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Indonesia – ratification of the Bilateral Investment Treaty between Indonesia and Singapore

On September 25, 2020, the Indonesian President ratified the Agreement of October 11, 2018 on the Promotion and Protection of Investments between the Republic of Indonesia and the Republic of Singapore (“ISBIT”) under Presidential Regulation No. 97 of 2020, which entered into force on September 29, 2020.

Less than four years after the application of the Indonesian strategy of non-renewal of, or even exit from, the main BITs entered into with its trading partners, the ratification of the replacement ISBIT¹ illustrates the Indonesian government’s will to shape a more favorable environment for foreign investors, both Singaporean investors and international investors who have chosen Singapore as an investment hub in South East Asia. The choice of Singapore is however not fortuitous, Singapore being Indonesia’s largest foreign direct investor by a wide margin.

Under ISBIT, the two nations guarantee equitable treatment (ie. the most-favored-nation clause) towards the management, conduct, operation and sale or any other arrangement of investments for the benefit of their respective investors.

As a corollary to this guarantee, ISBIT protects, among other things, foreign investors against unlawful expropriation or nationalisation in terms consistent with international practice and provides for compensation for losses suffered by a foreign investor in this case or in the event of political instability having caused damages.

Given Indonesia’s history in disputes over the protection of foreign investments, the introduction of a dedicated chapter concerning dispute settlement procedure is of particular interest.

The latter provides that parties should first try to settle the investment dispute via a consultation mechanism and alternative dispute resolution methods (mediation, conciliation). At the expiration of the above-mentioned period, the claimant may bring his appeal before the International Centre for Settlement of Investment Disputes (ICSID), Indonesia and Singapore being both members to the ICSID Convention, or any other arbitral institution, in accordance with the agreement of the parties.

The main novelty of ISBIT is the assertion of the national Right to Regulate. Accordingly, any national regulation which could create a negative effect on the investment will not be considered *per se* as a direct violation of an obligation under ISBIT. This is a response to Indonesia's previous BITs non-renewal strategy and follows the global trend of further defining states' regulatory and policy-making rights in

¹ In 2016, Indonesia gave Singapore a notice of non-renewal of the 2005 BIT-style agreement on promotion and protection on investment

investment treaties. The application of this *caveat* will be closely monitored to determine its impact on the balance of protections for foreign investors.

ISBIT should reassure observers of the Indonesian government's desire to improve the protection of foreign investments, *ad instar* policies passed recently, such as the investment component of the Omnibus Law which aimed at creating a more welcoming environment for investors in Indonesia. In addition, ISBIT represents a significant improvement from the 2005 version in terms of security and legal technique. Its wording is indeed specified by 44 articles against only 13 articles in its letter of 2005.

However, observers will closely monitor how Indonesia complies with ISBIT to assess whether Indonesia is taking the necessary measures to better protect foreign investors and ensure enforcement of judgments and awards rendered in virtue of ISBIT.

This Alert has been drafted alongside with our partners from Armand Yapsunto Muharamsyah & Partners



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