

## Law 25/2007 Law on Capital Investment

Signed into law 2 May 2007

(commentary with specific reference to foreign investment)

FEATURE	CONTENT	COMMENT
Capital investment	Article 1(1) defines capital investment as all investment, whether by domestic or foreign investors.	
Foreign investment	<p>Article 1(3) defines foreign investment (<i>pma</i>) as investment by foreigners alone or in partnership with domestic investors.</p> <p>Article 1(6) defines a foreign investor as an individual, a foreign enterprise or foreign government.</p> <p>Article 1(8) defines foreign capital as capital owned by a foreign state, a foreign citizen, a foreign enterprise, a foreign legal entity, and/or an Indonesian legal entity partly or wholly owned by foreigners</p>	<p>Note that there is a clear distinction made between a foreign legal entity and an Indonesian entity whether partly or wholly owned by foreigners. This is in line with longstanding international private law that a company takes its nationality from the country of its incorporation, not the nationality of its owners (refer the ICJ <i>Barcelona Traction</i> case of 1970). An Indonesian company with foreign shareholding is not a foreign company.</p> <p>The definition of foreign enterprise contained in repealed Law 6/1968 is now gone.</p>
Equal treatment ( <i>perlakuan</i> )	<p>Article 3 establishes the principle that foreign and domestic investors are equal before the law, and Article 6(1) further asserts that all investors shall be treated equally.</p> <p>Articles 4(2) further explains equal treatment.</p> <p>Article 6(2) recognizes however that bilateral agreements regarding investment may be made.</p>	<p>Laws 1/1967 and 6/1968 which set up separate regimes for foreign and domestic investment (<i>pma</i> and <i>pmdn</i>) are both repealed.</p> <p>Those responsible for drafting the law are careful to explain that entry opportunities are necessarily different, but that treatment after entry will be equal.</p> <p>Gone is the provision in Law 1/1967 placing a limit of 30 years on a foreign investment permit of 30 years. There is no provision</p>

		<p>for foreign investment permits.</p> <p>Gone is the provision in Law 1/1967 for there to be divestment.</p> <p>Gone is the provision in Law 1/1967 that foreign investment in mining may be undertaken through a contract of work.</p> <p>Gone are the apparently ignored provisions in Law 6/1968 that foreign enterprises (as defined in that law) could not participate in trade and industry after 31 December 1977. As stated earlier, the distinction between national and foreign enterprises in Law 6/1968 is now gone.</p>
General Plan	Article 4(3) provides for a General Plan for Capital Investment	There is no further information about this plan.
Form of Investment	Article 5(2) provides that foreign investment shall generally be undertaken through a limited liability company.	
Nationalisation	Article 7 provides that while nationalization is not intended, if it does take place there shall be compensation based on market value. Any dispute shall be resolved through arbitration.	This repeats the provisions of repealed Law 1/1967 and reflects customary international law to this effect. The law actually goes further than the UN <i>Charter of Economic Rights and Duties of States</i> of 1974 in that it sets a standard for compensation (i.e. market value)..
Transfer of assets	Article 8 reassures the right of all investors to transfer assets offshore, subject to reporting, and the right of the Government to be paid taxes etc	
Employment	Investors must give priority to Indonesian employment, but may use foreigners as needed (Article 10).	
Sector activity	Article 12 provides that all sectors are open to investment, except as may be declared in a <u>Presidential Regulation</u>	This reverses the provision in repealed Law 1/1967 (long since reversed by

	to be closed or open with restrictions.	Presidential Decree).
Rights	Article 14 provides that all investors are entitled to certainty as to rights and law, to transparent information, and to service.	
Obligations	Article 15 requires investors to practice good corporate governance, and to report on their activities to BKPM.  Article 17 highlights the obligation of mining and resource investors to rehabilitate their areas.	There is no provision as to how this reporting is to be set up and implemented.
Facilities	Facilities are available to investors under certain conditions – although investors may qualify in one of many ways to receive facilities (Article 18).	
Tax facilities	The possibility of reductions in income tax, import duty, VAT, land & buildings tax, and accelerated depreciation are to be set out in a <u>Ministry of Finance Regulation</u> , but also depend on industry policy (Article 19)	The concessions are not as specific as in repealed Law 1/1967. All detail will now depend on the Minister of Finance, as this law grants no specific rights.
Land titles	Article 22 provides that titles and extensions may be granted from the start, so that the initial grant of HGU becomes 60 years in effect, HGB becomes 50 years in effect, and Hak Pakai becomes 45 years in effect, immediately.	No new land titles are created. Article 22 simply supplements the way that the rights available under Basic Land Law 5/1960 are administered. While Law 5/1960 allows that extensions to initial titles may be granted (e.g. in the case of HGU the initial 35 years may be extended for 25 years), it is not specific as to when. This law now provides that in certain circumstances, extensions will be granted immediately, at the time the initial title is granted. This concession would appear to have no effect if existing titles are being bought.  All this of course has no effect on an Indonesian individual investor who purchases freehold ( <i>Hak Milik</i> ).
Visas	Article 23(3) provides the possibility of a 2 year limited stay visa, a permanent	Unless a BKPM recommendation is

	<p>stay visa after 2 years, a multiple reentry permit for 12 months for a 1 year visa holder, and 24 months for a 2 year or permanent stay visa holder.</p> <p>Article 23(1) opens eligibility to any business needing foreign labour, and Article 23(4) provides that the grant of the 2 year and permanent stay visas require a recommendation of BKPM.</p>	<p>obtained, it is apparent that the current 1 year visa system applies. Note that the longer multiple reentry permits do not depend on BKPM recommendation, even for the 1 year visa holder.</p> <p>Note also that a so-called permanent visa is actually a 5 year visa.</p> <p>There is no specific requirement for an enabling regulation to put all this into effect, therefore there is no guidance as to how it will be effected.</p>
Importing facilities	Article 24 provides for import facilities.	There is no specific requirement for an enabling regulation, no indication as to what facilities may be granted or who will grant them, and no indication as to how an investor may qualify.
Integrated service facilities	Articles 25(5) and 26 provide that operating licences may be obtained through one door integrated services. These services may have the appropriate authority to licence delegated by national or regional bodies. How these services are to operate will be set out in a <u>Presidential Regulation</u> .	<p>The language of the law is silent as to whether these one door services must be set up or simply <i>may be</i> set up – the presumption is <i>may be</i>.</p> <p>It is worth noting that during the life of the previous law, the only licences to be delegated to BKPM were the import licence, and (for a time) the approval of employment plans, apart from the investment approvals (interim &amp; permanent) which were its own creations.</p>
BKPM	Article 27 provides that Government coordinates investment policy through BKPM, the chairman of which is directly responsible to the President. And Article 28 elaborates on the duties of BKPM.	The language of the Article appears not to <i>establish</i> BKPM, which suggests that the organization established by Presidential Decree 33/1981 continues. However

	<p>Duties as defined relate generally to coordination, analysis and promotion.</p>	<p>Article 28 defines the role of BKPM, and since this definition is in a law, and appears to be exclusive of any other duties, it would necessarily replace the definition of duties in Decree 33/1981. Gone therefore are the duties to formulate policy and to grant approvals.</p> <p>There is however a duty to “determine procedures for the implementation of policy and services” which is unclear as to its extent.</p>
<p>Implementation of policy</p>	<p>Article 30 provides that the implementation of policy is carried out by the area of government within whose jurisdiction the investment is being made. However certain investment activities are primarily a central Government function (which may be delegated).</p> <p>These investment activities are:</p> <ul style="list-style-type: none"> <li>▪ Non renewable resources with high environmental risk</li> <li>▪ High-priority national industries</li> <li>▪ Regional communications</li> <li>▪ Defence and security</li> <li>▪ Foreign investment which is made by a foreign government</li> </ul> <p>The distribution of responsibility is to be spelled out in a <u>Government Regulation</u>.</p>	
<p>Dispute settlement</p>	<p>Article 32(4) provides that disputes between the Government and foreign investors shall be settled through international arbitration.</p>	<p>This is a provision not in the repealed law, but conforms with Law 5/1968 by which Indonesia ratified the (1958 New York) <i>Convention on the Settlement of Investment Disputes between States and the Nationals of Other States</i>.</p> <p>This obligation BKPM always recognized in its approvals, which will now no longer be available or</p>

		necessary. The obligation is also always recognised in bilateral agreements for the protection of investment.
Nominee arrangements	Article 33 prohibits agreements under which shares are held for another's benefit, with specific reference to agreements between domestic and foreign investors.	Company law allows shares to be pledged, and allows shareholders to give others power of attorney to vote. It remains to be seen whether an assignment of rights to dividends (given as security for a loan) is caught up in this very general and therefore unclear prohibition.
Mark ups	Article 33(3) provides for the Government to terminate agreements where its investor-partner is found by a court to have inflated recovery costs.	This appears to be a tilt at suspected practices of PSC contractors.
Penalties	Article 34 provides that in addition to penalties that may be applicable under other laws, investors who do not practice good corporate governance, report as required, and respect culture may simply be warned or may eventually have their business closed.	These are administrative penalties, and there are no monetary penalties.
Current agreements and approvals	Articles 36 and 37 provide that agreements and approvals already in place remain valid until their validity periods expire. Enabling regulations of the repealed laws remain in effect to the extent that they do not contradict and have not been replaced.	BKPM regulations set up a regime for approvals for variations to investment approvals. While approvals will remain in place, it is not clear whether variations to these approvals must still have approval. Logic suggests that these should no longer be required.  Many foreign investors are still operating under their initial investment approvals, and do not have their IUT (permanent approval). It is not clear whether they simply now go to the general SIUP, or must still follow the old IUT path.
<b>IBC Recommendations</b>	Bearing in mind that the IBC has had continuing and close communication with government as to the preferred content of an investment law over 7 years, the IBC had made the following	

	recommendations to DPR Commission VI relating to the draft understood to be under consideration, which have been treated as Indicated:	
	1. National Policy Team.	No action as yet, although provision for a General Plan is included in the law.
	2. Clear negative list, outside the law.	Yes it will be outside the law in a Presidential Regulation, but is not yet published.
	3. Equal treatment.	Yes.
	4. Move from an approval regime.	It appears, yes.
	5. End subjective screening for 'quality'.	It appears, yes.
	6. Support for sector/ regional government responsibility.	Yes.
	7. Establish regional, not national integrated service centres.	One door service centres are to be established at national and regional level.
	8. Establish an investment ombudsman.	Not done.
	9. Establish an investment promotion agency.	Yes, this is the stated intention.
	10. Provide incentives, but without over-emphasis.	Yes.
	11. Avoid too much procedural detail to allow for flexibility.	YES.

Peter Fanning  
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