

The new Singapore- Indonesia investment treaty and what it means for your business

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FOREWORD

In this update

The bilateral investment treaty (“**BIT**”) between Singapore and Indonesia came into force on 9 March 2021. Following the expiry of the 2005 BIT, the 2021 BIT would be a welcome development for investors, as Singapore has been Indonesia’s top foreign investor since 2014 and Indonesia was one of Singapore’s top 10 trading partners in 2020.¹

In this update, we highlight the differences between the previous 2005 BIT and the 2021 BIT pertaining to:

- a) applicability of the BIT;
- b) key protections provided to investors and investments; and
- c) key features of the dispute resolution mechanism.

1. INTRODUCTION

The bilateral investment treaty

The 2021 BIT between Singapore and Indonesia provides clarity on the protection provided to investors and investments.

On 9 March 2021, a BIT between Singapore and Indonesia came into force. This replaces the previous 2005 BIT that expired in 2016 and applies to investments existing on 9 March 2021.²

We summarise below the salient differences between the previous 2005 BIT and the 2021 BIT pertaining to:

- a) applicability of the BIT;
- b) key protections provided to investors and investments; and
- c) key features of the dispute resolution mechanism.

¹ The Straits Times, <<https://www.straitstimes.com/business/economy/bilateral-investment-treaty-between-singapore-and-indonesia-comes-into-force>> (accessed 6 April 2021).

² 2021 Indonesia – Singapore BIT Article 2(1).

2. APPLICABILITY OF THE 2021 BIT

The 2021 BIT applies to investments in existence as of 9 March 2021 and to investments “made, established, acquired or expanded thereafter”³. The new treaty BIT widens the applicability by expressly including certain forms of investments while providing clarity on areas that are excluded. The Indonesian Government ratified the BIT through Presidential Regulation No. 97 of 2020 dated 25 September 2020.

1. Definition of “investment” expanded to widen applicability of BIT

An investment must first fall under the BIT’s definition of investment for the BIT to apply. In the 2021 BIT, investments are defined as “*any kind of asset owned or controlled, directly or indirectly*”⁴ that have characteristics such as “*commitment of capital, the expectation of gain or profit, the assumption of risk or certain duration*”.⁵

The forms of investments that are now specifically expressed as falling under the BIT are:

- a) bonds, debentures, loans, and other debt instruments, including rights derived therefrom;⁶ and
- b) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts.⁷

However, caveats have also been included to limit what is considered as investment:

- a) loans must refer to business activity;⁸
- b) a loan issued by one State to the other will not be considered as investment;⁹ and
- c) order or judgment entered in a judicial or administrative action or arbitral awards will not be considered as investments.¹⁰

2. Carve-outs specified to exclude applicability of BIT

The 2021 BIT now lists areas the BIT will not be applicable to:¹¹

- a) subsidies or grants provided by a State;
- b) government procurement;
- c) services supplied in the exercise of governmental authority; and
- d) matters of taxation.

³ 2021 Indonesia – Singapore BIT Article 2(1).

⁴ 2021 Indonesia – Singapore BIT Article 1.

⁵ 2021 Indonesia – Singapore BIT footnote 1.

⁶ 2021 Indonesia – Singapore BIT Article 1.

⁷ 2021 Indonesia – Singapore BIT Article 1.

⁸ 2021 Indonesia – Singapore BIT footnote 3.

⁹ 2021 Indonesia – Singapore BIT footnote 4.

¹⁰ 2021 Indonesia – Singapore BIT footnote 2.

¹¹ 2021 Indonesia – Singapore BIT Article 2(3).

3. KEY PROTECTIONS TO INVESTORS AND INVESTMENTS UNDER THE BIT

1. Fair and equitable treatment (“FET”)

The FET provision provides a minimum standard of protection for investments and includes various elements, such as non-discrimination, transparency and protections against bad faith, coercion, threats, and harassment.¹²

Under the 2021 BIT, each State is to provide “*fair and equitable treatment*” and “*full protection and security*” to investments.¹³ While the 2005 BIT had been vague by requiring each State to provide these “*in accordance with the terms*” of the BIT,¹⁴ the 2021 BIT provides specific definitions:

- (a) “fair and equitable treatment” has been defined to require each country “*not to deny justice in any legal or administrative proceedings*”;¹⁵ and
- (b) “full protection and security” have been defined to require each country to “*take such measures as may be reasonably necessary to ensure the protection and security of the investment*”.¹⁶

However, the protections are limited by two new caveats. First, the FET is limited to customary international law and does not create additional substantive rights.¹⁷ Second, this provision is not considered to be breached by “*the mere fact*” that a State “*takes or fails to take an action that may be inconsistent with an investor’s expectations*”¹⁸ or if there has been a determination for breach of another provision of the BIT or a separate international agreement.¹⁹

2. National and most-favoured-nation treatment (“MFN”)

The national treatment obligation protects foreign investments from discrimination by requiring a State to give them no less favourable treatment as would be given to domestic investments. The MFN treatment obligation also protects foreign investments from discrimination by requiring the State to give them no less favourable treatment as would be given to other similarly situated foreign investments.²⁰

The 2021 BIT stipulates the scope of both obligations in more detail, i.e., “*the management, conduct, operation, and sale or other disposition of investments*”,²¹ as opposed to the previous scope of “*investments...or returns from such investments*”.²² When determining whether treatment is accorded in

¹² Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) at p 279, section 6.25.

¹³ 2021 Indonesia – Singapore BIT Article 3(1).

¹⁴ 2005 Indonesia – Singapore BIT Article 2(2).

¹⁵ 2021 Indonesia – Singapore BIT Article 3(2)(a).

¹⁶ 2021 Indonesia – Singapore BIT Article 3(2)(b).

¹⁷ 2021 Indonesia – Singapore BIT Article 3(2)(d).

¹⁸ 2021 Indonesia – Singapore BIT Article 3(2)(c).

¹⁹ 2021 Indonesia – Singapore BIT Article 3(3).

²⁰ Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) at p 148, section 4.1.

²¹ 2021 Indonesia – Singapore BIT Article 4(1).

²² 2005 Indonesia – Singapore BIT Article 3(1).

“like circumstances”, the totality of the circumstances will be considered, including legitimate public welfare objectives.²³

Carve-outs are now provided to limit the applicability of these obligations:

- a) the national treatment obligation does not apply to certain measures (such as those related to (i) collection, purification, treatment, disposal and distribution of water, including waste water, (ii) real estate, including but not limited to ownership, purchase, development, management, maintenance, use, enjoyment, sale or other disposal of real estate, and (iii) the national public health service scheme) as listed in Annex I of the BIT; and
- b) the MFN obligation does not have the effect of extending benefits resulting from any other BITs or arrangements with other States to the State that is a party to this BIT prior to the entry into force of the 2021 BIT, including any arrangement with a non-party in the same geographical region.²⁴

3. Protection against expropriation

The expropriation provision stipulates when the State may exercise its sovereign rights to expropriate or nationalise investments and the corresponding compensation to be provided. The conditions to be met for expropriation or nationalisation of an investment are largely the same as in the 2005 BIT, namely:

- a) there must be a public purpose;
- b) such expropriation or nationalisation must be carried out in a non-discriminatory manner; and
- c) in accordance with due process of law.²⁵

The key differences from the 2005 BIT are as follows:

- a) “public purpose” is now more clearly defined to refer to a concept in customary international law;²⁶
- b) the requirements for compensation are now stipulated more in detail, such as the requirement for payment “*without undue delay*”;²⁷ and
- c) a carve-out is provided so that the expropriation provision does not apply to compulsory licenses granted in relation to intellectual property rights in accordance with the BIT on Trade-Related Aspects of Intellectual Property Rights under the WTO Agreement.²⁸

4. Compensation for losses

Both the 2005 BIT and the 2021 BIT provide for foreign investors to be given compensation for losses that would be no less favourable compared to other foreign investors or domestic investors in the event

²³ 2021 Indonesia – Singapore BIT footnote 13.

²⁴ 2021 Indonesia – Singapore BIT Article 5(2).

²⁵ 2005 Indonesia – Singapore BIT Article 4, 2021 Indonesia – Singapore BIT Article 6(1).

²⁶ 2021 Indonesia – Singapore BIT footnote 16.

²⁷ 2021 Indonesia – Singapore BIT footnote 18.

²⁸ 2021 Indonesia – Singapore BIT Article 6(6).

the investor suffers losses from war or other armed conflict, civil disturbances, a state of national emergency, revolt, insurrection, riot, or other similar situations.²⁹

The provision remains substantively the same, but the 2021 BIT adds more clarity as it stipulates that any resulting compensation is to be made in freely usable currency and be freely transferable in accordance with the provision on transfers.

5. Transfers

The transfers provision protects foreign investors' ability to transfer money into and out of the host State regarding their investments.³⁰

The 2021 BIT now provides carve-outs to allow circumstances in which a State may restrict transfers:

- a) A State may prevent a transfer through the “*equitable, non-discriminatory, and good faith application of its laws*” relating to:³¹
- (i) bankruptcy, insolvency, or the protection of the rights of creditors;
 - (ii) issuing, trading, or dealing in securities, futures, options or derivatives;
 - (iii) criminal or penal offences;
 - (iv) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
 - (v) ensuring compliance with orders or judgments in judicial or administrative proceedings;
 - (vi) social security, public retirement, or compulsory savings schemes;
 - (vii) severance entitlements of employees; or
 - (viii) the requirement to register and satisfy other formalities imposed by the central bank or other relevant authorities of a State.
- b) To safeguard the balance of payments, a State may restrict payments, transfers or capital movements related to investments in exceptional circumstances where there is “*serious balance of payments and external financial difficulties or threat*”.³²

4. KEY FEATURES OF THE DISPUTE RESOLUTION MECHANISM UNDER THE BIT

The dispute resolution provisions in BITs are critical as they enable an investor to resolve disputes before a neutral and independent tribunal. The 2021 BIT stipulates a detailed multi-tiered dispute resolution framework. Like the 2005 BIT, the 2021 BIT obliges the disputing parties to first try and settle the dispute via consultations, failing which the parties may submit the claim to a competent court with jurisdiction or before a tribunal for arbitration. The 2021 BIT includes an investor-State dispute settlement provision that enables an investor to submit a dispute to arbitration either under the ICSID Convention (*Convention on the Settlement of Investment Disputes between States and Nationals of other States*, done at Washington on March 18, 1965) or the UNCITRAL Rules (*Arbitration Rules of the*

²⁹ 2005 Indonesia – Singapore BIT Article 5, 2021 Indonesia – Singapore BIT Article 7.

³⁰ Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) at p 399, section 8.2.

³¹ 2021 Indonesia – Singapore BIT Article 8(3).

³² 2021 Indonesia – Singapore BIT Article 9.

United Nations Commission on International Trade Law, as adopted by the United Nations General Assembly on 15 December 1976).

The new salient features of the dispute resolution mechanism are as follows:

- a) The cooling off period which the parties must use to try and settle their disputes through consultations has been extended from the previous 6 months to 1 year³³. This cooling off period is longer than the 3 to 6 month period commonly found in other BITs.
- b) Investors are prevented from relying on their secondary citizenship for the sake of bringing a claim under the BIT, as “*the person shall be deemed to possess exclusively the nationality of the Party of her or his dominant and effective nationality*”³⁴. For instance, if an investor has both Singaporean and Indonesian citizenship and the investor wants to claim against the government of Indonesia under the BIT, this will not be possible if the investor’s “*dominant and effective nationality*” is Indonesia.
- c) Disputing parties may resort to without prejudice mediation at any time, with each party bearing its own costs³⁵.
- d) There are detailed provisions on how arbitration is to be conducted, such as the following:
 - (i) the disputing parties may submit comments to the tribunal on the proposed decision on award and the tribunal shall consider them³⁶;
 - (ii) the unsuccessful disputing party is to bear costs of the proceedings³⁷; and
 - (iii) tribunal may order the disputing investor to post security for costs³⁸.
- e) If a disputing party benefits from third party funding, that party must notify the other disputing party and the tribunal of the name and address of the third party funder.³⁹ Third party funding is still novel and not commonly deployed in Indonesian litigation.

5. CONCLUSION

The entry into force of the 2021 BIT provides greater clarity in the types of protection provided to investors, as well as the mechanism for solving disputes. Investors should seek legal advice to check whether and how this new BIT is applicable to their investments.

³³ 2005 Indonesia – Singapore BIT Article 8(2), 2021 Indonesia – Singapore BIT Article 17(1).

³⁴ 2021 Indonesia – Singapore BIT footnote 7.

³⁵ 2021 Indonesia – Singapore BIT Article 16.

³⁶ 2021 Indonesia – Singapore BIT Article 24.

³⁷ 2021 Indonesia – Singapore BIT Article 25.

³⁸ 2021 Indonesia – Singapore BIT Article 26.

³⁹ 2021 Indonesia – Singapore BIT Article 18.

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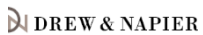


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