

DISPUTE RESOLUTION

## Indonesia and Switzerland Seeks to Accelerate Investments under New Bilateral Investment Treaty



A new bilateral investment treaty between Indonesia and Switzerland, namely the Indonesia-Swiss Agreement on the Promotion and Reciprocal Protection of Investments (“**2022 BIT**”), came into force in August 2024. The 2022 BIT is part of the two states’ joint effort to strengthen investment ties and open up new opportunities for businesses in both countries.

Following seven rounds of negotiations, the 2022 BIT was ratified in Indonesia through President Regulation No. 2 of 2024 and officially replaced the previous 1974 bilateral investment treaty (“**1974 BIT**”).

This updated treaty reflects the growing economic relationship between the two countries. Indonesia has been a key economic partner for Switzerland for over 15 years, highlighting the need for a modern framework to govern investments. The 2022 BIT provides greater certainty and clarity for Swiss and Indonesian investors, covering a wider range of investments and offering stronger protections.

## Comparison between 2022 BIT and 1974 BIT

For a clear overview of how the investment landscape has evolved, we have summarised the key changes between the 1974 and 2022 BITs in the following table:

Subject	1974 BIT	2022 BIT
Scope	Applied to investments made in line with local laws. Did not exclude government contracts.	Applies to investments made in line with local laws. <b>Excludes government procurement.</b>
Taxes	No specific rules on taxes.	<b>Introduces new rules on how taxes apply to investments.</b>
Fair and Equitable Treatment (“FET”)	No specific conditions that can be deemed as violations of the FET principle.	Provides more detailed protections for investors, including conditions that can be deemed as violations of the FET principle (e.g., fundamental breach of due process, targeted discrimination).
Similar treatment to local investors (referred to as “National Treatment & Most Favoured Nation Treatment”)	General principle of treating foreign investors similarly to local ones.	<b>Provides more detailed rules on treating foreign investors similarly to local ones, with some exceptions.</b>
Taking of investments by government (expropriation)	Allowed only for public purposes with fair compensation.	Maintains similar rules but provides <b>clearer guidelines on calculating compensation</b> , including fair market value and interest.
Effectivity of existing provisions that are more favourable than the BIT	Allowed for provisions in other agreements that are more favourable to investors.	<b>Does not include this provision.</b>
Dispute settlement	Disputes to be resolved through diplomatic negotiations between both governments. If unsuccessful, disputes to be settled by arbitration.	<b>Introduces a comprehensive framework for resolving disputes</b> , including consultation, mediation and detailed rules for arbitration.
Losses due to war or civil unrest	No specific provisions.	Includes rules on compensation for losses caused by war or similar events.
Moving investments freely	No specific provisions.	Guarantees the right to freely transfer investments and returns.
Temporary restrictions	No specific provisions.	Allows temporary restrictions on investment transfers in exceptional circumstances (e.g., to protect the economy).
Investor-state disputes	No specific provisions.	Allows investors to directly sue the host government for treaty breaches.
Government's right to regulate	No specific provisions.	Explicitly protects the government's right to regulate in the public interest.
Corporate social responsibility (“CSR”)	No specific provisions.	Encourages responsible business conduct.
Anti-corruption	No specific provisions.	Includes measures to prevent and combat corruption.

## Key Differences between the 1974 BIT and the 2022 BIT

The 2022 BIT offers several important advances compared to the 1974 BIT, providing greater certainty and protection for investors. Here are some of the most significant changes:

- **Clearer Rules to Prevent Dispute:** The 2022 BIT includes more specific definitions and conditions related to fair treatment and expropriation, thereby reducing ambiguity and the potential for disagreements.

For instance, Article 4 of the 2022 BIT clearly outlines what constitutes a violation of the fair and equitable treatment, a common point of contention in an investor-state dispute. Similarly, Article 7 provides more detailed conditions for expropriation. This increased clarity helps investors better understand their rights and obligations, reducing the risk of disputes and fostering a more predictable investment environment.

- **Emphasis on Friendly Dispute Resolution:** The 2022 BIT encourages parties to resolve disputes amicably before resorting to arbitration.

Based on Article 19 of the 2022 BIT, disputing parties must engage in consultations for at least 12 months before initiating arbitration proceedings. Any claims made in arbitration must be included in the original request for consultation. This means that if new grounds for a claim arise during the 12-month consultation period, the parties would need to go through the consultation process again for the new claim.

- **Protecting the Right to Regulate:** A key contention that often arises in an investor-state dispute concerns the balance between commerce (or the investors' interests) and the state's public policy objectives. The 2022 BIT takes this into account and explicitly recognises the right of both Indonesia and Switzerland to regulate within their territories to achieve legitimate policy objectives.

This means that government actions taken in the public interest, even if they negatively impact an investment, are less likely to be considered a breach of the treaty. This provision provides greater regulatory flexibility for both countries and helps balance investor protections with the states' right to pursue public policy goals.

- **Promoting Responsible Business Conduct:** The 2022 BIT encourages investors to adhere to internationally recognised standards, guidelines, and principles of CSR. While the 2022 BIT does not impose specific CSR obligations, it signals the growing importance of responsible business practices.
- **FET Provisions:** The 2022 BIT regulates more detailed protection for investors in a FET, as well as full protection and security.

A breach of obligations to the FET is deemed to occur if, for example, there is a fundamental breach of due process, abusive treatment (e.g. coercion, duress, or harassment), or targeted discrimination on manifestly wrongful grounds occurred. Additionally, a party's failure to uphold a specific written commitment that creates a legitimate expectation, which the investor relied on, may be deemed as a breach.

- **Free Transfers:** The 2022 BIT provides provisions on the free movement of investment-related funds, in contrast to the 1974 BIT.

The 2022 BIT guarantees that investors can freely and immediately transfer funds related to their investments, such as dividends and proceeds from the total or partial sale or liquidation of any investments, across borders in a freely convertible currency at the market exchange rate. Transfers must be completed within two months since the day the request for transfer is submitted.

To balance this allowance, the 2022 BIT allows the host country to apply laws governing, among others, bankruptcy, securities, employee severance, and compliance with judicial or administrative orders, provided that the application is done fairly.

- Further, the 2022 BIT regulates that the state's obligations to the International Monetary Fund supersede its provisions.

## Key Takeaways

The 2022 BIT represents a significant upgrade to the investment relationship between Indonesia and Switzerland. By providing clearer rules, promoting amicable dispute resolution, and addressing contemporary investment issues, the treaty fosters a more stable and predictable investment environment. Both countries are set to benefit from this modernised framework, which will strengthen economic ties and increase investment opportunities.

In light of the 2022 BIT, clients with existing or planned investments in Indonesia or Switzerland must carefully review the provisions of the 2022 BIT to understand its implications for their operations. Companies should also assess their current investment strategies in light of the 2022 BIT and consider whether any adjustments are necessary to take advantage of the enhanced protections and opportunities it offers.

## Contacts

### DISPUTE RESOLUTION



Eri Hertiawan

**PARTNER**

**D** +62 21 2555 7883  
[eri.hertiawan@ahp.id](mailto:eri.hertiawan@ahp.id)

### GENERAL CORPORATE / M&A



Eko Ahmad Ismail Basyuni

**PARTNER**

**D** +62 21 2555 7802  
[eko.basyuni@ahp.id](mailto:eko.basyuni@ahp.id)



Angelica Ayu Maharani

**PARTNER**

**D** +62 21 2555 7815  
[angelica.maharani@ahp.id](mailto:angelica.maharani@ahp.id)

[Haris Joshua Terroe](#), [Nadya Theresia](#), [Alexander Samuel Paruhum](#) and [Marcelline Allegra](#) also contributed to this alert.

Please feel free to also contact Knowledge Management at [RTApublications@rajahtann.com](mailto:RTApublications@rajahtann.com).

## Regional Contacts

### Cambodia

Rajah & Tann Sok & Heng Law Office

T +855 23 963 112 / 113  
kh.rajahtannasia.com

### China

Rajah & Tann Singapore LLP  
Shanghai & Shenzhen Representative Offices

T +86 21 6120 8818  
F +86 21 6120 8820  
cn.rajahtannasia.com

### Indonesia

Assegaf Hamzah & Partners

#### Jakarta Office

T +62 21 2555 7800  
F +62 21 2555 7899

#### Surabaya Office

T +62 31 5116 4560  
F +62 31 5116 4560  
www.ahp.co.id

### Lao PDR

Rajah & Tann (Laos) Co., Ltd.

T +856 21 454 239  
F +856 21 285 261  
la.rajahtannasia.com

### Malaysia

Christopher & Lee Ong

T +603 2273 1919  
F +603 2273 8310  
www.christopherleeong.com

### Myanmar

Rajah & Tann Myanmar Company Limited

T +951 9253750  
mm.rajahtannasia.com

### Philippines

Gatmaytan Yap Patacsil Gutierrez & Protacio  
(C&G Law)

T +632 8248 5250  
www.cagatlaw.com

### Singapore

Rajah & Tann Singapore LLP

T +65 6535 3600  
sg.rajahtannasia.com

### Thailand

Rajah & Tann (Thailand) Limited

T +66 2656 1991  
F +66 2656 0833  
th.rajahtannasia.com

### Vietnam

Rajah & Tann LCT Lawyers

#### Ho Chi Minh City Office

T +84 28 3821 2382  
F +84 28 3520 8206

#### Hanoi Office

T +84 24 3267 6127  
F +84 24 3267 6128  
vn.rajahtannasia.com

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