

## Hoping to Boost Investment, Indonesia Ratified the Indonesia-Singapore Bilateral Investment Treaty

*Effectiveness pending the exchange of the instruments of ratification between the two countries.*



On 25 September 2020, President Joko Widodo signed Presidential Regulation No. 97 of 2020, which ratified the Agreement between the Indonesian government and the Singapore government on the Promotion and Protection of Investments (“**Treaty**”). The Treaty complements the ASEAN Comprehensive Investment Agreement, which is designed to promote greater investment flow between Singapore and Indonesia.

Under the Treaty, investors from Indonesia and Singapore that invest in either country will enjoy specific legal protection, including access to international arbitration to resolve disputes. The Treaty also affirms two principles: national treatment and most favoured nation treatment. Under the first principle, Indonesia and Singapore must treat each other equally with respect to the management, conduct, operation, and sale or other disposals of the investments. Meanwhile, under the second principle, one country is not required to extend privilege or preference to the other based on a bilateral investment agreement signed before the Treaty or any arrangement with a non-party in the same geographical region designed to promote regional cooperation within the framework of a specific project.

Despite being ratified under the Presidential Regulation, the Treaty itself will come into force on the date when Singapore and Indonesia exchange instruments of ratification (“**IOR**”), which is still being deliberated by both governments. As such, investment agreements signed between 21 June 2016 until the date of exchange will need to rely on the protection under the ASEAN Comprehensive Investment Agreement, which is similar to the protection under the Treaty.

The key points under the Treaty are discussed below.

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## Notable Changes

The previous bilateral investment treaty between Indonesia and Singapore became effective on 21 June 2006 and expired on 20 June 2016.

Compared to the previous treaty, the Treaty strikes a more even balance between the rights and obligations of investors, as well as adopting new norms and model from other bilateral investment treaties and free trade agreements.

### 1. *Application and exemption*

The Treaty only applies to investments made after the date of exchange of IOR. Also, the investment must comply with the laws of the jurisdiction where such investment is made, and if required, specifically approved in writing by a competent party in that jurisdiction.

Unlike the previous treaty, the following investments will not enjoy the protection afforded under the current Treaty:

- (i) subsidies or grants from either country, including government-supported loans, guarantees, insurance, or conditions attached to the receipt or continued receipt of such subsidies or grants, regardless of whether such subsidies or grants are offered exclusively to the investor;
- (ii) government procurement;
- (iii) services supplied in the exercise of governmental authority; and
- (iv) taxation matter, which will remain governed by the laws of either country and any tax treaty between Indonesia and Singapore.

### 2. *Compensation*

Adopting a similar tone as other investment protection treaties, the Treaty gives investors the right to receive compensation in expropriation or nationalisation, as well as for losses that arise due to war, armed conflict, civil disturbances, national emergency, or other similar situations.

There are thresholds that a country must fulfil before expropriating or nationalising an investment, namely that the expropriation or nationalisation:

- (i) be done legally;
- (ii) in a non-discriminatory manner; and
- (iii) most importantly for the investors, in exchange for adequate and effective compensation.

Meanwhile, the Treaty regulates that the amount that must be paid for losses suffered due to war or similar situations must not be less than an amount that would have been paid by a country to investors of a non-party or to its own investors.

### 3. *Dispute settlement*

One of the ways that the Treaty seeks to boost investors' confidence in investing is by widening the dispute settlement mechanism.

Previously, investors would have no option but to go through an external body to resolve investment disputes. This body can be the local court in the host country, any regional arbitration centre within ASEAN, conciliation or arbitration by the International Centre for Settlement of Investment Disputes ("ICSID") (where both Singapore and Indonesia are parties to), or an ad-hoc tribunal under the arbitration rules of the United National Commission on International Trade Law.

Apart from the above, now investors have the option to resolve disputes through arbitration under the ICSID Additional Facility Rules or any other arbitral institution or any other arbitration rules if the disputing parties so agree. The Treaty also cements the option for investors to recourse through mediation. Also, the Treaty includes provisions on the submission of a claim, composition of the arbitral tribunal, governing law, place of arbitration, and awards, which were not previously regulated.

### 4. *Certain restrictions*

Another way that the Treaty seeks to boost investors' confidence is by allowing investors to freely transfer their investments in and out of the host country.

Certain transfers are, however, prohibited. These include transfers that are prohibited under domestic laws relating to:

- (i) bankruptcy and insolvency;
- (ii) securities, futures, options, or derivatives;
- (iii) criminal or penal offences;
- (iv) financial reporting;
- (v) social security and severance; and
- (vi) registration and other formalities imposed by the central bank or other relevant authorities in Indonesia and Singapore.

Moreover, the Treaty also allows a country to adopt or maintain restriction on payment, transfer, or capital movement concerning an investment if such country is experiencing severe balance of

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payment or financial difficulties. This restriction is tailored for situations where the host country has an exceptionally low foreign currency reserve, which makes it difficult to convert and transfer funds related to investments.

## Key Takeaways

In the grand scheme of things, the Treaty is another way in which the Indonesian government seeks to increase investment in Indonesia. Since 2014, Singapore has consistently been one of the top investors in Indonesia, and it is likely that the government's move in ensuring that Singaporean investors receive adequate protection for their investments would be followed by growth in investment. Concurrently, the Treaty also gives confidence for Indonesian investors in widening their reach beyond Indonesia and will lead to greater trade and investment flows between the two countries.

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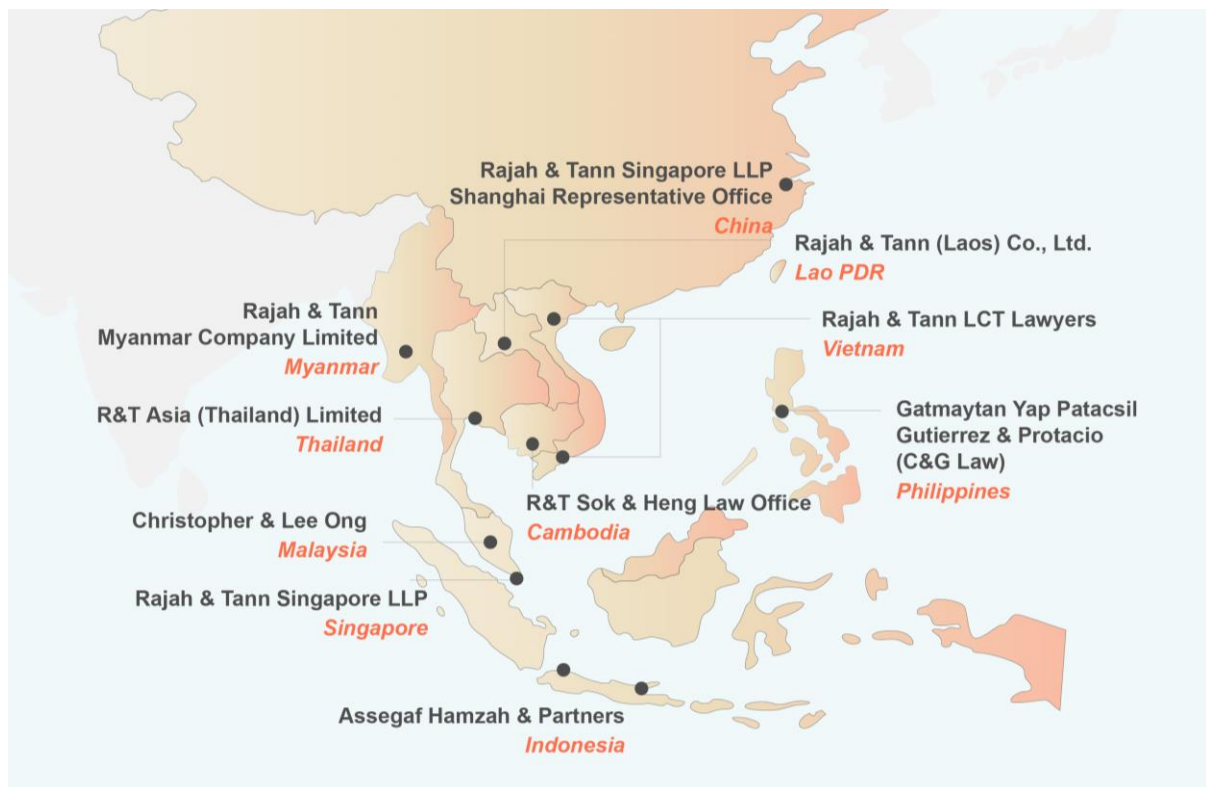
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