

THE PROJECT  
FINANCE LAW  
REVIEW

THIRD EDITION

Editor  
David F Asmus

THE LAWREVIEWS

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REVIEW

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# PREFACE

I am pleased to introduce the third edition of *The Project Finance Law Review*, which now includes additional new chapters covering government investment agreements, commercial lenders, government funding and construction risk. This edition builds on the work from the first two editions, expanding both the scope and depth of the resource offered.

Recent years have seen many changes affecting the projects market, including enormous growth in capital directed toward renewable energy (and more novel projects such as carbon capture and storage, and hydrogen), the increasing impact of the regulatory environment on the viability of large projects and now, as the world gradually recovers from a covid-19-induced downturn, an abundance of government financing for selected projects as a part of various economic stimulus programmes. Project finance, unsurprisingly, continues to evolve with the markets it serves. The purpose of this volume is to provide a living guide to project finance that will be updated on a regular basis, while still tackling the core project finance concepts that every practitioner needs to understand.

This volume seeks to cover the most salient topics while leaving scope for expansion into other key areas (such as mezzanine financing, the effect of new technology risk on project financing and environmental, social and governance (ESG) issues) in future editions. As discussed briefly at the end of Chapter 1, all three of these areas have been in great flux, with newer funding sources (e.g., private equity, pension funds and sovereign wealth funds), changes in the nature of projects seeking finance (which now may involve new technologies such as carbon capture and even direct air capture of carbon dioxide) and more substantial environmental restrictions (particularly with respect to climate change concerns) in effect at key lending institutions all combining to change the complexion of the project finance market. The next several years should bring increased clarity to all of these subjects, including particularly the future of project finance in the oil and gas industry.

I would like to express my thanks to all of the authors of this third edition, and particularly those who have contributed new chapters or who undertook significant updates to their earlier work. Their efforts have allowed this volume to be more useful than ever as we enter a new decade facing increasing uncertainty in global politics and global markets, including the project finance market. It is the hope of all of the authors that this volume not only will be of use to all of its readers today, but also will continue to grow in scope and utility in the years ahead.

**David F Asmus**  
Sidley Austin LLP  
Houston  
April 2021



Part II

PROJECT  
COMPONENTS

# GOVERNMENT INVESTMENT AGREEMENTS, CONCESSIONS AND PERMITS

*Emir Nurmansyah, Giffy Pardede and Serafina Muryanti<sup>1</sup>*

## I GOVERNMENT INVESTMENT AGREEMENTS

As of 2021, Indonesia has more than 50 investment agreements (both bilateral and multilateral as an ASEAN member country) (government investment agreements).<sup>2</sup> The main purpose of government investment agreements is to attract foreign investment to Indonesia and to provide comfort that investments will be protected in particular. This was more relevant at the time when investment regulations in Indonesia were very limited and many important areas of investment had not been clearly regulated such as transfer and repatriation of any fund related to the investment (capital, dividend, etc.) and dispute resolution through international arbitration for any conflict related to the foreign investment in a particular international arbitration.

Nonetheless, the number of existing government investment agreements has considerably decreased over past decades with the government actively terminating the government investment agreements, in particular the bilateral ones.

For foreign investors that come from countries that do not have an investment agreement with Indonesia, this does not mean that their investment is not without any protection. The provisions of the government investment agreements are covered by the current The Investment Law (i.e., Law No. 25 of 2007 on Investment as amended by Law No. 11 of 2020 on Job Creation) (together referred to as the Investment Law) and Law No. 11 of 2020 on Job Creation, referred to as the Job Creation Law). For example, the Investment Law also provides the right of the investor to transfer or repatriate (in foreign currencies), among other things:

- a* capital;
- b* profits, bank interest, dividends and other income;
- c* funds that are required:
  - to purchase raw materials and components, intermediate goods or finished goods; or
  - to purchase raw materials and components, intermediate goods or finished goods;
- d* additional funds that are needed for investment financing;

---

1 Emir Nurmansyah is a managing partner and Giffy Pardede and Serafina Muryanti are partners ABNR Counsellors at Law.

2 Based on independent checking, we note that currently there are 51 bilateral investment agreements still in effect and six multilateral investment agreements. The information on the status of the government investment agreements is available on the Minister of Foreign Affairs website, <https://treaty.kemlu.go.id/>, and the UNCTAD Investment Policy Hub (Indonesia, International Investment Agreements Navigator), although we cannot confirm whether the information is up to date in these websites.

- e* funds for repayment of loans;
- f* royalties; and
- g* proceeds of the sale or liquidation of the investment.

The Investment Law also has similar dispute resolution as normally stipulated in investment agreements. The Investment Law provides that in the event of an investment dispute between the government and the foreign investor, the parties will settle the dispute through international arbitration, upon which parties must agree. Therefore, it is important that any concession agreement or cooperation agreement entered between a foreign investor and the government include an arbitration clause, which normally is the case in practice.

In light of the above, the presence or absence of an investment agreement might not significantly affect foreign investment and financing in Indonesia.

## **II CONCESSIONS AND PERMITS**

The participation of private entities in the exploration, exploitation and utilisation of energy and natural resources as well as the development of infrastructure in Indonesia is conducted based on concession rights and permits granted by the government.

### **i Concession rights**

Concession rights are generally granted by the government through a public tender. The preferred bidder will be granted or awarded the concession right and in certain sectors, the government and the preferred bidder or its special purpose company (SPC) will enter into a concession agreement with the government or state-owned enterprise (SOE) that has the authority from the government to manage the assets or project.

In recent years, not many concession rights are granted and implemented in the form of concession agreements due to regulatory change. Only certain sectors that still use a concession agreement regime and for public-private partnership (PPP) projects (by way of a cooperation agreement). In the energy and mineral resources sector, only the oil and gas sector stills implements a concession through a concession agreement. In the mining and geothermal areas, it has shifted into a permit regime, meaning the concession is granted in the form of a concession permit. Below is brief explanation of the concession regime for strategic sectors in Indonesia.

#### ***Oil and gas***

The concession is granted in the form of a joint operation contract.

#### ***Mining and energy (geothermal)***

The concession is currently granted in the form of a permit (i.e., a mining business licence (IUP) for the mining sector and a geothermal permit (IPB) for geothermal). Nevertheless, the existing concession agreements granted under the previous regime (a contract of work for the mining sector and a joint operation contract or energy sales contract for geothermal) that have not yet expired will remain valid and honoured by the government until the end of their respective validity periods. The contractors under these contracts must apply and obtain an IUP or IPB before the end of the validity period of the concession agreements if they wish to continue with the exploitation and utilisation activities under the concession area.

### ***Infrastructure***

For toll roads, the water supply and airports, the concession right is granted in the form of a concession agreement.

On a related note, in recent years, the PPP scheme is often used in the development of energy projects in Indonesia such as geothermal and hydropower plants. For projects developed under the PPP scheme, the government or SOE and the preferred bidder (through its SPC) will enter into a cooperation agreement. In certain sectors where the development right is granted in the form of a concession agreement, the concession agreement is deemed as the cooperation agreement as mandated by the PPP regulation. PPP projects in Indonesia will obtain a guarantee from PT Penjaminan Infrastruktur Indonesia (Persero), an SOE or a special purpose vehicle under the Ministry of Finance specifically tasked with providing guarantees for government infrastructure projects developed under the PPP scheme. In certain cases (depending on the scale of the project – the bigger the project, the higher the amount of guarantee will be required), the Minister of Finance also acts as co-guarantor.

From a project financing perspective, a concession agreement with the government or an SOE provides more flexibility in terms of transfers of right or step-in rights for the finance parties in the event of default under the concession agreement or finance document. Commonly, the concession agreement already contemplates the possibility of the SPC obtaining external financing and will contain provisions on transfers or assignments of rights within the framework of enforcement of security by the finance parties.

In a permit regime, it is to be noted that under Indonesian law, a permit cannot be transferred to any third party or be subject to any security interest. Therefore, the implementation of the step-in right of the finance party relies on a contractual arrangement between the finance party and the SPC, which in project finance in Indonesia is normally in the form of an irrevocable power of attorney to manage business. However, the implementation of an irrevocable power of attorney in Indonesia is not without doubt. Under Indonesian law, a power of attorney, whether granted irrevocably or not, may be deemed terminated by force of law, and without prior notice, upon bankruptcy or suspension of payments. Any power, authority or appointment expressed in the document to be irrevocable may not, despite such expression, be considered irrevocable in that a grantor in issuing an irrevocable power of attorney remains authorised to and capable of carrying out the relevant acts that are subject to the irrevocable power of attorney, and in that the exercise of such authority and capacity of the grantor, albeit in violation of the provisions of an irrevocable power of attorney, does not, per se, render the action so performed invalid. In light of the foregoing, the finance parties can only claim for damages to the SPC as the grantor on the basis of breach of contractual agreement. In addition, there are also doubts on the enforceability of such power of attorney since it may be considered as the board of directors of the SPC providing a general authorisation to a third party to manage the SPC, which authorisation may not be permitted under the Company Law since it has to be granted only for specific actions.

Another issue that is sometimes raised or asked for by finance parties with respect to a concession in the form of a permit is the duration or validity period of the permit and how easy or straightforward it is to get an extension. Concession permits are generally granted with a long validity period of around 20 to 30 years and with possible extension. With respect to the extension, although it may not be entirely administrative in nature, usually it will be granted as long as there are no outstanding obligations (both under the regulation or the concession permit itself such as reporting, tax and non-tax payments to the government) of the SPC.

**ii Permits for the development of projects**

There have been significant changes to the permitting procedure in Indonesia, starting with the introduction and implementation of the online single submission (OSS) system. With the OSS system in place, now almost all applications and issuances of permits are conducted online and with a relatively shorter timeline. To make doing business easier, the government is also making efforts to eliminate a number of administrative and operational permits, licences and governmental approvals.

In terms of the standard procedure and requirements to apply for permits, licences and governmental approvals, the government has tried to unify the procedure and requirements, especially for permits and licences where the issuing authority is with the local government, with the issuance of the Job Creation Law. Under the Job Creation Law, the issuance of a licence that is under the authority of the local government shall be based on the standards and norms prepared by the central government. Although the implementing regulation on the standards and norms for the issuance of permits and licences covering all sectors has not been issued by the central government, at least the government has acknowledged the need for such unification of standards and procedures and is in the process of making it happen.

In addition to the reformation of the permitting procedure that is applicable generally, the government also provides additional facility for projects that are listed as national strategic projects<sup>3</sup> in the form of an acceleration in the issuance of business licences.

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3 The latest list of national strategic projects is found under Presidential Regulation No. 109 of 2020.

## ABOUT THE AUTHORS

### **EMIR NURMANSYAH**

*ABNR Counsellors at Law*

Emir, a senior partner at ABNR and a member of the firm's management board, is one of the most respected and versatile lawyers in Indonesia today. After some 30 years in legal practice, he is a market-leading lawyer for project finance and development, banking and finance, corporate, mergers and acquisitions, and foreign direct investment. He also offers extensive experience and expertise in restructuring and insolvency, shipping, aviation and technology, media and telecommunications.

As head of ABNR's project finance and development practice, Emir has been involved in most of the major power projects developed in Indonesia in recent years, including the US\$1.74-billion, 1,000MW Cirebon expansion project; the US\$3-billion, 2,000MW Java 9 & 10 project; and the US\$2.7-billion, 2 x 660MW Tanjung Jati A project.

### **GIFFY PARDEDE**

*ABNR Counsellors at Law*

Giffy is a key member of the firm's project finance; mergers and acquisitions, foreign direct investment and real estate practices, advising clients across a wide range of industries and economic sectors, including oil and gas, natural resources, financial services and fintech; manufacturing, consumer goods, pharmaceuticals and healthcare, power and renewables, automotive, plantations and agriculture, and tourism and hospitality.

In project finance, he advised a consortium of domestic state-owned banks and international lenders on the recently closed, US\$1.846-billion trustee borrowing scheme financing provided to PT Pertamina EP Cepu (a wholly owned subsidiary of Indonesia's state energy company, PT Pertamina Persero) for the development of the Jambaran-Tiung Biru gas project: the financing consisted of a US\$1,746,400,000 conventional facility and a US\$100 million *shariah*-based *wakala* facility.

### **SERAFINA MURYANTI**

*ABNR Counsellors at Law*

Serafina joined ABNR in 2007 and was made partner in January 2019. She focuses her practice on project finance and development, mergers and acquisitions and foreign direct investment.

In project finance and development, she has extensive experience advising lenders and sponsors on power project financings, including related risk analyses and all aspects of the

Indonesian regulatory regime. Over the years, she has been involved in many of Indonesia's largest power projects, including the Paiton expansion project, Tanjung Jati B expansion project, Sarulla project, Wampu hydroelectric project, Semangka hydroelectric project, Central Java PPP project, Cirebon expansion project, Tanjung Jati B 5 & 6 project, and the Muara Laboh and Rantau Dedap geothermal projects. In other infrastructure projects, she is a member of the ABNR team advising on the procurement, financing and development of waste-to-energy, waste treatment and water supply projects.

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