld the validity of the Yoshida mark. It said that the letters "YKK" were so well known, both in Indonesia and abroad, that they had taken on the character of something more than mere letters, and therefore constituted a permissible, registerable mark. Thus, notwithstanding the statutory prohibition against registering marks that consist only of letters, letters can sometimes be registered.

3. Duration of Trademark Registration

Registration of a mark is good for ten years, commencing from the date of registration in the Registry at the Directorate of Patents and Copyrights.¹³¹ The registration can be periodically renewed for additional ten-year periods. Registration can be invalidated if the mark is not used within six months of registration or if at any time during the period of registration the mark is not used for any consecutive thirty-six-month period.

4. Remedies for Trademark Infringement

Trademark infringement is a crime, and a person convicted of infringing a trademark right is subject to imprisonment.¹³² In addition, as discussed above, an action can be brought under the Trademark Law to cancel a wrongful registration and one can sue for damages under article 1365 of the Civil Code, based on unfair competition or tortious infringement.

5. Assignment of Trademark

A trademark can be assigned to a third party if that part of

131. Trademark Law art. 18.

132. CRIMINAL CODE arts. 382, 393, K.U.H.Pid. 148, 152 (BPHN trans. 1983).

the enterprise producing or trading the goods that uses the mark is also assigned and if the assignment is properly recorded at the Directorate of Patents and Copyrights in Jakarta.¹³³

6. Trademark License

The Trademark Law is silent as to licensing. However, in a recent landmark decision, *Gallaher Limited v. P.T. Asia Indonesia Tobacco*,¹³⁴ the Indonesian Supreme Court has upheld the validity of trademark license agreements, at least where the licensor maintains sufficient control over the quality of the goods being manufactured by the licensee under the license. The decision is especially important because import restrictions in Indonesia often make it impossible to be a first user except via license.

In the *Gallaher* case, Gallaher Limited, the English owner of the GOLD BOND cigarette trademark, had registered the mark in Indonesia and licensed an Indonesian company to manufacture GOLD BOND cigarettes. Later, following a royalty dispute, the Indonesia licensee brought an action to cancel the GOLD BOND registration on the ground that trademark licenses were invalid and therefore the licensee was the first user of the mark in Indonesia. Although a District Court agreed with the licensee, the Supreme Court reversed, upholding the validity of the license agreement and the licensor's status as first user. The Supreme Court said that the licensor should be protected because the licensee was acting in bad faith, trademark licenses were customarily recognized in other countries, parties are free to make contracts respecting trademarks despite the absence of any provision respecting licenses in the Trademark Law, and cigarettes were produced by the licensee only with the permission and under the supervision of the licensor.

To protect and prove a licensor's status as a first user, the general practice, apart from registering the mark, is to require the Indonesian licensee to print on the container of any prod-

133. Trademark Law art. 20. The Directorate of Patents and Copyrights is the successor office to the Office of Industrial Property, *supra* note 120.

134. Supreme Court Decision Reg. No. 3051K/Sip/1981 (Dec. 23, 1983); S. GAUTAMA, *ANEKA MASALAH HUKUM PERDATA INTERNASIONAL* 126 (1985).

ucts manufactured under the license the statement "manufactured by authorization of (name) (address)" or similar words, and to set forth in the license agreement procedures for maintaining standards and quality control.

C. Copyright

Indonesia enacted a Copyright Law in 1982 and amended it substantially in September 1987.¹³⁵ The 1987 amendments arose out of sustained international pressure on Indonesia to provide stronger protection to foreign music, software, films, and books as well as growing demands from Indonesian artists for protection from unauthorized duplication of their copyrighted works. While it is still too early to determine whether the amended Copyright Law will put an end to the copyright infringements that caused the international and Indonesian protests, it appears that the amendments strengthened the protection accorded copyrighted materials in Indonesia.

1. Scope of Protection

The Copyright Law gives an author the exclusive right to publish and duplicate his or her scientific, literary, or artistic work. The Copyright Law protects all the works of an Indonesian citizen, resident, and legal entity irrespective of where the works are first published; all the works of a foreign individual or legal entity when the works are first published in Indonesia; and all the works of a foreign individual or legal entity for works protected in the country of residence of such individual and entity when such country has a bilateral copyright agreement with Indonesia or is a signatory to a multilateral copyright convention of which Indonesia is a signatory.¹³⁶ Accordingly, the work of a foreign individual or entity is protected under the amended Copyright Law only when the work is first published in Indonesia or when Indonesia has signed a bilateral agreement with the author's country or is signatory with the author's country to a multilateral convention.

Indonesia is not at present a member of the Universal

135. The Copyright Law replaced a Dutch law dating from 1912 that had remained in force after independence. *Auteurswet 1912*, 600 *Staatsblad* 1912.

136. Copyright Law art. 48.

Copyright Convention or the Berne Convention.¹³⁷ Indonesia has not signed any bilateral copyright agreements.¹³⁸ Accordingly, until Indonesia joins one of the conventions or executes a bilateral copyright agreement, the only way for a foreign author to protect works from copyright infringement in Indonesia is for such author to be the first publisher of such works in Indonesia.

Under the Copyright Law the first publisher of a work is the author who first reads, speaks, broadcasts, or distributes a work so that such work is read, heard, or seen by the public. The first registration of a work with the Department of Justice constitutes a rebuttable presumption that an author is the first publisher of a work. For this reason, registration of a work with the Department of Justice is advisable, even though an author's right to a copyright can be demonstrated even in the absence of a first registration.

2. Duration

Copyright protection for published works generally is effective for the life of the author plus fifty years, measuring the fifty-year segment from the death of the longest lived co-owner in cases of joint ownership.¹³⁹ In the case of so-called "derivative" works (*e.g.*, dance, drama, and puppet theater), protection runs for fifty years, measured from the time of the first publication. Photographs, computer software, and anthologies are protected for twenty-five years measured from the first publication.

3. Copyright Registration Procedure

The Copyright Law provides for permissive registration of works with the Department of Justice.¹⁴⁰ As noted above, registration provides a registrant with a rebuttable presumption of first use, but is not necessary to demonstrate first use and the right to copyright protection. A regulation was issued recently by the Minister of Justice setting forth the procedure for

137. 4 M. NIMMER & D. NIMMER, *NIMMER ON COPYRIGHT* app. 21-1 to -4, app. 22-1 to -6 (1987).

138. Negotiations are under way between the United States and Indonesia to enact a bilateral copyright agreement.

139. Copyright Law arts. 26, 27.

140. *Id.* art. 31.

registering a copyright.¹⁴¹ To register a work, the author or holder of the work must submit an application in triplicate, in the Indonesian language, to the Directorate of Patents and Copyrights, Department of Justice. If the application is submitted by more than one individual or by a legal entity, the name of each such individual or legal entity must be listed on the application, and a single address must be listed. If the application is signed by an attorney, it should be accompanied by a power of attorney. Such attorney must be an Indonesian citizen resident in Indonesia. In the case of a foreign applicant, the application should contain a designation of local domicile in Indonesia and the appointment of a legal representative in Indonesia.

The application should be accompanied by a sample of the work for which the copyright is being sought. The registration fee is Rp.7,500 and the application should have Rp.1,000 in stamps affixed to its first page. Upon submitting the application, the applicant will receive a receipt from the Directorate of Patents and Copyrights.

Each application will be examined for its compliance with the registration requirements. The Directorate of Patents and Copyrights will advise the applicant in writing if the application is incomplete and will give the applicant an opportunity to complete the application. After the application is complete, the application will be examined to ascertain that the applicant is entitled to copyright protection and that no conflicting registrations are in existence. If the registration is approved, the registration will be recorded in the public registry at the Directorate of Patents and Copyrights and the registration will be announced in the Supplement to the State Gazette. If registration is denied, the applicant is entitled to appeal to the Jakarta District Court within three months of the date of notification of denial.

4. Acts of Infringement

Infringement of a copyrighted work arises when a party, not being the copyright holder and without the authorization of the copyright holder, publishes or reproduces or causes to

141. Minister of Justice Regulation No. M.01-H.C.03.01/1987 (Oct. 26, 1987) re pendaftaran ciptaan.

be published or reproduced in Indonesia a scientific, literary, or artistic work protected by the Copyright Law. However, the Copyright Law provides that the mere possession of an infringing work does not constitute infringement if the party possessing the work has procured it in good faith.¹⁴² The law permits copyright holders to bring infringement actions only against parties who intentionally and knowingly infringe the copyright.¹⁴³

The Copyright Law provides specific provisions to exempt certain acts from constituting infringement. For example, quotation from copyrighted works is permitted for educational and scientific purposes provided that acknowledgement of the author is made; limited reproduction of copyrighted works by a public library is permitted; and the copying of a backup copy of computer software is permitted if the copy is made for the personal use of the owner of the software.¹⁴⁴

In addition, pursuant to "compulsory licensing" provisions of the Copyright Law, under certain circumstances the government of Indonesia is authorized to compel a copyright holder to translate or duplicate a protected work in Indonesia or to compel the holder to authorize the government or a third party to translate or duplicate a protected work in Indonesia, when it is determined that such work has importance with respect to scientific, educational, and research activities in Indonesia and such work has not been translated or distributed in Indonesia during the three-year period since it was granted copyright protection in Indonesia.¹⁴⁵ In this case, the government is obligated to compensate the copyright holder for such translation or authorization to translate.¹⁴⁶

5. Remedies for Copyright Infringement

The Copyright Law authorizes a copyright holder to initiate a civil court action against an infringing party and empowers the trial court to enjoin the infringer from making, reproducing, broadcasting, circulating and selling the infringing work. The availability of this civil action to a copyright holder

142. Copyright Law art. 43.

143. *Id.* art. 43(2).

144. *Id.* art. 14.

145. *Id.* art. 15

146. *Id.* art. 15(2).

in no way limits the state's right to bring criminal action against the infringer.¹⁴⁷ The criminal penalties provide that a party that intentionally infringes a copyrighted work by publishing or duplicating a work or licenses another party to publish or duplicate a work, is subject to a penalty of up to seven years imprisonment and/or a fine of Rp.100 million.¹⁴⁸ Parties convicted of broadcasting, displaying, distributing, or selling an infringing work are subject to up to five years imprisonment and/or a fine of Rp.50 million.

6. Assignment and Transfer of Copyright

A copyright may be assigned or transferred pursuant to a written request from the transferrer and transferee or the transferee alone.¹⁴⁹ Such assignment or transfer shall be recorded in the public registry and shall be announced in the Supplement to the State Gazette.¹⁵⁰

CONCLUSION

This Article has presented an overview of the legal and regulatory framework that governs foreign investment in Indonesia as of March 1988. This investment framework continues to evolve. As noted above, Indonesian policymakers have introduced six major packages of legislation in the past three years aimed at stimulating the country's economic performance and improving Indonesia's attractiveness as a site for foreign investment. Additional measures are expected in 1988 and 1989.

The recent reforms in the investment regime have reduced the number of bureaucratic hurdles facing foreign investors and have reduced domestic production costs for such investors. In the current atmosphere of weak international oil and gas prices, Indonesia's efforts to promote foreign investment can be expected to continue. While Indonesia remains a challenging place to do business, the government's commitment to deregulating the economy and streamlining invest-

147. Law No. 7/1987, Elucidation introduction art. 4, 35 *Warta Cafi* 231 (Oct. 9, 1987).

148. Copyright Law art. 44.

149. *Id.* art. 35.

150. *Id.* art. 35(4).

ment procedures promises to make Indonesia an increasingly attractive site for foreign investors.