LEGAL ASPECTS OF "GOING INTERNATIONAL"*

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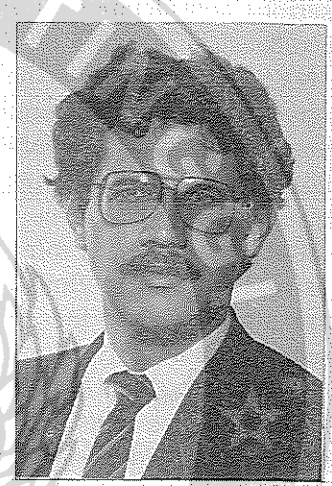
Dalam usaha mendapatkan dana, Pemerintah merencanakan Badan Usaha Milik Negara (BUMN) untuk "go international". Karangan ini mencoba untuk menjelaskan kemungkinan-kemungkinan bagi BUMN Indonesia menjual saham melalui Bursa Efek di luar negeri. Salah satu contoh adalah kemungkinan bagi Indosat untuk menjual sahamnya di New York Stock Exchange atau London Stock Exchange. Hal yang sama untuk swastanisasi pada umumnya dan telah lebih dulu dilakukan oleh perusahaan telekomunikasi Mexico, Chile dan Argentina yang menjual sahamnya di New York Stock Exchange dan bursa efek lainnya.



I constantly read the phrase "going international" in local newspapers, but confess puzzlement about what this means in the Indonesian context. To prepare for today's presentation I approached several Indonesian colleagues and acquaintances involved in the financial markets. I asked each what "going international" meant and so what topics I should address today from a technical, legal perspective. Everyone talked about Indosat, P.T. Telkom, PLN or Pertamina, but there were as many different views of what "going international" meant as people with whom I spoke. Nonetheless, I gleaned

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 The paper was originally prepared for "Law Enforcement Dalam Bidang Pasar Modal" held March 28-29, 1994 at the Jakarta Grand Hyatt Hotel. The author is a Fulbright Scholar and Associate Professor of Law at the University of South Carolina School of Law cooperating with the Fakultas Hukum UI in research under Surat Izin Penelitian No. 8072/I/KS/1993.

three different strains of meaning or approaches from these conversations.

First, a majority focused on "going international" as seeking capital or technology abroad. Most stressed the idea of listing certain state-owned enterprises or "SOEs" on foreign stock exchanges (citing Finance Minister Mar'ie Muhammad's recent statements reported in the press indicating serious consideration of listing Indosat either on the International Stock Exchange of London or "LSE", or on the New York Stock Exchange or "NYSE"). However, some also talked about direct investment in Indonesia (given the Minister's parallel statements that Indosat should enter into joint venture or similar cooperative arrangements with certain foreign telephone companies). Both interpretations of "going international" are understandable given Indonesia's focus on national development, but are recognizably different from how a foreign audience would understand the term (stressing *private* companies' global finance and operational activities, although there are already a few Indonesian enterprises following this path by issuing securities abroad).

Second, some Indonesians seemed to understand "going international" in terms of the transformation of SOEs themselves into privare entities as part of the Indonesian Government's economic liberalization policy. The stress was on privatization, although even here there were important differences related to general approaches to economic questions. Some addressed economic efficiency (following press reports of World Bank President Lewis Preston's discussions during his recent Jakarta visit). Others discussed SOE share sales focused in the alternative on foreign versus local control of enterprises as a matter of national concern, or on (Indonesian) private versus government control of enterprises as a linked issue of legal and social policy. Again distinguishing the outside perspective, a foreign audience would understand "going international" itself (in the Indonesian sense of listing SOE shares on a foreign stock exchange) chiefly as a privatization exercise. As a result, potential foreign investors would carefully review Indonesian policy decisions in the privatization area as part of what foreign underwriters would deem "marketing" issues (*i.e.*, at what price foreign investors would buy an interest in an SOE).

Third and finally, a few Indonesians stressed "going international" from the practical viewpoint of Indonesia's infrastructure financing needs. Their focus on obtaining foreign development capital was not unlike the first view, but they emphasized the common character of Indosat, P.T. Telkom and PLN as infrastructure enterprises. Thus, they cared less for economic efficiency and similar privatization concerns in talking about SOE share sales (understanding prospective foreign investors could view them as utility

companies). At the same time, they talked about foreign direct investment in infrastructure such as the Paiton project as part and parcel of "going international" (as much as listing SOEs abroad). From the foreign viewpoint, here SOE privatization issues touching on control would be much less important than the regulatory and pricing structure for utility services as the chief determinants of a privatized entity's future revenues.[1]

I am still confused whether there is one common Indonesian understanding of what "going international" really means. However, there are practical interrelationships between the three separate views uncovered. Thus, I would like to return periodically to their different aspects while approaching the entire "going international" complex chiefly from the viewpoint of global securities markets. To focus the presentation I shall discuss legal concerns: (1) in selling SOE shares abroad, chiefly in terms of issues which would probably arise both in connection with any Indosat transaction (and future complications introduced by its character as a potential reporting issuer in a foreign jurisdiction);[2] (2) in privatization, chiefly in terms of the experience of certain foreign countries (including the large scale United Kingdom privatizations listed chiefly on the LSE, but to a lesser extent the experience of other countries listing on the NYSE privatized SOEs such as the Mexican telecommunications company *Telefonos de Mexico* and the Argentine oil company *YPF S.A.*; and (3) in infrastructure finance, beyond listing abroad the role of capital markets in meeting the enormous capital needs for Indonesian development.[3]

Basic Securities Regulation Issues

[1]Sophisticated foreign investors may view this kind of infrastructure or project finance as closer to debt than equity investment, regardless of how the security or investment is characterized. From a corporate finance point of view, the legal characterization gives way to the fact that the investment offers a relatively fixed rate of return (of finite duration in something like common build-operate-transfer or "BOT" project finance arrangements, and, even in the case of continuing investment, of limited practical value beyond an amortization period when viewed in terms of the discounted present value methodology commonly employed to evaluate such investments).

[2]Although my knowledge about the transaction is limited to what I read in the newspapers, so all of this is only informed speculation among lawyers concerning technical issues.

[3]Focusing on the potential role of domestic debt markets in BOT project finance as a faster source of capital than SOE privatization in some respects, and how foreign offerings might affect domestic equity markets.

Behind Global Offerings

The starting point for understanding the relevant legal concerns is to recast newspaper reports about Indosat "listing on the LSE or NYSE" in terms of legal complications inherent in a global securities offering. The question of what are LSE or NYSE listing requirements is really only a secondary legal issue. However, to eliminate any possible suspense, I tell you in advance that Indosat should be able to satisfy either NYSE or LSE listing requirements following a properly structured global offering.

At a certain legal level global securities offerings are surprisingly straightforward. There are two basic structures to consider from a legal point of view: (1) a limited, non-public offering directed at institutional investors in one more foreign countries (presumably accompanied by a domestic offering on the Bursa Efek Jakarta or "BEJ"); or (2) a securities offering directed at the public in at least one major foreign financial market outside the issuer's home jurisdiction (presumably accompanied by limited, non-public securities offerings to institutional investors in other major financial markets as well as by a domestic offering on the BEJ).

The reason for distinguishing legally between "(1)" and "(2)" relates to a common pattern in different countries' securities laws. The sale of securities to sophisticated large investors is usually subject to relatively loose regulation.[4] This is due to the opinion that large investment companies, pension funds and insurance companies are powerful enough to fend for themselves and do not need the same level of protection as members of the general investing public.

On the other hand, the sale of securities to the general public is subject in most countries to strict regulation to protect less sophisticated individual investors. For similar reasons, beyond the immediate transaction, in major capital markets public offerings of securities typically result in continuing issuer disclosure obligations. While sophisticated large investors may require continuing disclosure under private contract, there often is no statutory continuing disclosure obligation (because that usually attaches to the initial public offering in most jurisdictions, whether as a result of stock exchange listing requirements or otherwise).

There are initially three basic kinds of legal concerns building on our

[4]Indonesia itself follows this basic distinction in distinguishing between public offerings requiring full registration and non-public offerings. It seems likely that such basic distinctions will survive despite any other changes which might occur as a result of the draft capital markets law currently under discussion.

knowledge of the common distinctions between offers to sell securities to sophisticated institutional investors or to the general investing public in a given country. First, to the extent simultaneous public offers are made in different jurisdictions, compliance with different countries' regulatory and underwriting systems is necessary.[5] Here the problem is that, despite years of international discussion, reciprocity is limited for full-scale public offerings.[6] As a result issuers are commonly forced to reconcile financial statements under differing national accounting standards and make varying disclosures based on national law in each financial market in which a public offering takes place (both to comply with local capital markets regulation and to avoid potential liability for misstatements or omissions under each jurisdiction's securities law as well as providing offering materials in the local language).[7] Being subject to strict disclosure requirements under foreign law is a problem for all issuers outside their home jurisdiction, but SOEs undergoing privatization present special problems (because, unlike foreign private issuers with prior experience offering securities in their home markets, SOEs typically were sheltered from close examination at home by

[5]This is probably the practical reason why global securities offerings rarely involve more than one public offering outside the issuer's home market. It is difficult to coordinate strict regulatory compliance under more than two countries regulatory systems at the same time (so public offerings are commonly made in the issuer's domestic capital markets plus one major foreign financial center, with limited, non-public offerings for sophisticated institutional investors directed into other major financial markets).

[6]The chief examples of it involving major financial markets are probably the multijurisdictional disclosure system or MJDS between Canada and the United States (*see* Multijuridictional Disclosure and Modification to the Current Registration and Reporting System for Canadian Issuers, SEC Release Nos. 33-6902, 34-29354, 39-2267, IC-18210, International Series 291 of June 21, 1991 and subsequent amending releases) and to a lesser extent the minimal standards set by European Union directives aimed at the goal of an integrated European market for the various EU member countries (*see* Admissions Directive, 79/279/EEC; Listing Particulars Directive, 80/390/EEC; Interim Reports Directive, 82/121/EEC; Prospectus Directive, 89/298/EEC). The problem is that there may be cooperation on a higher level, but there is substantially no formal reciprocity at the level of individual securities offerings in a legal sense between regulators in major financial markets (understood as New York, Tokyo and London).

[7]For example, English is the common language for Great Britain and the United States. As a result, prospectuses and other documentation for London and New York Stock Exchange listings and periodic issuer reports are in English. On the other hand, the Tokyo Stock Exchange requires all documentation in Japanese.

their government status).[8]

The second concern relates to the high and continuing nature of financial and other disclosures required when listing in major financial markets. Extensive disclosure would accompany the foreign public offering incident to listing abroad while periodic reporting requirements render disclosure and foreign filings a continuing undertaking. Beyond the continuing cost of outside consultants,[9] periodic filings and other disclosure requirements often collide with a foreign issuer's desire to maintain the confidentiality of certain information. (Common examples are a foreign issuer's belief that a company's business plans and true financial condition should remain secret to avoid tipping competitors, or that its officers' and directors' total economic compensation should remain secret as a matter of social mores.) Privatized SOEs may again present special problems, particularly when continuing partial government ownership or continuing business relationships with government entities may require disclosures touching on broader government plans.[10]

Third and finally, special legal problems accompany global securities trading (understood as trading in the same issuer's securities on different countries' stock markets). Trading in listed securities at each stock exchange is typically subject to monitoring and restraints designed to prevent price manipulation and similar fraudulent activity (directly through local exchange rules or under the government supervision of its capital markets authorities). Coordination and information sharing between stock exchanges and between capital markets regulatory agencies in the stock exchanges' respective jurisdictions are necessary to police the markets under normal circumstances. Harder questions arise due to such concepts as the stabilization of offering and inconsistent trading and underwriting practices (*e.g.*, future fund raising transactions such as rights offerings may raise repeatedly special problems

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[8]The natural response for issuers initially seeking to raise capital abroad is often to avoid as many of these disclosure concerns as possible by engaging in a limited offering to institutional investors (a transaction like "(1)" above). A foreign public offering in a transaction like "(2)" above then may come once the issuer is comfortably generally with foreign requirements. A "(1)" also can be converted subsequently into listed securities by means of an exchange offer.

[9]Continuing advice from foreign legal consultants and accountants may be necessary to comply with the continuing foreign securities law requirements.

[10]Here the common avoidance mechanisms might be complete as opposed to partial privatization (to avoid further government involvement with the SOE beyond regulation post-privatization) and again initiating a transaction of type "(1)" as opposed to "(2)". *See* note 13 *infra*.

with compliance in the foreign jurisdiction). The point is that legal issues concerning global securities trading reach beyond insider or manipulative trading to reconciliation of different securities markets' offering and trading practices.

Depository Receipt Structures in Global Offerings

Moving beyond basic structural concerns in a global securities offering, we reach the straightforward question whether that offering involves the same security everywhere (and how clearing and settlement may be accomplished for secondary trading of the same security in different markets worldwide). Using a potential Indosat transaction as an example, what security would be sold overseas in a primary offering and, assuming that Indosat's principal trading market were the BEJ, how would secondary market overseas trading activity be settled? We begin with the assumption that any Indosat BEJ offering would be of common stock, with local BEJ transactions to be cleared by P.T. KDEI.

A legal practice exists in securities markets outside Indonesia enabling foreign securities ownership through special bank custody arrangements. Under such arrangements a bank might take custody of Indosat shares and issue negotiable receipts for them (which negotiable receipts could be sold abroad). These receipts representing ownership of the shares are themselves securities (referred to commonly as American depositary receipts or "ADRs" for such receipts trading in United States securities markets[11] and global depository receipts or "GDRs" for such receipts trading in European securities markets). As a matter of information, ADRs/GDRs may include more than one underlying regular share per receipt security (for example, NYSE ADRs bundle enough underlying regular shares to achieve a per ADR trading price of between perhaps $ 10 and $ 75).

ADRs/GDRs serve a number of purposes. First and foremost, the receipts as securities are cleared through foreign exchange settlement systems

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[11]*See* Sanders, *American Depository Receipts: An Introduction to U.S. Capital Markets for Foreign Companies*, 17 FORDHAM INTERNATIONAL LAW JOURNAL 48 (1993); Schimkat, *The SEC's Proposed Regulations of Foreign Securities Issued in the United States*, 60 FORDHAM LAW REVIEW S203 (1992); Royston, *The Regulation of American Depository Receipts: Americanization of the International Capital Markets*, 10 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW & COMMERCIAL REGULATION 87 (1985).

(to isolate the foreign investor trading securities from potential clearing problems in the issuer's home market).[12] At the time of the primary offering the custodian bank receives a large block of the underlying issuer shares. It continuously monitors corporate actions, dividend payments, holder's tax obligations and similar developments in the issuer's home jurisdiction. In this sense the custodian serves as the eyes and ears of ADR/GDR holders, who would find it prohibitively expensive on an individual basis to follow issuer events in a foreign country.

Subject to securities law restraints, the custodian bank will collect and forward corporate reports and similar materials to ADR/GDR holders. The custodian bank automatically converts dividends and similar corporate payments from the issuer's home currency into international currencies (commonly U.S. dollars; this also enables certain institutional investors in the United States to purchase foreign securities, since fiduciary law may prohibit their ownership of non-dollar securities). Payments are then made directly to ADR/GDR holders by the custodian bank.

Given their functional aspects, ADRs/GDRs often are employed in global offering transactions both in type "(1)" and type "(2)" transactions. Indosat shares themselves presumably would be the securities sold in Indonesia (and perhaps also in a foreign institutional offering). It is very likely that at least the public portion of a global offering sold outside Indonesia would involve ADRs in case of an NYSE listing or GDRs in case of a LSE listing. However, creation of an ADR/GDR program alongside BEJ or foreign market trading in regular Indosat shares would not separate trading prices between ADR/GDR Indosat shares and regular Indosat shares. Arbitrage between different trading markets for regular Indosat shares ensures that those different markets' prices do not diverge significantly over time. ADR/GDR programs traditionally permit tender of the negotiable receipts representing ownership interest to the custodian bank in exchange for regular issuer shares (which can then be sold for similar arbitrage purposes into the trading markets for regular issuer shares).

We shall talk subsequently about ADRs/GDRs in the context of a potential exchange-listed Indosat offering, but their use in capital-raising programs goes far beyond NYSE or LSE listings. For those of you desiring more general information about ADRs/GDRs, I have placed on the table at the back of the room custodian bank information pamphlets. You might look

[12]Involving the Depository Trust Company for ADRs and typically CEDEL/Euroclear arrangements for GDRs.

at these materials during the luncheon break, and I would be happy to discuss legal aspects of ADR/GDR capital-raising programs more generally during the question and answer period (particularly different levels of ADR/GDR programs).

Disclosure and Privatization Issues for a Global Offering

We turn now to privatization issues, the chief significance of which in a global securities offering may involve disclosure obligations. Here again I admit confusion. The Indosat newspaper stories talk about potential foreign listings, but are silent about broader details of Indonesian privatization plans. Without knowing in advance, we shall review in passing how privatization disclosure and similar issues will probably arise in a potential Indosat transaction.[13]

As a result of longterm policy changes, during the past fifteen years the British Government has been engaged in an extensive SOE privatization program. Felicitously, it recently published an informational pamphlet highlighting the policy and legal decisions faced in privatizing SOEs.[14] Based on the British experience, privatization through the capital markets entails at least three legal and policy issues of special interest for "going international".[15]

First, competition policy issues are in integral part of privatization. Given the monopolies traditionally enjoyed by many SOEs, when privatization is considered governments must revisit the issue whether an individual SOE's monopoly is economically justified (examining what economists would refer to as "natural monopoly" or similar "market failure"

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[13]The disclosure issues would be more pressing in a type "(2)" offering to the extent public disclosure were involved. Disclosures would also be involved in a type "(1)" offering, althought presumably to a limited circle of institutional investors. We assume that due to an Indosat offering's probable size, a type "2" offering would be involved. *See* text and notes at notes 19 - 20 *infra*.

[14]Her Majesty's Treasury, *Privatization: Sharing the UK Experience* (London).

[15]We skip issues relating to rationalization of SOE personnel and their conversion from civil servants to private company employees as part of "corporation" understood as the legal transformation of SOEs as government entities into limited liability corporations in private law form. These seem to present no problems at least in the case of Indosat. For a fuller treatment of privatization's legal issues, see R. Candoy-Sekse, H. Nankani and C. Vuylsteke, *Techniques of Privatization of State Owned Enterprises* (1988; 3 vols., World Bank Technical Papers Nos. 88-90).

questions). One kind of legal/economic issue arises if the SOE's monopoly is not economically justified: whether to encourage competition by breaking up the monopoly enterprise into competing units, or to free other enterprises to enter the SOE's sheltered business (by removing what is often a longstanding statutory monopoly granting exclusive rights to conduct a certain business). Conflict between different government privatization policy goals may even arise: removing an SOE's monopoly rights may lessen its immediate sales price, but demonopolization may be required to avoid longterm underperformance in the broader national economy.

Competition policy issues go to heart of Indosat's longterm business prospects and so would present real disclosure concerns. From newspaper reports I understand Indosat to be a special kind of telecommunications enterprise.[16] Indosat's operating assets are relatively modest, so its single most valuable asset may be its government franchise to operate Indonesia's international long distance connections through P.T. Telekom's local network. Potential investors will want to know what, if any, guaranties exist that Indosat will retain its valuable franchise. Would P.T. Telekom (alone or with foreign telecommunications partners) ever be allowed to compete with a privatized Indosat in supplying international long distance services? As part of a global offering, the Indonesian Government probably will be required to articulate its longterm policy choice between guarantying an Indosat monopoly (and selling Indosat shares for a higher price) or favoring competition (perhaps lessening Indosat's offering price, but favoring Indonesian development generally through lower communications costs).

The second category of legal issues arise if indeed the SOE monopoly is economically justified (a "natural monopoly" in economic terms, with the textbook example often being utility companies or similar infrastructure enterprises). Here the problem is that breaking up the SOE monopoly may be senseless as an economic matter. However, transfer of the SOE monopoly into private hands via privatization raises the specter of its abuse by new private owners (again with the possibility of related longterm underperformance in the broader national economy).

The response to this quandary in most countries has been to establish longterm statutory pricing schemes for the privatized SOE's monopoly services (and independent regulatory agencies to monitor compliance). To

[16]Indonesia has apparently split its telecommunications industry into P.T. Telekom as the domestic long distance and local telephone company, Indosat as the international long distance carrier and Satellindo as the majority privatized joint venture satellite operator for P.T. Telekom and Indosat.

achieve the proper economic effects, however, the new regulatory framework must be explicit and transparent (incorporating an incentive structure for the privatized monopoly's management, whether to lower costs of its services to the public or increase services such as by building new infrastructure). The independent legal structure of regulation also must be created before privatization is consummated. On the one hand, such arrangements are necessary for protection of the public at large as soon as privatization occurs. On the other hand, longterm pricing policy for privatized SOE monopoly services plays an important role in determining the price at which foreign investors in particular are willing to purchase shares in privatizations executed on the capital markets.

Independent regulation and pricing policies may be a greater concern for utility privatization candidates such as P.T. Telekom or PLN than for Indosat. However, to the extent Indosat retains its franchise, will Indosat be free to raise its charges post-privatization? Indosat's future revenues would be determined by a combination of anticipated telecommunication rates and usage, so regulatory pricing policies again will be a central concern of disclosure.

The third complex of privatization concerns from a legal standpoint relates to a government's longterm relationship with a privatized SOE (and national control of specific industries).[17] Certain issues arise in the context of continuing government ownership of an SOE (in practical terms, whether only partial privatization is intended and, secondarily, whether the government will retain a majority or minority interest). Viewed in the context of economic liberalization, continuing government ownership raises issues without regard to the nationality of private co-owners. However, related legal issues may arise to the extent *foreign* as opposed to *private* control is the real concern (on national security or similar grounds).

In the British case, strong economic policy convictions have led the Government to privatize SOEs completely wherever possible. However, certain SOEs were so large that complete privatization could not be achieved

[17]Special concerns apply in privatization through the capital markets. The British experience includes measures to encourage SOE employee or small holder purchase of securities (to encourage wider and deeper domestic share ownership). Using the British example again, beyond priority in the allocation of shares, employee incentives to buy shares have included free, matching and discount share offers. Non-employee share purchase incentives have included installment payment plans (effectively a discount) and discounts to shareholders for the privatized entity's services (for example, vouchers to be used in payment of utilities bills). Separate efforts have been undertaken to encourage retention of shares, such as offering bonus shares after several years if a purchaser in the initial public offering retains its shares.

in a single capital markets offering. In such cases, the British Government customarily has undertaken not to exercise voting rights attached to its residual shareholding. In a few circumstances it has adopted temporary limitations on share concentrations (for example, that individuals or groups of affliated shareholders may not hold more than 15% of a former SOE's capitalization for five years following privatization). It has limited distinctions between overseas and domestic investors to a very few cases.

Britain's experience does not seem to arise from its character as an industrialized country. The predominant pattern for telecommunications SOEs in such countries as Mexico, Chile and Argentina has involved full privatizations (although the process may extend over several years and involve multiple capital market offerings or negotiated share sales to foreign telecommunications enterprises as strategic partners).[18] To the extent foreign control is a concern, the response has often been to create different classes of non-voting or similar shares for foreign investors (such as *Telefonos de Mexico's* class L shares listed on the NYSE).

Turning again to disclosure issues in a potential Indosat offering, newspaper reports to date reveal serious consideration of a transaction to sell a 35% stake. The initial disclosure issue would revolve around the question whether the Indonesian Government plans to retain control of Indosat on a longterm basis (and what this might indicate about its attitude toward running Indosat as a commercial enterprise under independent management). Much as with competition policy, Indosat securities could be sold abroad regardless of the answer (but probably at a lower price if full privatization is not contemplated on a longterm basis). The problem is that disclosure requirements in the current offering would require the Indonesian Government to articulate its longterm plans.

Beyond disclosure looms the sensitive collateral issue of foreign control. Will restrictions on foreign portfolio investment and current Indonesian allocation rules simply not apply to enterprises selling shares abroad? If the answer is no, how will it be possible to maintain those rules for BEJ offerings on a longterm basis?

The Specific Context of a Potential Indosat Global Offering: Probable Legal Structure and Size

[18]Malaysia may be an exception in this regard, *see* Hensley and White, *The Privatization Experience in Malaysia: Integrating Build-Operate-Own and Build-Operate-Transper Techniques Within The National Privatization Strategy*, 28 COLUMBIA JOURNAL OF WORLD BUSINESS 70 (1993)(discussing Telekom Malaysia).

Let us now think through the probable legal issues in the specific context of a potential Indosat offering. Recent newspaper accounts indicate that serious consideration is being given to a public offering of 35% of Indosat's shares (25% for sale abroad and 10% for sale in Indonesia, with listings on the BEJ and either on the NYSE or LSE). They note that Indosat earned approximately $ 515 million before taxes over the past three years (with pre-tax profits of Rupiah 314.69 billion for 1991, Rupiah 366 billion for 1992 and projected income of Rupiah 400 billion for 1993). These figures can be used to value Indosat on a preliminary basis by capitalizing earnings. This hypothetical exercise is necessary since transaction size may determine where and how Indosat securities would be sold (which in turn shapes the legal analysis).

I note with caution that "pre-tax" earnings are involved, which presumably would be reduced on an after-tax basis for any privatized entity. The apparent increasing tendency of earnings would also be important to financial markets in evaluating a potential price-earnings ratio or "PER". A corporate finance judgment beyond law is involved, but for our purposes it is realistic enough to aggregate earnings to be capitalized as $ 500 million over a three year period. For estimation purposes, we assume hypothetically that all Indosat earnings involve ordinary income without any extraordinary transactions or non-recurring gains and that earnings are evenly distributed across three years.

How high might the dollar value of such a transaction be assuming annualized Indosat earnings of circa $ 166.67 million? If we assume a PER of between 10 and 20, a completely privatized Indosat might enjoy a total market capitalization ranging from $ 1.67 billion to $ 3.33 billion.[19] However, according to newspaper reports, the sale of only 35% of Indosat's capitalization is contemplated. Thus, transaction size would be in the range of approximately $ 583.33 million to $ 1.17 billion.[20] On this basis the

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[19]In Indonesian capital markets the apparent current PER ceiling for public offerings is 15, so a PER range between 10 and 20 seems reasonable. The final offering price will presumably be determined by international market demand around the time of the offering, presumably based upon preliminary indications of interest in the international markets (since that is where the majority of shares will be placed). Beyond demand generated in the individual transaction by sales efforts, initial public offerings of securities are typically priced off current pricing of comparable issues trading in the same market.

[20]Representing gross offering proceeds before underwriters' fees and expenses, which in an offering of this size and complexity might range from 4 % to 8 % of the gross as a matter of common practice. This does not take into account special advisory or similar fees paid in the privatization planning process, since the privatization and the underwritten sale are severable and might involve different financial and

dollar amount of Indosat securities sold in Indonesia might range from $ 166.67 million to $ 333.33 million while sales abroad might thus range from $ 416.67 million to $ 833.33 million.

Based upon recent international underwriting practices, an Indosat share offering of $ 416.67 million to $ 833.33 million outside Indonesia probably would be sold in most if not all of the world's major financial markets (*e.g.*, in the United States, Europe and Japan). Again following recent practice in global securities offerings, there would be one managing underwriter worldwide (commonly referred to as the global coordinator) who typically is responsible both for allocating so-called tranches among separate regional syndicates (while selling a large portion itself on a worldwide basis) and arranging sales efforts including issuer presentations in different financial centers worldwide. Again, a corporate finance judgment beyond law is involved, but as a function of offering size somewhere between $ 416.67 million and $ 833.33 million it may become difficult to place the entire transaction amount outside Indonesia with institutional investors in a type "(1)" transaction. Thus, beyond newspaper reports about a NYSE or LSE listing, it seems likely that any large Indosat global offering would be in the form of a type "(2)" rather than a type "(1)" transaction (with all the attendant legal complications).

For purposes of further legal analysis we assume the Indosat transaction would be constructed as what we originally referred to as a type "(2)" transaction (involving simultaneous public offerings on the BEJ and in the United States with a NYSE listing or in Britain with a LSE listing). It presumably would be accompanied by tranches involving non-public offerings to sophisticated institutional investors outside the public offering jurisdiction (presumably in the United States if Indosat securities are listed on the LSE or in Europe if they are listed on the NYSE, together probably with a tranche sold in Japan and other Asian financial centers). How much and to whom would be determined in the end by offering size (the PER question), regional syndicate placement and composition under the global coordinator's direction.

The Specific Context of a Potential Indosat Global Offering: New York or London Listing and Concomitant Concerns

We commence with a quick examination of NYSE and LSE listing

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legal consultants (based upon other countries' experience).

requirements. The underlying focus of both is liquidity and breadth of the market in a company's shares.

There are three different sets of NYSE listing standards under which Indosat might quality as a non-United States issuer. Non United States companies may choose to be evaluated under any of two versions of domestic listing standards or under an alternate foreign listing standard[21]

Original Domestic NYSE Listing Requirements

2,000	U.S. "round-lot" holders (generally 100 shares make up a round lot)
1,100,000	U.S. public shares
$18,000,000	U.S. market value of public shares
$18,000,000	net tangible assets
$2,500,000	pre-tax income most recent year
$2,000,000	pre-tax income two preceding years

Alternate Domestic NYSE Listing Requirements[22]

2,200	U.S. shareholders
100,000	U.S. shares average monthly trading for most recent 6 months
$6,500,000	aggregate pre-tax income for last 3 years together with $4,500,000 minimum in most recent year (all 3 must be profitable)

Alternate Foreign NYSE Listing Requirements

5,000	worldwide round-lot holders
2,500,000	worldwide public shares
$100,000,000	worldwide market value of public shares

[21]See New York Stock Exchange, Listing Standards and Procedures for Non-U.S. Corporations.

[22]This standard is really intended for NYSE listing of a stock already trading elsewhere and so is not applicable to the Indosat situation if NYSE listing were to accompany the initial public offering.

$100,000,000 net tangible assets
$100,000,000 aggregate pre-tax income for last 3 years together with $25,000,000 minimum of any one of the 3 years)

Let us assume for the sake of argument that a type "(2)" transaction were under discussion (involving a public offering in the United States accompanied by a NYSE listing). Indosat should be able to satisfy the original domestic listing standards following a successful public offering in the United States. It may also be possible to satisfy the alternate foreign listing standards, although there is insufficient published information to say for sure. News accounts that Indosat's "total" assets were estimated recently at Rupiah 781 billion indicate that the alternate foreign listing requirement's demand of $100,000,000 "net" tangible assets probably is within reach. The previous discussion of potential Indosat offering sizes indicates no difficulty in achieving the dollar value amounts for public shares, with the sole concern being how to ensure that the requisite number of round-lot owners would be achieved (which would be a concern of the global coordinator, as a condition to NYSE listing). Given Indosat's status as a new issuer following an initial public offering, underwriters' certifications would presumably be used to establish broad share distribution.

The number of round-lot holders required for NYSE listing assumes significant sales to individuals beyond institutional investors. The round-lots under discussion are calculated presumably as the equivalent of the NYSE ADR securities, instead of the regular shares underlying the ADRs. The distinction is that ADR securities may bundle more than one underlying regular share to achieve a per ADR trading price of perhaps $10 to $50. Thus, the requirement of 2,000 U.S. versus 5,000 worldwide round-lot holders should be understood as 2,000 or 5,000 holders of at least $1,000 to $5,000 worth of Indosat securities. The larger figure of perhaps 5,000 holders of $5,000 worth of Indosat securities on a worldwide bases should be evaluated with an eye toward the potential effect of the Indonesian allocation system for the BEJ tranche of any global offering. If foreign sales outside the U.S. in a type "(2)" transaction were institutional placements, it is unlikely that they would be made to more than perhaps 500 institutional investors (with a relatively small number of buyers accounting for a large number of shares). Thus, the bulk of the round-lot holders would have to be achieved through sales in Indonesia and the United States.

For those of you desiring more general information about NYSE listing, I have placed on the table at the back of the room an NYSE informational

packet for prospective foreign issuers including such items as a listing agreement and similar NYSE documentation. Again, you may wish to look at these materials during the luncheon break. I would be happy to discuss in more detail NYSE listing mechanics and fees during the question and answer period. In terms of NYSE requirements for ADR programs, I note that NYSE listing requirements specify that a listed ADR must be "sponsored". The practical significance of this is that the cost of the custodian bank responsible for the ADR will be paid on a continuing basis by the listed company.

An LSE share listing would provide no more of a challenge than NYSE share listing requirements, although the three methods of listing differ somewhat from NYSE practices.[23] First, the LSE will permit its members to "introduce" new shares to listing if a company has 100 shareholders, 25% of its stock is held by the public and the securities "are already of such an amount and are so widely held that their marketability when listed can be assumed". Second, a company's shares may be "placed" by a member among its clients without a public offering. The maximum limit for initial public offerings is 15 million pounds (with no such limit for placings by companies already listed). Securities must be distributed among at least 30 shareholders for each one million pounds of the placing, with an overall minimum of 100 shareholders and not more than 25% of the placement allocated to discretionary portfolios. A minimum of 25% of an equity placing exceeding 2,000,000 pounds either must be made available to the general public or be distributed by a second, independent member. The third method is the "offer for sale", which is employed when an offering is too large to qualify as a "placing" (presumably the case with a potential Indosat offering).

Compared to the NYSE, a LSE listing would not require as broad a distribution of shareholders (harkening back to the NYSE roundlot ownership requirements). For that reason, an LSE listing may be more easily achieved if the vast majority of sales in a global offering are to institutional investors. However, broad distribution of shareholders in a global offering can be given high priority in selection and direction of the global coordinator (since the global coordinator allocates securities among underwriters and may choose members of the regional underwriting syndicates with an eye

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[23] *See* Norman S. Poser, INTERNATIONAL SECURITIES REGULATION: LONDON'S "BIG BANG" AND THE EUROPEAN SECURITIES MARKETS 304-08 (1991). The LSE listing requirements are contained in the so-called LSE Yellow Book

towards their power to place securities with individual as opposed to institutional investors).

We can now turn to securities law details of a public offering culminating in listing on the NYSE or LSE. Both would require preparation of a prospectus containing extensive disclosures, with a draft English language disclosure document being subject to review and comment by authorities abroad (which review does not lessen in any way potential liability for material misstatements and omissions in the foreign offering jurisdiction). Due to differences in the underlying regulatory systems, there are some differences in the basic responsibility for review and comment on the disclosure documents. In the case of a type "(2)" transaction involving a United States public offering and a NYSE listing, early consultations would be had with the NYSE to assure listing eligibility. However, similarly to the Indonesian system, a registration statement for the U.S. tranche would be filed with BAPEPAM's American equivalent (the U.S Securities and Exchange Commission or "SEC"). The real responsibility for and control of the registration review would lie with the SEC as a government agency. On the other hand, "offering particulars" (the British equivalent of a prospectus) are reviewed and controlled by the LSE itself in the case of an LSE listing.

Concerning the further details of a U.S. public offering accompanied by listing ADRs on the NYSE, as a technical matter the applicable registration statement for the public offering under the Securities Act of 1933 would be prepared on Form F-1 (viewing Indosat as a foreign private issuer). However, it would be accompanied by a second registration statement under the Securities Exchange Act of 1934 in connection with the exchange listing (probably on Form 20-F).

Considering the character of financial statements required, Form F-1 itself specifies that the issuer's financial statements do not have to be prepared in accordance with United States generally accepted accounting principles or "GAAP". However, a full reconciliation to United States GAAP must be provided for major line items (essentially a detailed explanation of relevant differences between United States GAAP and the foreign GAAP principles under which the original financial statements were prepared). Further, separate NYSE requirements under its listing agreement do at least require consolidated financial statements (while Indonesian GAAP advises but does not require consolidation, although I know nothing about the format of Indosat's current financial statements).

There would be a question of judgment for accountants and legal consultants actually involved in preparation of such a registration statement, but under certain circumstances it may be easier (and more prudent from the

standpoint of potential liability) to prepare United States GAAP financial statements in lieu of explaining differences between foreign and United States GAAP. From the point of view of an NYSE listing, beyond the requirement for consolidated financials the Exchange would accept whatever is satisfactory to the SEC. The only caveat is that the NYSE basically requires a listed company to continue reporting financial results under the format of its original listing (so the form of financial statements in the initial registration statement must be continued in the future).

Concerning continuing disclosure, as a foreign private issuer with ADRs listed on the NYSE Indosat would be required by the Securities Exchange Act of 1934 to make periodic filings on Form 20-F (basically an annual report with full financial statements) and 6-K (for interim financial reports and important events affecting the issuer, both largely keyed to reporting obligations in Indonesia). Foreign private issuers' interim financial statements need only be prepared biannually (rather than quarterly, as is required for domestic issuers). Under Securities Exchange Act of 1934 Rule 3a12-3 foreign private issuers are also exempted from the normal obligations of domestic reporting companies under Section 14 that covers proxy statements (as well as certain tender offer rules). Separate disclosure obligations under NYSE rules would apply to Indosat by virtue of its listed ADRs (most importantly a requirement promptly to disclose important matters affecting its business).

Turning to a possible LSE listing,[24] the content of the disclosure document is determined by LSE requirements (under the parallel influence of the United Kingdom's Financial Services Act and certain European Union Directives promulgated as part of the EU's effort to establish uniform standards and an integrated, single financial market in Europe).[25] The details differ in minor respects from the United States' requirements, but, with the possible exception of financial statement presentation, disclosure obligations are largely the same. Legal liability exists for misstatements and omissions. The LSE imposes continuing disclosure obligations similar to those under the Securities Exchange Act of 1934 and NYSE rules. As a practical matter, there is probably no significant difference in the level of disclosure attaching to listing on the LSE as opposed to the NYSE. Instead, the decision between the exchanges in a type "(2)" transaction would be

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[24] *See* Norman S. Poser, *op.cit.*, at 308-25.

[25] *See* note 6 *supra*.

driven largely by concerns about where and what kind of investors an issuer seeks.

The most significant difference beyond the location of investors concerns capital rasing and public offering practices in the different public markets. British financial practice relys heavily on rights offerings underwritten on a stand-by basis as a way for listed companies to raise capital repeatedly (similarly to Indonesian practice, although it is unclear that stand-by underwriting arrangements are practiced in the Indonesian markets to the same degree). On the other hand, United States financial practice traditionally has favored firm commitment full underwritings over rights offerings.

Given differences in financial market and regulatory structures, even foreign companies' rights offerings executed abroad raise special concerns (often requiring application to the SEC for special exemptions under Securities Exchange Act of 1934 Rules 10b-6, 10b-7 and 10b-8 for underwriters active in conjunction with stand-by offerings overseas as well as full registration under the Securities Act of 1933 or exclusion from the offering of ADR holders in the United States). These problems are a matter of continuing concern for the SEC, which has put forth for comment over the past three years a number of regulatory proposals addressed generally to ADRs (some but not all of which have been enacted; rights proposals are an area in which no final action has been taken to date).[26]

Effects on the BEJ and Other Approaches to Infrastructure Finance

I understand that foreign and dual listings for SOEs are a matter of some debate within the Indonesian financial community (given fears about possible effects on the BEJ). Such policy decisions are a matter for Indonesians to decide, so as a foreigner I feel I should avoid this discussion beyond a statement that domestic capital markets are probably the surest longterm source for development capital. Assuming a decision is made to list abroad, however, it would serve domestic capital markets development if the managing foreign underwriter (here the global coordinator) were required to express a longterm commitment to the domestic market. This could presumably involve the establishment of a local securities joint venture

[26]For a review of the proposals, *see* Schimkat, *op.cit.*

(requiring participation in secondary trading activity as opposed to simply underwriting primary offerings). This would serve to inject new capital and professionalism into the market.

There is one matter for further consideration from the viewpoint of one element seemingly missing from discussions of infrastructure finance in Indonesia. If the drive to list SOEs abroad finds its source in Indonesia's enormous capital needs for infrastructure finance, it is surprising that more attention is not devoted to active development of domestic debt markets (to support project finance practices such as the BOT model, as has been the case in Malaysia).[27] I understand that BAPEPAM is actively involved in promoting development of a debt market, but hear no discussions about its potential role in infrastructure finance projects with foreign ventures (like the Paiton generating facility). The debt securities market on the BEJ itself is relatively small and illiquid, so there is considerable scope for development. Again, given interest I would be happy to explore the matter of the debt market's role in project finance during the question and answer period.

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[27]See Hensley and White, *op.cit.*; *Look for a local hero: a private sector view*, POWER ASIA (June 15, 1992); Sender, *Asia's just-in-time infrastructure*, INSTITUTIONAL INVESTOR 61 (April 1992).

For a Country to have a great writer is like having a second government, that is why no regime has ever loved great writers, only minor ones. *Kehadiran seorang penulis besar bagi sebuah negara sama dengan kehadiran pemerintah kedua. Itu makanya tidak pernah ada rejim yanng senang dengan kehadiran penulis-penulis besar, kecuali penulis kecil.*

Alexander Solzhenitsyn (1918-)

... that is the great fallacy; the wisdom of old men. They do not grow wise. they grow careful. *Ada kekeliruan besar mengenai kebijaksanaan orang tua. Mereka tidak bertambah bijaksana, melainkan bertambah hati-hati.*

Ernest Hemingway (1898-1961)