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Modernising Foreign Investment Protection in Malaysia: International Investment Agreements

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Khazanah Research Institute

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Summary

- An International Investment Agreement (IIA) is an agreement signed between two (or more) countries, setting the minimum standard of treatment that the Host State should provide to foreign investors. When negotiating recent international trade agreements, Malaysian policymakers have been adjusting to a new generation of IIAs to consider the new trend of IIA reforms, especially in view of Investor-State Dispute Settlement (ISDS) cases. The ISDS mechanism allows for a foreign investor to bring a State to international arbitration for breaches of IIA commitments.
- IIA reform is important to ensure that Malaysia's older IIAs are modernised to reflect current policy thinking. Modernising IIAs should occur soon as Malaysia's recent experience negotiating international trade agreements has afforded sufficient policy direction, resources and know-how to modernise the old stock of IIAs signed by Malaysia. Moreover, the ongoing Covid-19 pandemic has made many countries realise the importance of regulatory space to respond to crises effectively.
- **Role of IIAs and their history.** IIAs contribute to predictability, stability and transparency in the investment environment. IIAs were introduced during the era of de-colonisation, when foreign investors were weary of uncompensated expropriations. IIAs were proliferated in the late 1980s due in part to the economic boom in Asian economies and the shift toward fund sourcing from private foreign investors rather than private lending or public financing.
- **Challenges in modernising IIAs.** The United Nations Conference on Trade and Development's (UNCTAD) IIA Reform Accelerator suggests three different approaches for IIA reform: (a) joint interpretation of current treaty provisions, (b) amend existing treaty provisions, and (c) substitute an old treaty provision with a new one. Malaysia should assess the extent of modernisation required for each IIA in order to determine which of the three approaches best fits the need. This assessment could also be done in tandem with larger reforms on the treatment of foreign investors in Malaysia. Termination of treaties is an alternative to IIA reform but the presence of 'sunset clauses' make termination difficult.
- **Investment facilitation, investment aftercare and conflict management mechanism**. These initiatives are aimed at improving the existing investment environment. Investment facilitation aims to reduce the inefficiencies that arise from unnecessary regulation, bureaucratic overlap and outdated procedures. Investment aftercare relates to a range of activities from post-establishment facilitation, to encouraging follow-on investments, and to achieving greater local economic impact. A conflict management mechanism aims to address problems faced by foreign investors at an early stage before said issues have escalated to grievances, or even investment withdrawal.

1. Introduction

In recent years, Malaysia has participated in the negotiation of mega-regional trade agreements, such as the Regional Comprehensive Economic Partnership Agreement (RCEP). One element of RCEP is the provision of investment protection to foreign investors in Malaysia. This is done through a policy tool known as an International Investment Agreement (IIA). An IIA is an international agreement signed between two (or more) countries, setting the minimum standard of treatment that the Host State should provide to foreign investors. When negotiating recent trade agreements, Malaysian policymakers have been adjusting to a new generation of IIAs to capture the ongoing international discussion on IIA reforms, including learnings from past Investor-State Dispute Settlement (ISDS) cases.

The ISDS mechanism is a hotly debated issue among Malaysian policy experts, particularly in relation to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[1]. The ISDS mechanism allows for a foreign investor to bring a State to international arbitration for breaches of commitment in IIAs. This mechanism can be costly to governments, with the average ISDS proceeding and tribunal fees estimated at approximately USD5m (RM21m)[2] and the average claim size by foreign investors at approximately USD300m (RM1.3b)[3]. Thus, it is important to strike a balance in using IIAs as a policy tool to promote predictability, stability, and transparency in the investment environment, and the potential costs to the government.

In general, IIAs are only one policy tool, that fits into a framework of bigger policy issues. IIAs are part of wider policy discussions such as what is Malaysia's industrial policy? How does Malaysia's investment policy interact with its trade policy? How should Malaysia treat foreign investors? Therefore, although this paper focuses on IIAs as a policy tool, we recognise that in practice, IIAs interact with many different policies that should be addressed in their own right. As these agreements are international agreements, geopolitics and foreign policy also influence the creation and use of IIAs.

International organisations, such as the United Nations Conference on Trade and Development (UNCTAD), have been encouraging countries to modernise their IIAs, due to the weaknesses in older IIAs. For example, virtually all ISDS cases (99%) have been filed pursuant to IIAs concluded before 2012[4]. This is possibly due to broad provisions that tilt the balance in favour of foreign investors. Thus, the new generation IIAs are generally seen to strike a better balance between providing rights to foreign investors and ensuring that the government retains sufficient policy space and the right to regulate. This means, for example, that the government has greater

[1] Sundaram JK (2020)

[2] Hodgson (2015)

[3] Behn (2019) as quoted in Columbia Center on Sustainable Investment (2019)

[4] UNCTAD (2020c)

flexibility to design health and industrial policy, while seeking to promote a good investment environment for foreign investors.

IIA reform is important to ensure that Malaysia's older IIAs are modernised to reflect current policy thinking. Malaysia's recent experience negotiating the RCEP and the CPTPP has afforded sufficient policy direction, resources and know-how to modernise the old stock of IIAs signed by Malaysia. With this knowledge, striking the right balance should be easier to achieve now, as compared to twenty years ago. Moreover, in light of the ongoing Covid-19 pandemic, it has become more apparent than ever that countries need regulatory space to respond to crises effectively.

This paper explores the need to modernise Malaysia's current stock of older IIAs and how some governments have sought to improve the general investment environment for foreign investors. Focusing on IIAs, this paper looks at foreign investment rather than domestic investment – although we recognise that both areas are important to the country's development. First, this paper touches on the role of IIAs before providing some historical context to Malaysia's earlier IIAs. Second, we discuss the challenges faced in treaty reform. Finally, we explore alternative forms of reform to improve the general investment environment in Malaysia.

2. Exploring the role of IIAs[5]

The role of IIAs is to contribute to predictability, stability, and transparency in the investment environment. Thus, IIAs are only one of the factors that could influence investors' decisions on where to locate their investments. Other factors include the country's policy framework, economic determinants, and business facilitation, as shown in Figure 1[6]. Attracting foreign direct investment (FDI) is neither the main nor the only role of IIAs[7]. Nevertheless, the relationship between IIAs and FDI is seen to be important to policymakers, academia, and the general public. Thus, the role of IIAs in attracting FDI has been used as justification for countries to sign IIAs.

A review of the literature on the relationship between IIAs and FDI shows mixed results[8]. As the results are mixed, for public policy purposes, IIAs should not be used as a key policy tool solely to promote FDI. Although most studies *do not prove a causal link*, i.e. that IIAs cause an increase in FDI, these studies generally show a positive (if weak) correlation between IIAs and FDI. However, there are also studies that have found little or no effect of IIAs on FDI[9]. Studies on the relationship between IIAs and FDI tend to focus on Bilateral Investment Treaties (BIT), a subset category of

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[5] For more in-depth discussion on IIAs as a policy tool for Malaysia, please refer to Ayub, Aidonna Jan. 2018. "International Investment Agreements: Challenges and Opportunities for Malaysia." In *Malaysia's Trade Governance at a Crossroads*, edited by Pierre Sauvé. Kuala Lumpur: Khazanah Research Institute. http://www.krinstitute.org/assets/contentMS/img/template/editor/5%20Investment.pdf
[6] UNCTAD (2014)
[7] UNCTAD (2014)
[8] UNCTAD (2014)
[9] Aisbett et al. (2018), Bonnitcha (2017), Brada et al. (2020), Rose-Ackerman and Tobin (2011) and Yackee (2007)

IIAs that are stand-alone agreements that focus mainly on investment protection rather than investment liberalisation obligations.

Figure 1: Host Country Determinants of FDI

Policy Framework for FDI
• Economic, political and social stability • Good governance • Policies on functioning and structure of markets • Protection of property rights (including intellectual property) • Industrial and regional policies • Trade policy (tariffs and non-tariffs barriers) and stable exchange rates • **International Investment Agreements**
Economic Determinants
• Market-seeking investments • Natural resource-seeking investment • Efficiency seeking investment • Strategic asset or capability seeking investment
Business Facilitation
• Investment promotion • Investment incentives • Reduction of hassle costs • Availability of one-stop shop services • Provision of social amenities • Provision of after-investment services

Source: Adapted from UNCTAD (1998) and UNCTAD (2010), cited in UNCTAD (2014)

Studies do tend to show that BITs and other IIAs provide a measure of stability for foreign investors through factors such as risk reduction and the general ability to contribute to a better investment environment[10]. However, Rose-Ackerman and Tobin (2005) argue that BITs do not function as a signal for improved investment climate, except in cases where the investment climate is already stable prior to signing the BITs[11]. Interestingly, another study found that BITs stimulate bilateral FDI flows from partner countries so long as the developing Host State has not yet had a claim filed against them for arbitration[12]. Studies also show that the impact of IIAs is also conditional on, or mediated by, other key factors that influence FDI such as "the sector and industry in which the FDI takes place, the country of origin of investors, the governance and institutions pertaining to host countries, and the life-cycle of an IIA (e.g. the size of [the] impact is highest immediately after [an IIA's] entry into force and then tails off)"[13]. Moreover, a recent study found that the size of domestic market, trade openness, and rate of growth of national

[10] UNCTAD (2014)
[11] Rose-Ackerman and Tobin (2005)
[12] Aisbett et al. (2018)
[13] UNCTAD (2014)

income have a positive and statistically significant correlation with FDI inflows in conjunction with the number of international trade agreements[14].

3. Malaysia's earliest IIAs and where we are now

IIAs were not always positively viewed by developing countries. According to Vandevelde (2009), following the end of World War II (WWII), many countries were undergoing de-colonisation and were underdeveloped economically. FDI was viewed with scepticism because it was seen as a form of neo-colonialism and FDI could potentially allow foreign actors to intervene with domestic affairs. Some newly independent countries closed their economies and began to expropriate existing foreign investments and adopted import substitution policies. In the early 1970s, some developing and socialist countries were pushing, at the United Nations General Assembly, for the right to expropriate foreign investment without fair market compensation of the expropriated assets. Although the final declaration recognised expropriation with compensation, developed countries responded to this threat of expropriation by creating bilateral IIAs with developing countries[15].

Vandevelde (2009) goes on to explain that in 1959, Germany was the first developed country to enter a BIT with Pakistan and the Dominican Republic respectively. As Germany had already experienced the loss of its foreign investments as a result of its defeat in WWII, it was particularly sensitive to possible risks to its foreign investments. Later, many western countries followed suit by signing BITs[16]. One of Malaysia's oldest BITs is an agreement signed between Malaysia and Germany in 1960. As explained by Vandevelde, there was a proliferation of BITs in the late 1980s due to two main events: (a) the victory of market ideology (partly due to the fall of the Soviet Union), and (b) the lack of alternatives to foreign investment (partly due to the 1980s debt crisis). He then goes on to explain that eight Asian economies, including Malaysia, experienced exponential economic growth, attracting high rates of private foreign investment partly due to export-focused economic policies. The debt crisis, however, was one of the factors that forced developing countries to seek funding for development from non-traditional sources, such as private foreign investors, instead of private lending or public financing through multilateral development banks. Therefore, developing countries rushed to attract private foreign investors[17]. BITs were thus used as a mechanism to signal a desire to attract foreign investment. This trend of proliferation continued, and Malaysia signed more than 30 IIAs in the 1990s alone.

As explained above, the context in which IIAs were negotiated and signed, particularly in the 1960s, is quite different from the current standing of Malaysia now. Malaysia currently has a relatively well functioning and stable investment environment. As shown in Figure 2, Malaysia has more than 70 IIAs, whereby most IIAs are BITs. Investment liberalisation elements are mainly found in trade agreements such as the RCEP. Malaysia has overlapping agreements with the same countries due to several reasons. One reason is the interest to sign agreements directly with a country, before signing a regional agreement that includes the same country, as is the case with

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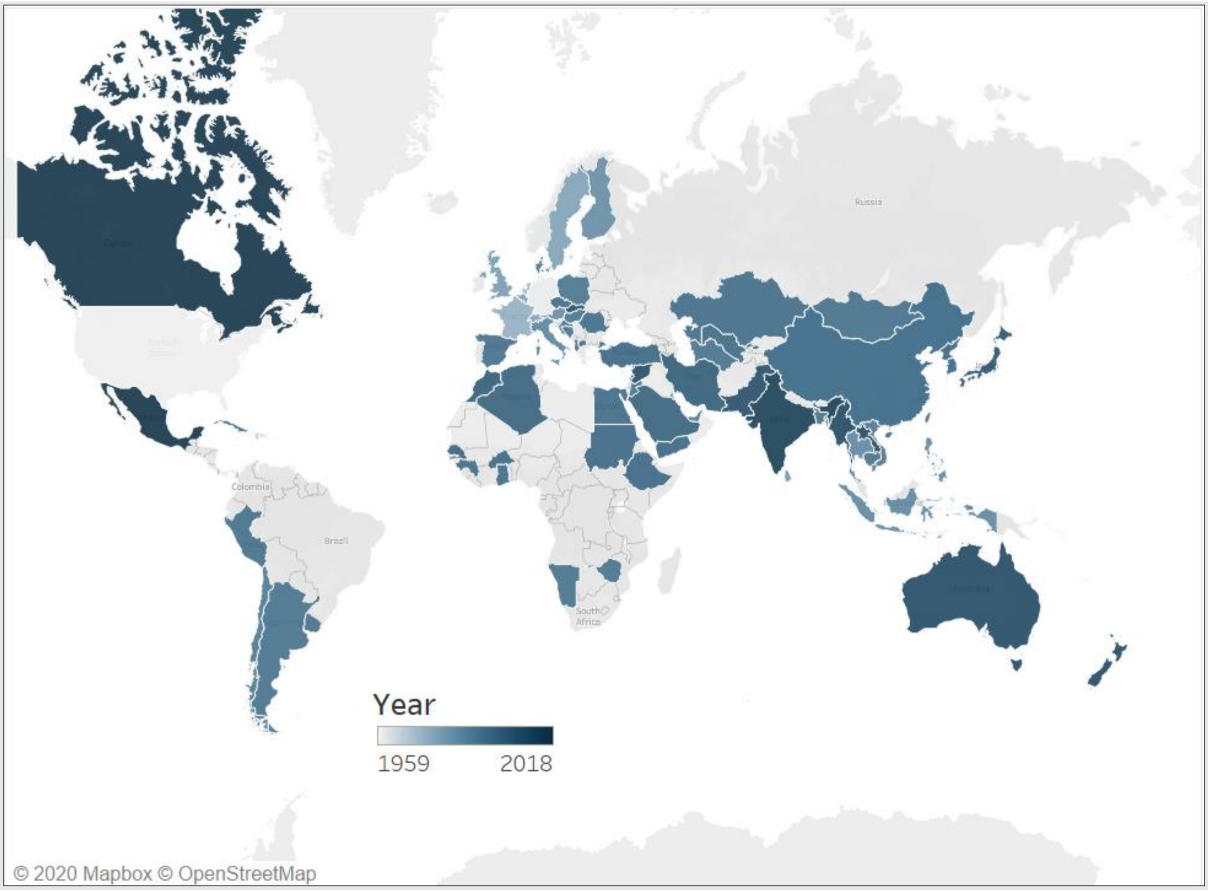
[14] Zahid et al. (2020)
[15] Vandevelde (2009)
[16] Vandevelde (2009)
[17] Vandevelde (2009)

New Zealand. Overlapping agreements create an opportunity for an investor to choose which agreement provides the best rights, particularly if there is interest to bring a claim against the Malaysian government through the ISDS mechanism.

Figure 2: Map of Malaysia's IIAs



Note: Publicly available list of IIAs as of December 2020.
Source: Author, based on MITI (2020) and UNCTAD (2020a)

Concerns on the possible impact of the ISDS mechanism on Malaysia should be balanced against the likelihood of foreign investors bringing ISDS claims against Malaysia. Further, although IIAs do provide legal protections for foreign investors, analysing the legal framework should also take into account existing domestic laws and the effectiveness of the domestic judiciary system. In terms of Malaysia's experience with ISDS cases, Malaysian investors have brought ISDS cases against several governments such as Chile, India, China and Ghana. The Malaysian government has also faced at least three ISDS cases against foreign investors. Thus, Malaysia has experienced both the benefits and challenges of the ISDS mechanism, as shown in the Table 1 below.

Table 1: Illustrative List of ISDS Cases

Year of Initiation	Case Name	Applicable IIA	Summary of Case	Outcome of Original Proceedings
Malaysia as a Respondent				
1994	Gruslin v. Malaysia (I)	BLEU[18] - Malaysia BIT (1979)	n/a	Settled
1999	Gruslin v. Malaysia (II)	BLEU - Malaysia BIT (1979)	Portfolio investment in securities listed on the Kuala Lumpur Stock Exchange	Decided in favour of Malaysia. Initial amount claimed was USD2.3m (RM8.7m)
2005	MHS v. Malaysia	Malaysia - United Kingdom BIT (1981)	Rights under a contract with Malaysia to locate and salvage the cargo of a British vessel that sank in 1817	Decided in favour of Malaysia. Initial amount claimed was USD3m (RM11.4m)
Malaysian Investor as a Claimant				
2001	MTD v. Chile	Chile – Malaysia BIT (1992)	Shareholding in an investment vehicle corporation for the construction of a residential and commercial complex in Chile	Decided in favour of investor. Initial amount claimed USD20m (RM76m)
2003	Telekom Malaysia v. Ghana	Ghana – Malaysia BIT (1996)	Shareholding and management contract of Ghana's national telecommunication company	Settled
2011	Ekran v. China	China- Malaysia BIT (1988) and/or China – Israel BIT (1995)	Rights under a 70-year lease over 900 hectares of land in the China (Hainan province)	Settled
2018	KLS Energy v. Sri Lanka	Malaysia – Sri Lanka BIT (1982)	Investments in a renewable energy project	Pending

Source: Reproduced from UNCTAD (2020d)

IIAs signed more than 20 years ago do not reflect the current challenges faced by governments. Occasionally, these legally binding treaties prevent Host States from performing their duties to their fullest capacities. “While IIAs should provide legal stability and predictability to foreign investors, this should not restrain regulatory powers to pursue legitimate public interest measures”[19]. Therefore, reforms of the existing stock of older, existing IIAs will allow States to better respond to modern obstacles with regards to public health, economic stability and environmental concerns. For example, broad and unqualified fair and equitable treatment (FET)

[18] Belgium-Luxembourg Economic Union
[19] UNCTAD (2020c)

provisions in older IIAs could limit the government's ability to respond to Covid-19 quickly. Therefore, with broad FET provisions, imposing export restrictions may not meet the reasonableness and proportionality test of the FET provision[20]. Treaty reform will reduce the possibility of a long and expensive ISDS case while preserving the positive impact of IIAs on the investment climate. Countries may pursue a range of reform paths from completely foreclosing an IIA relationship to modernising only a particular provision, according to the needs and priorities of the Host State.

4. Challenges in modernising IIAs

As highlighted above, there is a need to modernise Malaysia's older IIAs. International organisations such as UNCTAD recently launched an 'IIA Reform Accelerator' that provides a guideline for countries looking to amend or replace old treaties. UNCTAD has highlighted eight specific IIA provisions that are most in need of reform, including five of the most frequently used substantive clauses in known treaty-based ISDS cases. As shown in Table 2 below, these areas are definition of investment, definition of investor, national treatment (NT), most-favoured nation (MFN) treatment, FET, full protection and security (FPS), indirect expropriation, and public policy exceptions[21].

Table 2: Overview of IIA Provisions for Reform

Treaty Provisions	Options for IIA Reform
Definition of Investment	• Exclude specific types of assets from the definition of investment • Require investments to fulfil specific characteristics to be covered by the treaty • Include an enterprise-based definition of investment • Include a legality requirement
Definition of Investor	• Exclude certain categories of natural or legal persons from treaty coverage • Include a denial-of-benefits clause
National Treatment (NT)	• Include criteria of determining 'like circumstances' for NT • Subordinate the right of NT to a Host State's domestic laws • Include reservations to NT
Most-Favoured Nation (MFN)	• Include criteria for determining 'like circumstances' for MFN • Circumscribe the scope of the MFN clause • Clarify that substantive obligations in other IIAs do not in themselves constitute 'treatment'
Fair and Equitable Treatment (FET)	• Replace FET with an exhaustive list of State obligations • Clarify the FET standard • Reduce FET to a political commitment or entirely omit the FET clause

[20] UNCTAD (2020e)
[21] UNCTAD (2020c)

Treaty Provisions	Options for IIA Reform
Full Protection and Security (FPS)	• Explicitly link the FPS clause to customary international law and clarify that the FPS standard refers to physical protection
Indirect Expropriation	• Clarify protection in case of indirect expropriation • Explicitly exclude indirect expropriation
Public Policy Expectations	• Include exceptions for domestic regulatory measures in pursuit of circumscribed policy objectives or for prudent measures • Prevent abuse of the exceptions by Host States

Source: Reproduced from UNCTAD (2020c)

Modernising treaties can be done in several ways, subject to all parties' consent. Modernising treaties would require all parties to the treaty to agree to modernise the treaty, before negotiations on how to modernise the treaty can be undertaken. UNCTAD highlights some different approaches, which we discuss briefly below[22]. These are:

- **Joint interpretation of current treaty provisions.** This approach seeks to clarify the intention of specific treaty provisions that are deemed to be problematic. Although this approach may be seen as the easiest approach towards modernising treaties, it is limited to the current formulation of the provision. Thus, where there is a need for bigger changes to the treaty, as is the case for many older IIAs, this approach may not be suitable.

- **Amend existing treaty provisions.** This approach seeks to amend specific treaty provisions that are deemed to be problematic. This could be done via an exchange of letters among the parties to the treaty. This may be an interesting approach for treaties that do not require an overall change in treaty design and philosophy, but in practice, may be restrictive in ensuring full reform.

- **Substitute an old treaty provision with a new one.** This approach is more far-reaching than the earlier two approaches as it seeks to replace 'outdated' treaty provisions with new ones. This approach is basically a renegotiation of the treaty and allows for a holistic approach to reform. Thus, parties to the treaty could undertake a comprehensive revision of treaty provisions in line with a country's current policy objectives. However, this approach may require an effective transition between the old and new treaty provisions, to provide for transparency and predictability to foreign investors who may be using the treaty. In addition, as with all international agreements, geopolitical considerations could impact the negotiation process and final outcome of the agreement.

Beyond modernising treaties, it should be noted that some countries have sought to take a fourth option, which is to terminate treaties that are not deemed to be in line with a country's public policy objectives. For example, Indonesia began terminating its IIAs in 2014, in the midst of it facing a billion-dollar ISDS case from a foreign investor in the mining industry[23]. As part of this

[22] UNCTAD (2020c)
[23] Bland and Donnan (2014)

exercise, Indonesia's IIA with Malaysia was terminated, although Malaysian investors still retained investment protections through Indonesia's commitments under the Association of Southeast Asian Nations (ASEAN) agreements. It is noteworthy that Indonesia has since signed an international trade agreement with Australia, covering investment protection, investment liberalisation and ISDS[24]. Thus, Indonesia has generally sought to terminate old treaties and selectively negotiated new treaties with specific investment partner countries.

Terminating IIAs could be done with or without the consent of the other party to the treaty. A key consideration in terminating treaties as opposed to modernising treaties, is the presence of 'sunset clauses' in IIAs. A sunset clause allows investment protections to remain in place for a number of years even after an agreement has been terminated. In the case of Malaysia, it currently has approximately 40 IIAs with a sunset clause ranging from 5 to 20 years after an agreement has been terminated[25]. Thus, given the existence of sunset clauses, there may be a greater incentive to modernise IIAs rather than terminate IIAs. Nevertheless, there are countries who have agreed to waive the application of the sunset clause – thus the termination of the treaty is done with the consent of all parties to the treaty. However, one of the largest exercises to terminate IIAs together with the possible effects of sunset clauses was done due to policy considerations not directly related to the treatment of foreign investors. This exercise to terminate IIAs was done this year among European Union (EU) Member States after the European Court of Justice found that IIAs between EU Member States were incompatible with EU law[26].

Therefore, as explained above, there is a need to modernise IIAs, particularly in relation to the eight specific provisions, as highlighted by UNCTAD. There are three possible ways to approach the modernisation of treaties, depending on the extent of modernisation that is needed in the treaty. Malaysia should assess the extent of modernisation required for each IIA in order to determine which of the three approaches best fits the need. This assessment could also be done in tandem with larger reforms on the treatment of foreign investors in Malaysia. Although there are countries that have explored the termination of IIAs, it should be noted that consensual termination is important as, without consent, investment protection could survive for up to 20 years after termination, and thus be a deterrent to countries' interest to terminate. Beyond the modernisation of IIAs, some countries are also exploring alternative ways to improve the general investment environment for foreign investors, as discussed in the next section.

5. Investment facilitation, investment aftercare and conflict management mechanism

On top of managing the IIA regime, some countries, including Malaysia, also look at ways to improve the general investment environment in the country. It is important to note that modernising IIAs should happen in parallel to exploring ways to improve the general investment environment. At best, efforts to improve the investment environment benefit both foreign and domestic investments. In addition, retaining investments are also as important as attracting new

[24] Department of Foreign Affairs and Tarde (2020)
[25] UNCTAD (2020b)
[26] Bray and Kapoor (2020) and Official Journal of the European Union (2020)

investments, thus encouraging a dynamic and ongoing target to improve the regulatory environment.

In line with the theme of studying the IIA regime, we look at initiatives aimed at improving the investment environment, particularly for foreign investments. These are investment aftercare activities and a conflict management mechanism. We also look at investment facilitation that could potentially cover elements of both investment aftercare and conflict management mechanism. Investment aftercare is seen to be a more established form of addressing foreign investor-related issues while a conflict management mechanism is a relatively new concept that is still in the implementation phase. One of the key bodies that looks at investment promotion activities in Malaysia is the Malaysian Investment Development Authority (MIDA). MIDA has authority to provide some aftercare services, but not to the extent that is practiced in countries such as South Korea.

5.1. Investment facilitation

Investment facilitation relates to the "setting up of a more transparent, efficient and investment-friendly business climate by making it easier for domestic and foreign investors to invest, conduct their day-to-day business and expand their existing investments."[27] Investment facilitation aims to reduce the inefficiencies that arise from unnecessary regulation, bureaucratic overlap and outdated procedures. Formal negotiations at the World Trade Organization (WTO) on a Multilateral Framework on Investment Facilitation (MFIF) started in 2020, with 105 participating WTO members, including Malaysia[28].

MFIF's scope includes discussions on:

- Streamlining and speeding up administrative procedures
- Different mechanisms such as contact points and an ombudsperson, as well as arrangements to enhance domestic coordination and cross-border cooperation
- Facilitationof the movement of business persons for investment purposes
- Responsible business conduct

Interesting discussions during the November 2020 negotiations meeting include investor assistance mechanisms (aftercare services) and 'matchmaking' mechanisms between foreign investors and local firms which provide domestic supplier databases[29].

Although still under negotiation, investment facilitation has much promise and could potentially resolve some concerns regarding how best to support foreign and domestic investment. Investment facilitation could, for example, increase good governance while allowing countries to move away from the ISDS mechanism as a policy tool. However, negotiating investment facilitation may be complicated by the need to find coherence and complementarity with other

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[27] WTO (2020a)
[28] WTO (2020a) and MITI (2017)
[29] WTO (2020b)

existing IIAs and WTO agreements[30]. There is also a need to address developing countries' interest and priorities in terms of sustainable development[31].

5.2. Investment aftercare

Investment aftercare could mean different things to different investment promotion agencies. In general, investment aftercare is seen to be a core function in investment promotion that relates to a range of activities from post-establishment facilitation, to encouraging follow-on investments, and to achieving greater local economic impact[32]. Figure 3 below illustrates the different types of services. In short, investment aftercare facilitates the discussion between what foreign investors need and what the Host economy needs from foreign investors. Due to the wide range of activities, investment aftercare activities differ among countries.

Figure 3: Illustration of the Aftercare Service Space by Type of Service and Timeframe

The aftercare service space			
Strategic	Establish firm so that it operates successfully and performs its mandate	Competition legislation, product development, R&D capabilities	Services that support firms in becoming strategic leaders, centres of excellence
Operational	Find office space, factory, recruit staff, help install ICT equipment, power, etc.	Staff training, new premises, improved connectivity, local supply chains	Local R&D, university collaboration, strong relationships with unions
Administrative	Obtain visas, import permits, work permits for spouses, operate in free trade zone	International school, obtain food, drugs and administration approvals	Agreement with tax authorities, collaborate with public sector on planning and transport
	Short term	**Medium term**	**Long term**
	Time		

Source: Reproduced from UNCTAD (2007)

South Korea is seen to have one of the most sophisticated investment aftercare services, called the Office of the Foreign Investment Ombudsman (OFIO), which was established in 1999 under the Foreign Investment Promotion Act[33]. The Foreign Investment Ombudsman is commissioned by the President and heads the grievance settlement body[34]. Thus, a strong mandate is an important component of the South Korean model. The most important objective of OFIO is to settle grievances faced by foreign investors operating in South Korea, through its aftercare services[35]. OFIO analyses information concerning the issues foreign firms experience, requests

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[30] Bernasconi-Osterwalder et al. (2020)
[31] Bernasconi-Osterwalder et al. (2020)
[32] UNCTAD (2007)
[33] World Bank (2019) and OFIO (2018b)
[34] OFIO (2018b)
[35] World Bank (2019)

cooperation from relevant administrative government agencies, recommends implementation to such agencies, proposes new policies regarding foreign investment, and resolves foreign-invested companies' grievances[36]. OFIO resolutions are divided into three categories:

- Legislative improvement (regulatory reform and/or change in laws)
- Administrative intervention (improvements within the existing legal framework)
- 'Home Doctor' Resolution (internally-sourced resolutions by Home Doctors)

The 'Home Doctor' system is a system whereby a specialist in a given specialisation/sector is assigned to each foreign-invested company to give one-on-one consultations, resolving a wide range of grievances before they worsen; 'Home Doctors' often visit the company and/or site to identify and offer consultations through the process of resolving a grievance[37].

5.3. Conflict management mechanism

A conflict management mechanism, as promoted by the World Bank, is a mechanism that aims to address problems faced by foreign investors at an "early stage before they have escalated to grievances and placing the FDI at risk of withdrawal or expansion cancellation"[38]. This mechanism seeks to go beyond the scope of investment aftercare, as investment promotion agencies in many countries may face systemic issues such as (a) not being informed of grievances investors have with other government agencies; or (b) not having sufficient mandate to address the conduct of other government agencies that may be putting FDI at risk[39]. It is important to note that one of the risk factors that this mechanism seeks to manage is the potential for a government to be brought to international arbitration through the ISDS mechanism. As explained above, modernising IIAs also aim to manage this risk to the government.

The aims of the World Bank's Systematic Investment Response Mechanism (SIRM) are:

- Identifying specific FDI projects that are at risk
- Measuring the impact of mitigating strategies
- Tracking grievances over time
- Identifying systemic issues and proposing suitable solutions

As explained by World Bank (2019), SIRM requires the establishment of an intergovernmental mechanism that addresses identified grievances; the lead government agency will alert the appropriate higher-level government body of a specific issue affecting the investment environment so that it can be resolved before the issue is exacerbated. SIRM pilot programmes were launched in eight countries but only seven completed the pilot programme. These seven

[36] OFIO (2018b)
[37] World Bank (2019) and OFIO (2018a)
[38] World Bank (2019)
[39] World Bank (2019)

countries, which are still in the implementation phase are Georgia, Mongolia, Colombia, Ethiopia, Rwanda, Vietnam and Iraq. A key benefit of SIRM is seen to be the ability to prevent the escalation of investors' grievances by identifying and resolving them at an early stage. However, a key cost of SIRM is the implementation of the system (establishing the intergovernmental mechanism) while recognising that there must be significant customizations to each country for the implementation to be as smooth as possible.

6. Concluding Thoughts

IIAs are an important policy tool used to provide foreign investors investment protection in Malaysia. Similarly, it is a tool sometimes used by Malaysian investors abroad. However, with these rights comes the ability for foreign investors to sue the Malaysian government through the ISDS mechanism, which can be costly to Malaysia. As explained above, the context in which IIAs were negotiated and signed, particularly in the 1960s, is quite different from the current standing of Malaysia now. Malaysia currently has a relatively well functioning and stable investment environment. Thus, modernising Malaysia's existing stock of older IIAs is a good way to address concerns regarding the impact of the ISDS mechanism, while maintaining the benefits of IIAs on the investment climate. These legally binding treaties should not set back legitimate policymaking that may benefit the general public, especially with regards to public health.

Therefore, treaty reform of older IIAs would allow these agreements to better meet the current needs of both foreign investors and the Malaysian government. Although terminating an IIA is an option that some governments have taken, it would be best done with the consent of all parties. A key challenge in terminating IIAs without consent is the presence of sunset clauses that lengthen the legal obligations of Host States even after termination. In other words, treaty termination may meet the most pressing needs of the Host State but the positive benefits of such termination can take up to 20 years to take effect. Hence, turning to treaty reform might be more practical. This can materialise in forms of joint interpretation of an agreement, amending existing agreements, or substituting an old agreement with a new one.

In addition to modernising IIAs, Malaysia could explore ways to improve the existing investment environment. This paper briefly discusses investment facilitation, particularly the WTO's most recent efforts. This paper also discusses investment aftercare, particularly the South Korean model, which is seen to be one of the most sophisticated investment aftercare models. Although a relatively new concept, it is also important to keep an eye on another mechanism known as a conflict management mechanism to prevent foreign investors' issues from escalating to grievances. This proactive measure may prevent a long and expensive ISDS case as well as supplement treaty reform. Therefore, efforts to improve Malaysia's investment environment could happen in tandem with seeking a better balance of rights towards foreign investors while ensuring Malaysia's best interest is not compromised.

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