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WORLD BANK GROUP

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2019 INVESTMENT POLICY AND REGULATORY REVIEW

Malaysia

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GLOSSARY

ACIA	ASEAN Comprehensive Investment Agreement
ASEAN	Association of Southeast Asian Nations
B2C	Business-to-Consumer
CMA	Communications and Multimedia Act 1998
CPC	Central Product Classification
CSR	Corporate Social Responsibility
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CNII	Critical National Information Infrastructure
DFTZ	Digital Free Trade Zone
DTAA	Double Taxation Avoidance Agreements
DTS	Distributive Trade Sector
EAP	East Asia Pacific area
ECERDC	East Coast Economic Region Development Council
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIC	Foreign Investment Committee
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GKL	Greater Kuala Lumpur
HDC	Halal Industry Development
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IPRR	Investment Policy and Regulatory Review
IRDA	Iskandar Regional Development Authority
ISDS	Investor-State Dispute Settlement
LMW	Licensed Manufacturing Warehouse
MACA	Malaysian Aviation Commission Act
MATRADE	Malaysia External Trade Development Corporation
MAVCOM	Malaysian Aviation Commission

MCA	Malaysian Competition Act
MCMC	Malaysian Communication and Multimedia Commission
MOA	Ministry of Agriculture and Agro-based Industry
MOF	Ministry of Finance
MDEC	Malaysia Digital Economy Corporation
MDTCA	Ministry of Domestic Trade and Consumer Affairs
MIDA	Malaysian Investment Development Authority
MITI	Ministry of International Trade and Industry
MFN	Most-Favored Nation
MIC	Middle-Income Country
MPRC	Malaysia Petroleum Resources Corporation
MyCC	Malaysian Competition Commission
NBP	National Biotechnology Policy
NCI	National Committee for Investment
NCSP	National Cyber Security Policy
NEAC	National Economic Action Council
PDPA	Personal Data Protection Act
OFDI	Outward Foreign Direct Investment
QFLF	Qualified Foreign Law Firm
RCEP	Regional Comprehensive Economic Partnership Agreement
RECODA	Regional Economic Corridor Development Authority
RM	Ringgit (currency)
SEDIA	Sabah Economic Development and Investment Authority
SCM	Agreement on Subsidies and Countervailing Measures
SC	Securities Commission Malaysia
SDS	Step Down Subsidiary
SMEs	Small and Medium Enterprises
SLC	Substantial Lessening of Competition
SST	Sales and Service Taxes
TIP	Treaty with Investment Provisions
TRIMs	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

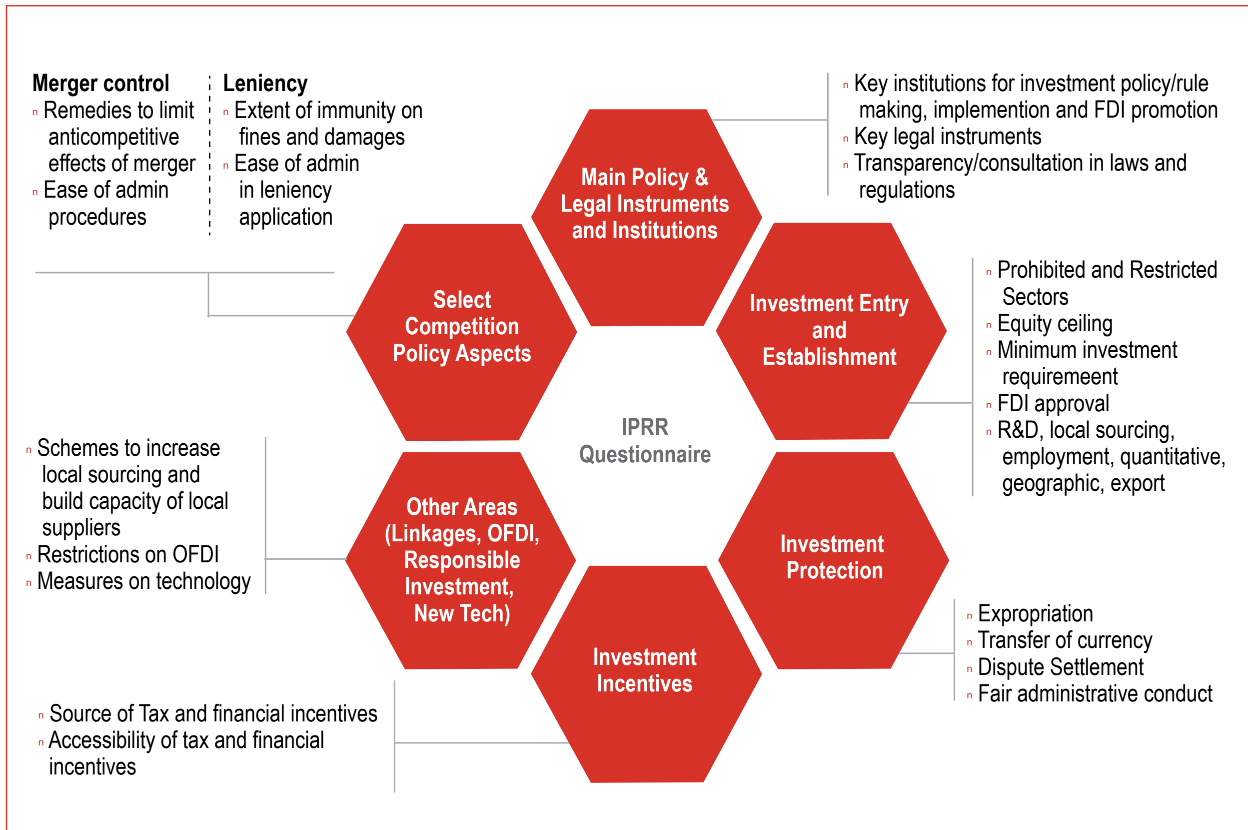
1. INTRODUCTION

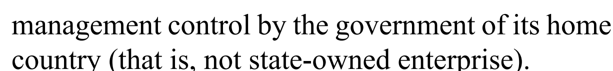
This Investment Policy and Regulatory Review (IPRR) presents information on the legal and regulatory frameworks governing foreign direct investment (FDI) and competition that affect businesses and foreign investors in Malaysia. Since legal and regulatory frameworks are constantly evolving, a cut-off date was set for the research. This country review therefore covers information available as of **May 31, 2019**, unless otherwise indicated in the review. IPRRs are available for the following middle-income countries (MICs): Brazil, China, India, Indonesia, Malaysia, Mexico, Nigeria, Thailand, Turkey, and Vietnam.

The research for preparing this IPRR was undertaken by the international law firm Baker McKenzie, under the supervision of the World Bank Group. The research was primarily based on a review of currently applicable policies, laws and regulations. In some cases, consultations with regulators were conducted to collect up to date information.

The research was guided by a standardized questionnaire, covering a limited set of topics, including foreign investment entry, establishment, protection and select competition related aspects. The questionnaire focused on de jure frameworks as generally applicable to a foreign investor, not located in any specialized or preferential regime (such as special economic zones). It primarily focused on national, economy-wide (rather than sector-specific) laws and regulations. For the purpose of the research, it was assumed that the foreign investor is a private multinational company with no equity interest or

Figure 1. Overview of Topics Covered in IPRR





management control by the government of its home country (that is, not state-owned enterprise).

There are aspects that this IPRR does not cover. It is not a comprehensive review of the entire legal and regulatory framework affecting investment. Information presented is not exhaustive, but illustrative of the main topics and issues covered (for example, it does not exhaustively list all available tax and financial incentives in the country). It does not present recommendations on reform areas. Notably, it does not capture de facto implementation of laws and regulations in the country. Given these limitations, information presented in this IPRR should be interpreted and used while keeping in view the overall country context and realities. Further, it contains information in summary form and is therefore intended for general guidance only. It is not intended to be a substitute for detailed legal research.

This IPRR is organized as follows:

- Section 2 provides an overview of the country's investment policy framework, including the legal instruments regulating foreign investment, key institutions involved in investment promotion, as well as the country's foreign investment promotion strategy; it also delineates the country's international investment legal framework, including the country's commitments under the World Trade Organization (WTO) and select international investment agreements (IIAs);
- Sections 3-6 cover the country's policies and domestic legal framework concerning different dimensions of the lifecycle of an investment: entry and establishment (Section 3), protection (4), incentives (5) and linkages (6);
- Sections 7-9 explore emerging investment policy and regulatory areas—Section 7 considers outward FDI, Section 8 responsible investment, and Section 9 considers recent policies on new technologies;
- Section 10 focuses on city-specific investment policy and regulatory measures in the largest commercial center; and
- Section 11 covers select aspects of competition law and policy, specifically merger control and leniency frameworks.

2. OVERVIEW OF INVESTMENT POLICY FRAMEWORK

A. Domestic Legal Instruments Regulating Foreign Investment

FDI Law and Regulation

Malaysia does not have a single, consolidated legislation that specifically regulates foreign investment in the country. Instead, regulations and requirements affecting foreign investors are generally sector-specific and administered by the relevant government agency or sectoral regulator. In addition, some of the main instruments regulating foreign investment at the national economy-wide level are the Income Tax Act (1967), the Promotion of Investment Act (1986, as amended 2014), as well as the Malaysian Investment Development Authority (MIDA) Act (1967).

Until 2012 foreign investments had been regulated by the Foreign Investment Committee (FIC) Guidelines. These guidelines had been strongly influenced by the Government's desire to promote the participation of "Bumiputera" (that is, indigenous people) but were repealed following a wave of liberalization between 2009 and 2012 (see Box 1). At the same time, the promotion of Bumiputera continues to play an important role in Malaysia's economic policies.

Sector Specific Laws

Despite incremental liberalization, restrictions on foreign investments remain in certain sectors. These take the form of requirements for Bumiputera/local equity participation and/or foreign equity restrictions (collectively referred to as Equity Conditions).

Restrictions on FDI are largely imposed under sector-specific laws, but additional ad hoc restrictions may be imposed by regulators. For example, this is the case for Equity Conditions. On the one hand, such conditions may be provided by law (for example, where a piece of legislation specifically prescribes a minimum local equity requirement or foreign equity restriction). On the other hand, where a law does not prescribe any Equity Conditions, the relevant regulator may impose Equity Conditions on specific sectors through discretionary written guidance or unwritten practices. Additionally, the relevant regulator may — based on the facts of each applicant — impose a different Equity Condition on a case-by-case basis (that is, an investor-specific basis). If laws prescribe a different set of Equity Conditions, those stipulated in laws will prevail over any discretionary guidance. Non-

Box 1. The Influence of the Promotion of Bumiputera on Malaysia's Investment Policy

In the 2000s, the objective to promote Bumiputera led the Government to create specific investment restrictions. The Malaysian Government has traditionally maintained economic policies with the overall aim of achieving a "balanced development" within a framework of rapid growth with equity as its primary thrust. In particular, one of the historical objectives of Malaysia's 1990 National Development Policy and 2001 National Vision Policy was to achieve at least 30% Bumiputera participation in all industries by 2010. This resulted in the formation of the Foreign Investment Committee (FIC) and the introduction of the FIC Guidelines to limit foreign participation in acquisitions of interest, mergers and takeovers, and acquisition of properties in Malaysia.

Between 2009 and 2012 the 30% Bumiputera equity requirement was removed for no less than 44 services sub-sectors. Some examples of these service sub-sectors that have been liberalized include private hospitals, medical and dental specialists, architectural, engineering, legal, accounting (including auditing) and taxation, courier services, telecommunications (except for the category of content application service provider license), education (including private universities, international schools, technical and vocational schools, and skills training centers), as well as departmental and specialty stores. Further, the FIC and the FIC Guidelines were, respectively, abolished and repealed.

compliance with Equity Conditions imposed under discretionary guidance does not typically attract legal sanctions. Yet, it can be enforced through administrative actions. For instance, where the intended operations of a company or business in Malaysia require certain operating licenses, permits or approvals, the relevant regulator may impose Equity Conditions for issuance of such licenses, permits, or approvals. Equity Conditions are listed in Section 3 (Investment Entry and Establishment).

The dispersed sector-specific nature of FDI laws and regulations makes the legal framework complex and sometimes uncertain. For example, processes for review and approval of foreign investment vary by the relevant ministry or agency in-charge of the sector. The ministries and governmental agencies often have discretionary powers to approve specific investment projects.

Public Access to Foreign Investment Laws and Policies

All principal laws, regulations and other legal instruments relating to foreign investment are publicly accessible. Under Article 66(5) of the Federal Constitution, a law cannot come into full force and effect until it is published in the Federal Gazette. As such, all principal laws of Malaysia (including laws relating to foreign investment) are accessible at the official portal of the Attorney General's Chambers of Malaysia and the Federal Gazette. There is no specific website or portal of a public institution that centralizes foreign investment laws in Malaysia.

At the same time, not all policies are publicly available. Policies relating to foreign investment often take the form of guidelines or policy documents issued by the relevant sectoral regulator. Where this is the case, the relevant guidelines or policy documents are usually published on the relevant sectoral regulator's official website. For example, the Distributive Trade Guidelines are published on the web portal of the Ministry of Domestic Trade and Consumer Affairs. That said, not all regulatory policies are publicly available and those that are may not always be up-to-date.

Consultation with Stakeholders

Stakeholder consultations are not mandatory in the law-making process, but some mechanisms for stakeholder participation exist. Neither the Malaysian Parliament nor the Government are mandated to ensure public or stakeholder consultations before a new bill is enacted into law. However, the Standing Orders (the set of rules that govern the conduct of members and proceedings) of each of the two houses of Parliament do provide that:

- Parties affected by a bill (public or private) can be heard, upon petition, before any committee to which the bill is referred;
- Private bills (that is, bills which deal with matters of local or private concern, as opposed to matters of general public interest) that would benefit a particular person (group of persons), organization or association, must be published in the Federal Gazette and in at least one newspaper that is in circulation throughout the Federation, at least one month before the day on which a motion for leave to introduce the bill is to be moved; and
- Every private bill and hybrid bill (that is, any other bill which in the opinion of the Yang Di-Pertuan Agong appears to affect prejudicially individual rights or interests) shall, after being read a second time (though also possible before the second reading), be referred to a Select Committee, before which any affected party who has previously presented a petition to the House of Representatives may be heard upon that petition.

While no law or policy mandates the Government to ensure public or stakeholder consultation prior to formulating and implementing a new policy or guidelines, in practice the Government has made progress toward overall good regulatory practice. For example, it has established a Good Regulatory Practices portal and is undertaking an initiative to comprehensively review its business regulations, involving relevant stakeholders. Notably, certain sectoral regulators (particularly in the highly-regulated industries, such as the Central Bank of Malaysia (Bank Negara Malaysia) that oversees the banking and financial services

industry, and the Securities Commission Malaysia (SC) that oversees the capital markets industry) generally carry out consultations with the relevant stakeholders and public prior to the finalization and issuance of specific sector policies.

Predictability and Stability in Policies and Rules

There are no specific laws mandating predictability and stability in policies and rules, but these principles are to some degree ensured through judicial review. The judiciary is entrusted with keeping every organ and institution of the state within its legal boundary, and generally has the authority to strike down legislation passed by Parliament or decisions made by the Executive that is unconstitutional (for example, if the legislation goes against principles of the Federal Constitution) or unlawful.

Judicial review is based on the principle of Constitutional supremacy. As opposed to Parliamentary supremacy, Constitutional supremacy means that the Federal Constitution of Malaysia is the highest law in the country and that every other law is subordinate to the Constitution. The Constitution has superiority over, regulates and restrains the institutions it creates. The Judiciary is tasked with enforcing those restraints, for example to uphold, among others:

- The rule of law — which, requires equality before the law and no exercise of arbitrary power; and
- Constitutionalism — which requires that all Government actions comply with the Constitution and do not destroy the democratic principles upon which it is based (such as fundamental rights); it also requires courts to interpret legislation on the assumption that Parliament would not intend to legislate contrary to fundamental rights.

B. International Legal Instruments Regulating Foreign Investment

Malaysia has undertaken legally binding international investment commitments through a variety of international investment agreements (IIAs) — signed at the bilateral, plurilateral and multilateral level. These commitments mainly cover entry and establishment conditions, protection, as well as the legality of specific types of incentives (see Table 1). It is important for Malaysia to reflect these

Table 1. Malaysia's International Investment Framework

Agreement(s) as Basis of Commitments	Type of Agreement	Investment Policy Dimensions Covered
WTO GATS Agreements	Multilateral	Entry and establishment
WTO TRIMs Agreement	Multilateral	Entry and establishment, Incentives
WTO SCM Agreement	Multilateral	Incentives
WTO TRIPS Agreement	Multilateral	Protection
Treaties with Investment Provisions (66 signed, 54 in force)	Plurilateral or Bilateral	May cover entry and establishment, protection, incentives
Bilateral Investment Treaties (26 signed, 21 in force)	Bilateral	May cover entry and establishment, protection, incentives
International Centre for Settlement of Investment Disputes (ICSID) Convention	Multilateral	Protection (Dispute settlement)
Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)	Multilateral	Protection (Dispute settlement)
IMF Articles of Agreement (Art. VIII Acceptance)	Multilateral	Protection
Double Taxation Avoidance Agreements (74 treaties in force)	Bilateral	Taxation

Source: World Bank Analysis

commitments in its domestic legal framework to ensure consistency as well as to monitor compliance.

Having been a member of the World Trade Organization (WTO) since January 1, 1995, Malaysia has commitments under several WTO Agreements. Under the General Agreement on Trade in Services (GATS), Malaysia grants rights to services suppliers from other WTO member countries. This includes services supplied through commercial presence (defined as establishment of a territorial presence), in other words through FDI. These rights are granted through commitments undertaken in "schedules". The "schedules" list sectors being opened, the extent of market access being given in those sectors (for example, whether there are any restrictions on foreign ownership), and any limitations on national treatment (whether some rights granted to local companies will not be granted to foreign companies). Malaysia has made commitments on market access and national treatment in 9 out of 12 services sectors in the WTO classification1: (i) Business services, (ii) Communication services, (iii) Construction and related engineering services, (iv) Financial services, (v) Health related and social services, (vi) Tourism and travel related services, (vii) Recreational, cultural and sporting services (viii), Transport services as well as (ix) Other services not included elsewhere. In these 9 sectors, Malaysia has made partial commitments on market access and national treatment for specific services in 23 sub-sectors. "Partial" means that although commitments have been made, there are still limitations/reservations, which may differ in their restrictiveness. For example, they may be more restrictive by limiting the equity contribution of the foreign investor, or less restrictive by merely requiring foreign service suppliers to become a member of a union chamber. Notably, any measure or special preference granted to Bumiputera or Bumiputera-status companies has been reserved.

In addition, under GATS every member is obligated to unconditionally extend to service suppliers of all other WTO members Most-Favored Nation (MFN) Treatment. However, Malaysia has made reservations in that regard. For business services, it reserves the ability to waive foreign content restrictions for advertising for service providers from specific countries. Across all sectors, it reserves the rights (i) to differentiate in regulating the movement of foreign semi-skilled and unskilled workers into Malaysia and (ii) to differentiate in limiting foreign equity or interests in companies and businesses.

Under the WTO Agreement on Trade Related Investment Measures (TRIMs), Malaysia has committed to not apply certain investment measures that restrict or distort trade (local content requirements, trade balancing requirements, foreign exchange restrictions and export restrictions). These measures are prohibited both when the obligation for the foreign investors is mandatory, and when it is tied to obtaining an advantage (that is, an incentive). Incentives are further regulated by the WTO Agreement on Subsidies and Countervailing Measures (SCM), which among others prohibits certain types of export subsidies. Under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), foreign investors' intellectual property rights are protected. In case of a violation of any of its WTO commitments, Malaysia may be sued under the WTO dispute settlement mechanism.

Malaysia has further entered into obligations through international investment agreements — 21 Bilateral Investment Treaties (BITs) and 54 Treaties with Investment Provisions (TIPs) are currently in force. The latter category comprises treaties that include obligations commonly found in BITs (for example, a preferential trade agreement with an investment chapter), or treaties with limited investment related provisions. Table 2 provides an overview of select Agreements: Malaysia's latest IIA (Australia-Malaysia FTA, 2013), its IIA with the largest home country measured by that country's share in Malaysia's total FDI stock (ASEAN Comprehensive Investment Agreement, ACIA, 2012), as well as an IIA with expansive regional coverage (ASEAN-China Investment Agreement, 2010). The table shows that the main protection guarantees are provided in these agreements, although access to investor-State dispute settlement (ISDS) is not provided in the FTA with Australia. Notably, under all three IIAs Malaysia commits to liberalization, since the

treaties provide for MFN status and selectively also national treatment in the pre-establishment phase, but with a different scope and under reservations. For example, ACIA only grants this right in specific sectors: manufacturing, agriculture, fishery, forestry, mining and quarrying, as well as services incidental to these. All reviewed IIAs make reservations for measures that do not comply with commitments.

On 8 March 2018, Malaysia signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). CPTPP is one of the largest trade and investment agreements. It covers 11 countries, a market of 500 million people, 13.5% of world GDP and 15.3% of world trade. So far, Malaysia has not yet ratified the agreement. Notably, in a side letter with New Zealand, Malaysia has decided, on a bilateral basis, only to give consent to investor state dispute settlement on a case-by-case basis.

Table 2. Comparison of Malaysia's Sample IIAs

	Largest Home Country IIA (% of total FDI stock): ASEAN Comprehensive Investment Agreement (2012) (Singapore)	Latest IIA (date of entry into force): Australia-Malaysia FTA (2013)	Expansive Regional Coverage IIA (highest number of members): ASEAN-China Investment Agreement (2010)
Scope of Application			
Covers Pre-establishment	Yes	Yes	Yes
Exclusions from Scope	Taxation measures (with exceptions), government procurement, subsidies or grants, services supplied in exercise of governmental authority	Subsidies, taxation, services supplied in the exercise of governmental authority, government procurement (NT and MFN)	Taxation (except expropriation and transfers), government procurement, subsidies or grants, services supplied in the exercise of governmental authority
Standards of Treatment			
National Treatment (NT)	Pre- and post-establishment	Pre- and post-establishment	Post-establishment
Most-Favored-Nation Treatment (MFN)	Pre- and post-establishment	Pre- and post-establishment	Pre- and post-establishment
Fair and Equitable Treatment (FET)	Yes	Yes	Yes
Full Protection & Security	Yes	Yes	Yes
Expropriation	Direct and indirect expropriation, payment of compensation	Direct and indirect expropriation, payment of compensation	Direct/indirect expropriation and payment of compensation
Rights to Transfer Funds	Yes	Yes	Yes
Prohibition of Performance Requirements	Reference to TRIMs	Reference to TRIMs	TRIMs+ (Prohibiting a larger number of performance requirements than TRIMs)
Dispute Resolution			
State-State Dispute Settlement	Yes	Yes	Yes
Investor-State Dispute Settlement	Yes	No	Yes, limited to post-establishment

Source: Analysis based on IIAs obtained from the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub

Moreover, Malaysia is involved in ongoing negotiations on several agreements. Most notably, it is negotiating the Regional Comprehensive Economic Partnership Agreement (RCEP) covering ASEAN member states as well as large economies in the East Asia Pacific (EAP) area such as China, Australia, and Japan. Further, in 2010 formal negotiations were launched between Malaysia and the EU for a Free Trade Agreement (FTA). After several rounds of negotiations, the negotiations reached an impasse in 2012. However, both sides had agreed that negotiations will resume when a fresh mandate and/or flexibilities become available at a later date.

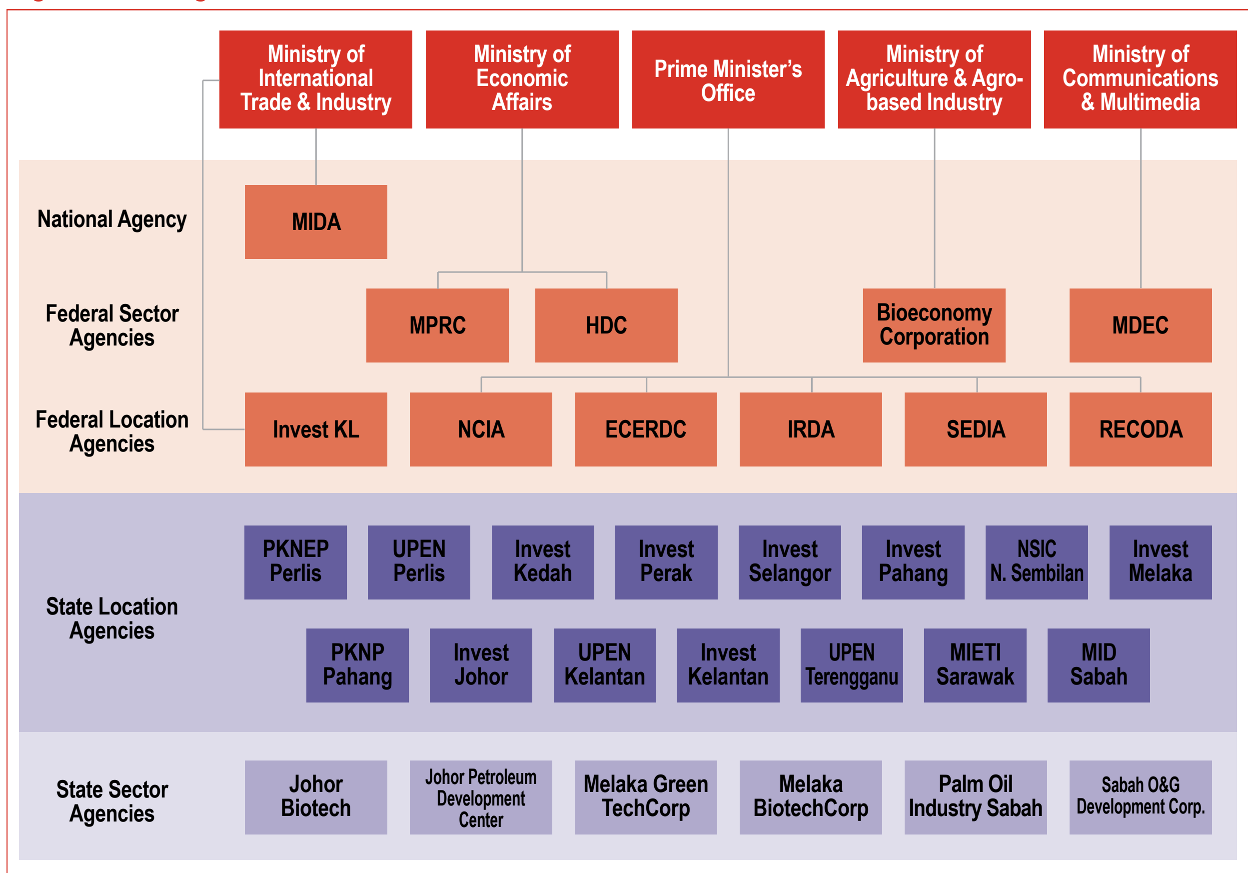
Malaysia is further a member of treaties covering investment arbitration. It is a member of the New York Convention and the ICSID Convention, facilitating the enforcement of arbitral awards. It has been a respondent in three publicly known investor-State arbitrations, two of which have been decided in its favor and one settled.

Acceptance of Art. VIII of the IMF Articles of Agreement requires Malaysia to maintain current account convertibility, enabling investors to transfer certain payments related to their investments. Malaysia is also party to 74 Double Taxation Avoidance Agreements (DTAAs) that are in force, influencing its ability to tax foreign investors and investments.

C. Key Institutions for Investment Promotion

In Malaysia, foreign investment is regulated at the sectoral level and investment promotion functions are generally vested in 32 national, corridor and state government agencies or sectoral regulators (see Figure 2.). The Malaysian Investment Development Authority is de jure the lead Investment Promotion Agency. Some of the main institutions at the national as well as the sub-national level are highlighted in Box 2.

Figure 2. Malaysia's Investment Promotion Institutional Framework



Source: Bank Negara Malaysia-WBG Analysis

Box 2. Select Key Institutions for Investment Promotion in Malaysia

National Level Institutions

Malaysian Investment Development Authority (MIDA)

MIDA is the Malaysian Government's principal agency responsible for the promotion of foreign investments in the manufacturing and services sectors (excluding financial and utilities). Established pursuant to the Malaysian Industrial Development Authority Act 1965, it is a statutory body under the purview of the Ministry of International Trade and Industry (MITI). MIDA assists investors in the form of direct consultation with relevant agencies, obtaining all necessary approvals for projects until they are operational, and facilitating site visits and investigations.

Malaysia Digital Economy Corporation (MDEC)

MDEC was established in 1996 to develop the Digital Economy in Malaysia. It is engaged in formulation of policies and coordination of agencies to enable success, workforce development and the creation of global champions in the digital economy. It oversees several programs, including MSC Malaysia, a platform that nurtures the growth of local tech companies while attracting both foreign and domestic direct investments.

Bioeconomy Corporation

Bioeconomy Corporation is the lead development agency for the bio-based industry in Malaysia, under the purview of Ministry of Agriculture and Agro-based Industry (MOA). It responsible for executing the objectives of the National Biotechnology Policy (NBP) and acts to identify value propositions in both R&D and commerce and to support these ventures via financial assistance and developmental services. It has mandate to actively promote foreign direct investments in bio-based industry.

Halal Industry Development Corporation (HDC)

Established in 2006, the Halal Industry Development Corporation coordinates the overall development of the Halal industry in Malaysia. Among its responsibilities are providing advisory services on opportunities throughout the halal market and value chain and promoting the Halal Malaysia brand worldwide.

Sub-National Investment Promotion Agencies

In addition to the national level agencies above, there are many sub-national investment promotion agencies operating under the purview of the relevant state governments. These sub-national agencies attract, facilitate, and support business investments in their respective states. They generally work independently with other governmental agencies, business chambers and industrial associations (including, among others, MIDA and the other sectoral regulators noted above) to encourage and promote investments in the respective federal territory or states. Some of the sub-national agencies include InvestKL Corporation Sdn Bhd; Invest Selangor Berhad; Invest Kedah Berhad; and Invest-in-Penang Berhad, to name a few.

D. Foreign Investment Promotion Strategy

Investment-related policy reforms in the country are driven by sector-specific governmental agencies in respect of the industries/sectors under their respective purview (such as the Investment Policy & Trade Facilitation division of the Ministry of International Trade and Industry, Bank Negara Malaysia for the financial sector, various divisions under the Ministry of Economic Affairs for infrastructure and utilities, agriculture, and energy, and the strategic investment division of the Ministry of Finance). Further, in February 2019 the Government established a new National Economic Action Council (NEAC) chaired by the Prime Minister. The NEAC's mandate is to encourage and stimulate sustainable economic growth, equitable distribution of wealth, and further enhance wellbeing of people.

There is no publicly available consolidated foreign investment promotion strategy document issued by the Government. Rather, Malaysia's foreign investment promotion strategy can generally be drawn from the broader paper of the Mid-Term Review of the 11th Malaysia Plan (Mid-Term Review), the country's five-year development plan toward realizing the goal of Vision 2020 and MIDA's reports. The Mid-Term Review highlights strategies to promote economic growth and private investment and proposes concrete measures to promote domestic and foreign investment in Malaysia (see Box 3). Other sources highlighting priorities of economic policymaking more generally are the 2030 Shared Prosperity Vision Economic Blueprint released in October 2019, as well as annual budget speeches.

There are several ongoing efforts that will shape Malaysia's investment promotion strategy in the future. Malaysia is currently in the process of adopting the 12th Malaysia Plan, led by the Ministry of Economic Affairs. Likewise, the 4th Industrial Master Plan is in development, led by the Ministry of International Trade and Industry.

Box 3. Mid-Term Review of the 11th Malaysia Plan—Strategies and Reform Proposals

The Mid-Term Review highlights the following strategies to promote economic growth and private investment in the country that applies to both domestic and foreign investors:

- Strengthening of sectoral growth and structural reforms through productivity improvements; increasing export capacity; improving market efficiency; and facilitating ease of doing business;
- Acceleration of innovation and technology adoption through harnessing the Fourth Industrial Revolution; increasing technology adoption; aligning research and innovation; and enhancing capacity building; and
- Provision of quality infrastructure through developing an integrated transport system; strengthening logistics and trade facilitation; improving digital infrastructure; improving water services; and sustaining energy supply.

Furthermore, the Mid-Term Review proposes numerous measures to promote domestic and foreign investment in Malaysia. These measures include:

- Comprehensive review of investment policies including incentives and tax structure;
- Improving the management of all existing investment incentives to optimize resources;
- Encouraging investment in Industry 4.0-related technology to reduce the gaps in the manufacturing sector;
- Strengthening of the ecosystem for private investment to ensure quality private investment that creates more high-paying skilled jobs, particularly in the manufacturing and services sector;
- Efforts to be undertaken to attract foreign direct investment in high value-added products and services, which utilize frontier technologies and promote technology transfer to local companies;
- To create a supporting ecosystem between the six regions by, among others, enhancing the role of state economic development corporations and promoting interstate coordination in infrastructure provision;
- Efforts to be encouraged to attract more investment, particularly for high impact programs and projects in the identified niche cluster activities, based on the six regional competitive advantages;
- To upskill and reskill current workforce through embracing innovation and increasing the use of information technology in order to facilitate investment and promote upgrading of economic activities in all six regions;
- To prioritize high quality investment in order to create more skilled jobs in the economy, and the list of industries that qualify for incentives under the Promotion of Investments Act 1986 will also be revised to attract such high-quality investments; and
- Promotion of competitive cities (that is, Kuala Lumpur, Johor Bahru, Kuching and Kota Kinabalu) to accelerate economic growth.

3. INVESTMENT ENTRY AND ESTABLISHMENT

Market Entry and Sectoral Limitations

Foreign investment is strictly prohibited in certain sectors and sub-sectors (Prohibited Sectors), and limited in certain others through "Equity Conditions" placing restrictions or equity caps on foreign participation (Restricted Sectors). Apart from the Prohibited and Restricted Sectors, the general position is that 100% foreign equity is permitted in a sector or sub-sector. Sectors that permit 100% foreign participation include manufacturing, agro-processing, textiles, chemicals, pharmaceuticals, IT and telecom equipment, hotels and restaurants, computers and software, among others.

There is no centralized list of the Prohibited or Restricted Sectors—including applicable equity conditions. Further, there is no overarching legislation prohibiting foreign ownership of the share capital of certain Malaysian companies. However, for every industry, there are sector-specific regulations or written policies issued by the relevant ministry or government agencies from time to time. In addition, there is unwritten guidance or policies stipulating equity conditions. In such cases, investors are forced to rely on the latest known equity conditions based on unofficial confirmation by officers of the relevant sectoral regulators (based on no names verbal enquiries). As the Equity Conditions of certain sectors may vary from time to time, it is prudent for investors to consult the relevant sectoral regulator prior to making an investment.

Prohibited and Restricted Sectors

Table 3. lists the Prohibited and Restricted Sectors based on various legislations, guidelines, and circulars issued by relevant regulators.

Table 3. List of Major Prohibited and Restricted Sectors

Prohibited Sectors	Scope
Wholesale and Retail Trade	Supermarket (unless operated by a hypermarket operator), 24-hour convenience stores, provision shops, general vendors, news agent, miscellaneous goods store, fuel station with convenience store, medical hall
Education	Schools offering the Malaysian national curriculum
Healthcare	Certain healthcare service providers (for example, general medical clinic, general dental clinic, pathology laboratory)
Professional Services	Legal services firms (for example, full-scope local law firms)
Certain SME sub-sectors	Provision shop/general vendor/miscellaneous goods store (these may cover petty trading), as set out above ■ Permanent wet market store ■ Permanent pavement store ■ Textile shops ■ Restaurants (non--exclusive) ■ Bistros
Agriculture, hunting, forestry and fishing	Foreign investment is subject to discretionary powers of the State and foreign ownership of agricultural land is generally prohibited.
Petroleum	70% cap depending on upstream products and services

Restricted Sectors	Restrictions on Foreign Equity
Electricity and water	■ 49% cap for electricity generation ■ 25% cap for companies listed on Bursa Securities Malaysia Berhad (the Malaysian Stock Exchange)
Alternative energy	49% cap
Construction	Restrictions on foreign ownership differ depending on country of origin of the foreign shareholder: ■ 41% for Australia, New Zealand and Pakistan ■ 51% for India ■ 51% for ASEAN countries ■ 30% for other countries
Wholesale and retail trade	■ 70% cap for hypermarket and supermarket operated by hypermarket operator ■ 30% cap for convenience stores

Travel and tourism-related services	■ 30% cap for tourism training institute
	■ Foreign equity is also capped in inbound and ticketing license of tour operating and travel agencies depending on the country of origin of the foreign shareholder:
	  ■ 30% for non-ASEAN countries
	  ■ 51-70% cap for ASEAN countries

Transport	49% cap in provision of transportation to third parties using commercial vehicles (that is, License A type), and 30% cap for public bonded warehouse
Telecommunications	30-70% cap for individual license (not applicable to Application Service Providers)
Financial services and insurance	■ 70% cap for investment banks ■ 70% cap in existing Islamic banks (but 100% FDI is permitted in new Islamic banks, that is, greenfield investments) ■ 70% cap in insurance and takaful (that is, Islamic insurance) companies
Real estate	■ 49.9% cap for ownership of certain residential units, properties build on Malay reserved land and properties allocated to Bumiputera interest ■ 70% cap (subject to EPU's approval) for acquisition of real property resulting in the dilution of Bumiputera or Government interests in the real property via direct acquisition of property valued at RM 20 million and above or indirect acquisition of property through shares if (i) the transaction results in a change in control of the company owned by Bumiputera interest and/or Government agency; (ii) real property makes up more than 50% of the said company's assets; and (iii) the real property is valued at more than RM 20 million
Professional, scientific and technical services	Foreign equity is capped in accounting and audit services depending on the country of origin of the foreign shareholder: ■ 30% cap for non-ASEAN countries ■ 51% cap for ASEAN countries Similarly, for taxation services, ■ 30% cap for non-ASEAN countries ■ 49% cap for ASEAN countries
Health services	■ 70% cap for ambulance care center and nursing home ■ 49% cap for hospice, nursing home, and community mental health center
Media and entertainment	30% cap for advertising
Education	70% cap for private higher education

Source: Analysis by Baker McKenzie based on country's laws and regulations.

Note: The table is based on a review of 32 specific sectors identified for the purpose of this research[2]. The list of sectors is therefore not exhaustive.

Given the foreign equity caps in Restricted Sectors, a joint venture between a foreign investor and a local partner is required by default for foreign participation in such sectors.

Restrictions on Non-Equity Contract Based Investments

Non-equity contract-based investments by foreign investors in certain sectors and subsectors are subject to special restrictions or conditions. Some examples are:

- *Outsourcing in the banking sector* — The outsourcing of critical functions by a licensed financial institution can only be made with the exemption (on a case by case basis) granted by Bank Negara and the appointment of a non-resident outsourcing service provider can only be made with the approval of Bank Negara.

- *Government procurement* — To tender for Government contracts, preference is generally given to contractors and suppliers, whether as a commercial intermediary or not, who are registered with the Treasury Department of the Ministry of Finance (MOF). Depending on the types of services or products that the contractor or supplier proposes to supply to the Government, the MOF will generally impose certain conditions, including, in certain instances, minimum equity participation by Bumiputera in such contractor or supplier. For services and products that can be sourced easily in the local market, the MOF may require that only entities that are majority Bumiputera-owned may supply these items to the Government.

- *Franchising sector* — A foreign franchisor is required to obtain the approval of the Franchise registrar prior to undertaking any franchise activities in Malaysia. This can be contrasted with the position for local franchisors, who are only subject to a registration requirement with the Franchise registrar in respect of any franchise activities.

- *Unregulated services sector* — The provision of unregulated services by foreign-owned Malaysian companies is subject to the approval of the Ministry of Domestic Trade and Consumer Affairs (MDTCA). "Unregulated services" include, among others, general management consulting services, marketing management consulting services, and other management related services.

Forms of Establishment

Foreign individuals and companies can generally hold any type of shares in a Malaysian incorporated company (for example, ordinary shares and preference shares). There are no restrictions on the establishment of a wholly foreign-owned subsidiary so long as no licenses, permits or passes are needed for the company to carry out its business activities in Malaysia. Where licenses, permits and passes are required, there have been instances where approvals have been obtained by companies subject to a condition of future partial divestment of equity to Malaysian shareholders.

Foreign investors cannot set up a partnership in Malaysia unless they have permanent residency in Malaysia. Generally, foreigners can establish a limited liability partnership (LLP) entity in Malaysia. The LLP Act allows for the registration of both local and foreign LLPs. It does however require the LLP to appoint at least one compliance officer from among its partners or persons qualified to act as company secretaries under the Companies Act 2016. Such a compliance officer must be a citizen or permanent resident of Malaysia and must ordinarily reside in Malaysia.

Foreign investors can also establish a branch or representative office in Malaysia, but the registration of a branch office is at the discretion of the Companies Commission. This Commission has statutory powers to impose conditions on such registration (that is, such conditions as are prescribed under the Companies Act). Foreign companies' representative offices in Malaysia are regulated by MIDA.

Minimum Paid-Up Capital Requirements

In certain specific sectors and sub-sectors minimum paid-up capital requirements are imposed on companies with foreign ownership. For example, the minimum paid-up capital for:

- Travel agency and tour operator business:
  - foreign-owned inbound license holder: 1.5 million Ringgit (RM);
  - locally-owned inbound license holder: RM 200,000 (City); RM 50,000 (Rural);
  - foreign-owned inbound & ticketing license holder: RM 500,000–RM 1 million (depending on country of origin of shareholder);
  - locally-owned inbound & ticketing license holder: RM 200,000 (City); RM 150,000 (Rural)
- Companies that wish to register with the Expatriate Services Division (ESD) to hire expatriates:
  - 100% local-owned: RM 250,000;
  - joint venture: RM 350,000;
  - 100% foreign-owned: RM 500,000; and
  - foreign owned companies (foreign equity at 51% and above) in the wholesale, retail and trade sectors: RM 1 million.

Quantitative Limits

There are generally no mandatory quantitative limits on the number of foreign service providers, enterprises or market players that can operate in a given sector, except for certain professional services sectors such as legal services. Under the current regime, a foreign law firm can be licensed as a qualified foreign law firm (QFLF) in Malaysia, subject to certain conditions. However, only up to five QFLF licenses will be granted. Further, ministries and certain regulators in highly regulated industries (for example, Bank Negara and Securities Commission Malaysia) have broad powers to impose a moratorium on the issuance of operating licenses in circumstances they deem appropriate.

Restrictions on Expatriate Appointments and Local Hiring Requirements

Special restrictions or conditions may be placed on the appointment of expatriates on boards of directors and as key managerial personnel of local companies, where, for example:

- The company offers professional services. For example, under the Architects Act 1967, an architectural consultancy practice in the form of a body corporate must have a board of directors comprising at least two thirds of architects registered with the Malaysian Board of Architects. Given that expatriates may face legal barriers (for example, recognized qualifications) to be registered as an architect with the Malaysian Board of Architects, the ability of an architectural consultancy practice to appoint expatriates to the board may be restricted; or
- The company holds regulatory licenses or approvals for which specific conditions are imposed by law or policy (written or unwritten). For example, it is commonplace for regulatory licenses or approvals in the oil and gas industry and distributive trade industry to impose minimum Bumiputera or Malaysian participation on boards of directors, management and/or employee levels of the company.

The process of obtaining expatriate work permits is clearly defined and the Immigration Department aims to process and approve employment pass applications within 5 working days upon the submission of all required documents. In practice however, applications are generally processed within 7 to 14 working days upon submission of all required documents.

Companies are encouraged to train more Malaysians. The aim is that the employment pattern at all levels of an organization in Malaysia reflects the multi-racial composition of the country, and that Malaysians are eventually trained and employed at all levels of employment. However, where there is a shortage of trained Malaysians, companies are allowed to bring in expatriate personnel (that is, foreign persons) to take on high-level managerial roles, intermediate level managerial and professional roles or technical roles. The Immigration Act 1959/63 stipulates that an employment pass may only be issued if the Immigration Controller is satisfied that no persons resident in Malaysia are available to

undertake employment of such position set out in the applicant's contract of service.

Local Sourcing and R&D Requirements

There is no overarching legal requirement that subjects foreign investors to local sourcing requirements in order to establish business in Malaysia. Local sourcing requirements may, however, be imposed as a regulatory licensing/approval condition for investments. For example, under the Distributive Trade Sector (DTS) Guidelines, a distributive trade company with foreign involvement is required to, among others:

- Appoint Bumiputera director(s);
- Hire personnel at all levels including management to reflect the racial composition of the Malaysian population;
- Formulate clear policies and plans to assist Bumiputera participation in the distributive trade sector;
- Increase the utilization of local airports and ports in the export and import of the goods; and
- Utilize local companies for legal and other professional services available in Malaysia.

There is no overarching legal requirement for foreign investors to invest in local R&D in order to establish business in Malaysia.

Foreign Investment Approval

There is no overarching FDI license or approval requirement. However, since foreign investment regulation in Malaysia is sector-specific, approval of sector-specific ministries, government agencies and/or regulators may be required. Equity conditions, minimum investment and other requirements are generally imposed as conditions for the granting of approvals, licenses or registrations by the relevant ministries, government agencies and/or sectoral regulator. There is no central website or database on which the key sectoral regulators are listed, though information on such regulators is publicly available and easily accessible. A list of government ministries (which are the ultimate policymakers for most economic sectors and under which the sectoral regulators sit) is available on the website of the Malaysia External Trade Development Corporation (MATRADE).

Where Equity Conditions apply, the approval of the relevant sectoral regulator is generally also required for any transfer of shares, change in shareholders and/or activities relating to mergers and acquisitions. Foreign ownership in Restricted Sectors is therefore to some extent constrained, since transactions are subject to the prior approval of the sectoral regulator.

4. INVESTMENT PROTECTION

Protection Against Expropriation

There is no domestic omnibus legislation that governs expropriation generally in Malaysia, and domestic sectoral laws generally do not provide for a positive protection against (direct and indirect) expropriation. However, foreign investors from certain countries enjoy protection against (direct and/or indirect) expropriation under international investment treaties. A number of these agreements include investor rights against expropriation, requiring that for an expropriation to be lawful, it must be for a public purpose, following due process, non-discriminatory and the payment adequate, effective and prompt (see further Section 2.B—International Legal Instruments).

Restrictions on Inflow and Outflow of Funds

The transfer of funds between residents and non-residents is subject to the requirements and restrictions under the Foreign Exchange Administration Notices issued by Bank Negara Malaysia (FEA Notice(s)). The FEA Notices set out the circumstances in which specific approval of Bank Negara is required to remit funds to and from Malaysia. Bank Negara also has broad powers to issue directions (for example, levies and charges on transactions) to safeguard the balance of payments position and the value of the local currency.

Few restrictions or approval requirements apply to the inflow of funds to Malaysia or repatriation of proceeds from Malaysia (net of applicable taxes and subject to standard compliances). Approval from Bank Negara Malaysia for inflow is required only in limited circumstances, such as if a foreign shareholder provides a loan to the Malaysian entity in excess of RM 1,000,000.

Ringgit are generally not tradable outside Malaysia, and hence conversion of Ringgit outside Malaysia is prohibited.

Dispute settlement mechanisms

A foreign investor in Malaysia can generally avail itself of dispute settlement through domestic courts, or domestic or international arbitration. Under administrative laws in Malaysia, public authorities and officers are required to exercise their powers fairly and reasonably, in good faith, and for proper purpose. Although there is no overarching law or legal mechanism giving investors the right to be heard before a Government decision, it is common for state laws or policy documents to impose on relevant authorities duties to consult with or give notice to interested parties before making a decision.

5. INVESTMENT INCENTIVES

Generally, various tax incentives are available either (a) under law (for example the Promotion of Investment Act or in the Income Tax Act) or (b) as a matter of policy (usually included in the Annual Budget speech). Key tax incentives available in Malaysia are either pioneer status (that is, income tax exemption) or investment tax allowance (that is, income tax exemption equivalent to qualifying capital expenditure incurred). Tax incentives in the form of partial reduction of the corporate income tax rate, sales and services tax exemption and/or remission, and customs duty exemption and remission are also available. On the other hand, financial incentives such as matching or conditional cash grants, public sector equity participation, reduced rates on land, utilities, and transportation are generally not governed by specific laws.

MIDA maintains an online portal that serves as a repository of key Malaysian tax and financial incentives available to foreign investors. Typically, MIDA updates the portal in the fourth quarter, which may result in certain changes in the substance and/or operational requirements in relation to tax and financial incentives in Malaysia.

The objectives of specific incentives introduced by the Malaysian Government are generally outlined in the annual Malaysian budget announcements. The tax and financial incentives made available by the Malaysian Government are based upon the policy of the prevailing government.

Eligibility Criteria and Approval Process

The National Committee for Investment (NCI) makes decisions on incentives. There are 2 committees. NCI1 approves bespoke or customized incentives. NCI2 approves standard incentives.

The granting of tax and financial incentives by the Malaysian Government to foreign investors are generally contingent upon satisfaction of the relevant eligibility criteria and demonstration of a business case for the incentive to be granted. The eligibility criteria for tax incentives are typically set out either in the relevant legislations or policy documents available on the online incentive portal maintained by MIDA. However, depending on the incentive, eligibility criteria may be vague, subjective, or involve complex judgments such as the preparation of technical notes on data analysis or determining "significant business spending". In addition, some schemes may have multiple (up to 20) criteria, with no sliding scale effect of non-compliance — an investor may lose the whole incentive as a result of failing just one criterion.

The application for tax and financial incentives are generally considered on a case-by-case basis and are not automatically granted upon fulfilment of the express eligibility criteria. The approval process is generally not stated in any law, regulation or notification and varies from one regulatory authority to another. That said, certain sales and service tax exemptions are generally automatically granted to the applicant and the Royal Malaysian Customs Department will typically conduct a post-approval audit to ensure that the applicant enjoying the exemptions does indeed satisfy the relevant exemption criteria. There is also no centralized registry of recipients of Malaysian tax and financial incentives.

Certain tax or financial incentives are contingent on local content or local sourcing requirements. A key example of such an incentive lies in the context of the automotive industry in Malaysia, where excise duty reductions are made available to automotive manufacturers based on the percentage of local components and parts used in the assembly of motor vehicles. The policy on this local content credit incentive is only made available to automotive manufacturers seeking to invest in Malaysia.

Certain tax or financial incentives are contingent on export requirements. An example includes the licensed manufacturing warehouse (LMW) status that grant customs duty (and consequently sales tax) suspension facilities to the LMW status holder on imported raw materials subject to fulfilment of the minimum 80% export requirement. Another example is the principal hub incentive that may include a condition that the incentive holder exports a certain percentage of its finished goods in order to continue to qualify for the relevant tax incentives.

6. INVESTMENT LINKAGES

For the purposes of this section, research was focused on the availability of incentive schemes to increase local sourcing, technology transfer and measures to improve information exchange between foreign investors and domestic suppliers. There are incentive schemes in place to encourage foreign investors to increase local sourcing, build capacity of local suppliers (or potential local suppliers) to help them meet strict procurement requirements, and to increase technology transfer. An example is the incentive in the context of the automotive industry in Malaysia described in the section above.

However, there are also incentives in place that may discourage foreign investors from increasing local sourcing. For example, customs duty and sales tax exemptions may be available on imports, whereas Sales and Service Taxes (SST) may need to be paid when buying from local suppliers.

The Malaysian External Trade Development Corporation maintains a general list of Malaysian suppliers and service providers on its website. The aim is to improve information exchange between foreign investors and domestic suppliers. Several investment promotion agencies are also involved in such activities.

7. OUTWARD FOREIGN DIRECT INVESTMENT

For this section, research was focused on whether there are any legal instruments specifically covering outward investment and if there are, whether they impose any restrictions on outward investment. In Malaysia, both state-owned and private sector enterprises can undertake investments abroad but may be subject to advance approvals. Malaysian law distinguishes between residents with and without domestic Ringgit borrowing for purposes of determining thresholds that require advance approvals from Bank Negara Malaysia for outward investment. These thresholds have been incrementally relaxed over time and are listed in FEA Notice 3:

- a Malaysian resident entity without any domestic Ringgit borrowing is allowed to undertake investment abroad of any amount; and
- a Malaysian resident entity with any domestic Ringgit borrowing is allowed to undertake investment abroad:
  - of any amount using foreign currency funds, sourced from:
    - abroad (other than proceeds from export of goods);
    - a non-resident (other than from foreign currency borrowing); or
    - foreign currency borrowing from a licensed onshore bank for direct investment abroad;
  - up to the amount of approved foreign currency borrowing from a non-resident, as permitted under the FEA Notices;
  - up to the amount of the proceeds sourced from the listing of shares through an initial public offering on the Main Market of Bursa Securities Malaysia Berhad (the Malaysian stock exchange); or

- up to RM 50 million equivalent in aggregate per calendar year (on a corporate group basis) using foreign currency funds, sourced from:

  - conversion of Ringgit Malaysia;

- foreign currency borrowing from a licensed onshore bank (for purposes other than a direct investment abroad);

  - transfer from the Malaysian resident entity's Trade Foreign Currency Account (as prescribed under the FEA Notices), including proceeds from export of goods; or

  - the swapping of financial assets.

Any investment abroad by a Malaysian resident entity exceeding the threshold above would require the prior approval of Bank Negara.

For purposes of the thresholds noted above,

- the Malaysian resident entity is deemed to have a domestic Ringgit borrowing if it or any other resident entity within its group with parent-subsidiary relationships has a domestic Ringgit borrowing;

- "RM 50,000,000 equivalent in aggregate" refers to the investment abroad by the Malaysian resident entity and other resident entities within its group with parent-subsidiary relationships; and

- "parent-subsidiary" relationship means direct or indirect relationship where a resident entity is: (i) a holding entity or ultimate holding entity of another resident entity; (ii) a subsidiary of another resident entity; or (iii) a subsidiary of a non-resident entity, where the ultimate holding entity is a resident entity.

8. RESPONSIBLE INVESTMENT

For this section, research was focused on whether there are any measures within the country's investment legislation that are specifically targeted to ensure responsible investment. Malaysia has no specific measures on responsible investment in the country's foreign investment policy and legal framework. It has undertaken several measures in its broader legal framework to preserve the environment, protect health and to ensure products produced comply with national and international standards. In particular, the Malaysian Government has established the legal and institutional framework for environmental protection through the National Policy on the Environment. Investors are encouraged to consider the environmental factors during the early stages of their project planning. Aspects of pollution control include possible modifications in the process line to minimize waste generation, seeing pollution prevention as part of the production process, and focusing on recycling options. Additionally, the Environmental Quality Act 1974 and its accompanying regulations call for environmental impact assessment, project siting evaluation, pollution control assessment, monitoring, and self-enforcement. Industrial activities are required to obtain approvals from the Director-General of Environmental Quality prior to project implementation.

The Malaysian Government has also issued the Malaysian Standards, which is a technical document that specifies the minimum requirements of quality and safety. However, the application of the Malaysian Standards is voluntary.

9. RECENT POLICIES ON NEW TECHNOLOGIES

This section considers Malaysia's recent policy measures on new technologies (that may affect both domestic and foreign investors). Globally, policy measures on new technologies tend to focus on the enabling (sectoral) regulatory framework, as well as on incentives, digital standards, and clusters. At the same time, countries have taken measures that highlight their changing approaches to national security. Other emerging policies that, though not directly related to investment, as a matter of fact impact investments, are data localization requirements as well as rules and regulations concerning the treatment and use of digitized information.

Malaysia has taken several measures focusing on the development of new technologies:

- **Malaysia has passed the National Industry 4.0 Policy (Industry4WRD).** Industry4WRD is a national policy to drive digital transformation of the manufacturing and related services sectors in Malaysia with the goal of becoming the primary destination for high-tech industry and a total solutions provider for advanced technology. The policy outlines Malaysia's vision for the manufacturing sector in the next 10 years, which is for the nation to become the strategic partner for smart manufacturing and related services in Asia Pacific. To achieve this goal, Industry4WRD calls for tax-incentives, efficient digital infrastructure, established regulatory framework to increase industry adoption, investment in future skilled labor, and increased access to smart technologies.

- **In 2016, Malaysia became the first country in the world to establish a Digital Free Trade Zone (DFTZ).** The DFTZ is a special trade zone that promotes the growth of e-commerce by providing a state-of-the-art platform for small and medium and other enterprises (SMEs). Jack Ma, CEO of Alibaba, the largest e-commerce company in the world, has committed major investments to the DFTZ.

- **In 2019, Malaysia introduced a National Cyber Security Policy (NCSP).** In response to increasing cybersecurity threats and rapidly growing connectivity-based technology, NCSP addresses risks to the Critical National Information Infrastructure (CNII) concerning the networked information systems of ten sectors. These sectors are defense and security, transportation, banking and finance, health services, emergency services, energy, information and communications, Government, food and agricultural, and water.

  There are eight "policy thrusts" under the NCSP to ensure effectiveness of cybersecurity controls over vital assets. These policy thrusts are to be implemented by the relevant government agencies and ministries to ensure effective governance and a proper regulatory framework.

  - Thrust 1: effective governance through centralizing coordination of national cyber security initiatives;
  - Thrust 2: legislative and regulatory framework that includes reviewing and enhancing cyber laws;
  - Thrust 3: cyber security technology framework;
  - Thrust 4: culture of security and capacity building;
  - Thrust 5: research and development toward self-reliance;
  - Thrust 6: compliance and enforcement;
  - Thrust 7: cyber security emergency readiness; and
  - Thrust 8: international cooperation

- **On April 8, 2019, the lower house of Parliament passed the Service Tax Bill 2019, which will impose a service tax on digital services that are imported by consumers into Malaysia under a Business-to-Consumer (B2C) regime**. The Bill needs to be passed by the upper house of Parliament and receive the Royal Assent before becoming law. Under this new regime, a service tax of 6% will be imposed on any digital service provided by a foreign service provider.

Data Localization

There are generally no data localization requirements under Malaysian law, except in respect of customer data in specific sectors, that is, electronic money and payment systems services. To regulate these services, Bank Negara in 2018 issued the Interoperable Credit Transfer Framework. This Framework requires approved issuers of designated instruments and registered merchant acquirers to ensure their customer data in relation to credit transfer services are stored securely in Malaysia.

The processing (including collection and use) of personal data in the context of commercial transactions is regulated under the Personal Data Protection Act 2010 (PDPA) in Malaysia. "Personal data" means any information that relates directly or indirectly to an individual, who is identified or identifiable from the information or from that and other information in possession of the data user. While the PDPA does not impose data localization requirements, personal data of a data subject may not be transferred to a place outside Malaysia unless the destination is a place specified by the Minister of Communications and Multimedia of Malaysia and published in the Federal Gazette. To date, no such place has been specified. That said, personal data can be transferred outside of Malaysia if, among others, the data subjects consent to the transfer.

10. CITY SPECIFIC REVIEW—KUALA LUMPUR

In Malaysia, foreign investment policies and strategies are generally shaped and driven by the Federal Government through various ministries, government agencies and sectoral regulators. The sub-national investment promotion agencies, under the purview of the respective State Governments, generally work with the federal ministries, government agencies and sectoral regulators to encourage and promote investments in their respective territory or state.

All investment-related federal legislation and policies, including investment incentives, apply to Kuala Lumpur (KL). There are no city-specific foreign investment policies/strategies that are applicable to foreign investments in KL. There is also no conflict between national and subnational (city) level laws, because KL is one of three federal territories (that is, Kuala Lumpur, Putrajaya and Labuan) that are generally subject to federal legislation.

The 'Greater Kuala Lumpur' (GKL) area has been a key region for economic development and investment promotion in recent years. GKL is an area covering 10 municipalities surrounding KL, including Putrajaya (one of the other two federal territories), Shah Alam, Petaling Jaya and Klang. To foster its development, the Malaysian Government established InvestKL Corporation Sdn. Bhd. (InvestKL), a government investment promotion agency under the purview of MITI mandated to attract Fortune 500 and Forbes 2000-type multinational companies to establish their regional hubs and undertake regional activities in GKL. InvestKL is responsible for providing investment-related services to investors in GKL, including introducing investors to various specialized business hubs in the region, providing post-investment services and recommending prime investment locations. InvestKL facilitates investments and does not have powers or the functions of making investment-related policies.

11. COMPETITION LAW & POLICY

For the purposes of this section, research was focused on merger control and leniency frameworks in the country. The primary law governing competition in Malaysia is the Malaysian Competition Act 2010 (MCA). The MCA provides for prohibitions of anti-competitive agreements and abuse of dominant position. It does not specifically regulate mergers.

The Malaysian Competition Commission (MyCC), established in 2011, is the main body in-charge of implementing competition law and policy in the country.

A. Merger Control

At present, merger control in Malaysia is only applicable to mergers in the aviation service market pursuant to the Malaysian Aviation Commission Act 2015 (MACA), administered by the Malaysian Aviation Commission (MAVCOM), and in the communications and multimedia sectors, administered by the Malaysian Communication and Multimedia Commission (MCMC). The two Commissions have published several guidelines on mergers, including the following:

- MAVCOM's Guidelines on Substantive Assessment of Mergers; Guidelines on Notification and Application Procedure for Anticipated Merger or Merger; and Guidelines on Aviation Service Market Definition.
- MCMC's Guidelines on Substantial Lessening of Competition; Guidelines on Mergers and Acquisitions; and Guidelines on Authorization of Conduct.

Pursuant to the MACA, a merger includes:

- merger of two or more enterprises, previously independent of one another;
- acquisition of direct or indirect control of the whole, or part of, one or more enterprises by one or more persons or enterprises;
- acquisition by one enterprise of the assets, or a substantial part of the assets, of another enterprise which places the acquiring enterprise in a position to replace or substantially replace the selling enterprise in the business; or
- a joint venture created to perform, on a lasting basis, all the functions of an autonomous economic entity.

The MACA provides that merger control will not be applicable in certain circumstances, including if control is acquired by an enterprise the normal activities of which include the carrying out of transactions and dealings in securities for its own account or for the account of others.

In 2014, the MCMC had indicated that it will regulate merger activities in the communications and multimedia industry if the merger/acquisition has the purpose or effect of substantially lessening competition in a relevant market. However, unlike the MACA, there is no formal merger control regime provided under the Communications and Multimedia Act 1998 (CMA) and therefore there is no merger notification procedure as such. Instead, the MCMC has adopted Guidelines on Mergers and Acquisitions issued on May 17, 2019, prescribing a voluntary process through which parties undertaking relevant transactions in the sector may choose to reduce their risk by proactively submitting their transaction to the MCMC prior to completion, to obtain its view on the competitive effect of their transactions. If parties chose to proceed without such filing, they bear the risk of an objection by the MCMC, which may result in enforcement actions under the CMA. MCMC Guidelines allow applicants to request a confidential assessment and/or an authorization of the transaction in question. Application for voluntary assessment and authorization of a M&A may be submitted simultaneously or an authorization request may be submitted without applying for the assessment first. Entities that are likely to have a post-transaction market share of

40% or more are encouraged to seek assessment and/or authorization. The MCMC may authorize the transaction in case there is national interest that outweigh potential negative effects on competition in the relevant market.

Pre-notification Meetings

The current merger control regime under MACA does not provide for any process for a merger party to consult or seek guidance from MAVCOM on whether a merger would infringe the Act or should be notified to MAVCOM. A merging party is expected to carry out its own assessment to determine whether a merger may lead to a substantial lessening of competition (SLC) effect on any aviation service market, and hence infringe the MACA.

In telecommunications, the parties have the option to reach out to the MCMC to request a 'confidential assessment' of the transaction. Although this constitutes a formal process, it allows parties to obtain information on the competitive effects of a transaction and whether notification would be advisable.

Fast Track Procedure and Information Requests

There is no fast track notification procedure for mergers under the existing sectoral guidelines. Instead, M&A in telecommunication will undergo a 2-phase procedure with fewer problematic transactions being cleared in Phase 1 within an estimated timeframe of 30 days. MAVCOM, on the other hand, has no formal deadlines to make a decision in relation to a merger application.

Remedies

If MAVCOM issues a proposed decision of infringement upon completion of merger review, the merger parties are given an opportunity to make a written representation to MAVCOM. In the written representation, an applicant or a merger party may propose certain conditions to address any competition concern arising from the anticipated merger. MAVCOM may accept such conditions and/or impose certain remedies, either structural and behavioral, or both.

Similarly, MCMC may also require parties to submit undertakings to address competition concerns of transactions. Examples under the MCMC Guidelines include both structural and behavioral undertakings. MCMC may also seek to impose an interim or interlocutory injunction under its Notice of Objection.

File Access and Third Party Intervention

While access to file is not specifically established in the sectoral guidelines, public consultations will enable market operators to express their views to MAVCOM and MCMC. On the one hand, MAVCOM will publish a summary of the merger notification for public consultation prior to commencement of its assessment and/or its proposed decision for public consultation before issuing its final decision. MAVCOM will take into consideration submitted feedback within a specified period from the date of the publication of the summary or proposed decision. On the other hand, MCMC assessment would typically involve public consultation with suppliers, competitors and customers, unless confidentiality needs to be preserved. In those cases, neither an announcement nor public consultation will take place. Under MAVCOM guidelines, parties may also request to redact the final decision of the regulator in order to protect confidential information.

Substantive Assessment

In assessing whether a merger would result or is expected to result in an SLC effect in any aviation service market, MAVCOM will carry out the SLC test, which entails three steps (outlined in the MAVCOM Guidelines on Substantive Assessment of Mergers). First, MAVCOM defines the relevant aviation service market. Second, MAVCOM develops a theory of harm to identify the possible harm and effects on competition in a relevant aviation service market arising from a merger. Third, MAVCOM develops a counterfactual scenario to compare conditions and the degree of competition in the relevant aviation service market in the absence of such a merger.

The MCMC also adopts an SLC test in the communications market. The MCMC

Guidelines on Mergers and Acquisitions also stipulate three steps for its assessment: (1) defining market, (2) defining context (dominant or not: to determine whether to pursue analysis under section 133 or section 139), and (3) assess the transaction including identifying whether a conduct substantially lessens competition in a communications market and counterfactual analysis. Additionally, the MCMC may authorize a conduct where the benefits arising from said conduct are substantial and in line with the national policy objectives. Under the Guidelines on Authorization of Conduct, the MCMC undertakes a cost-benefit analysis, where the MCMC will analyze whether there is any substantial national interest as per Subsection 3 (2) of the CMA. In any case, authorization is not possible for per se prohibited conduct, namely fixing rates, market allocation and refusal to deal (boycott) of supplier or competitor.

Penalties and Appeals

While merger notification is voluntary both in the aviation and the telecommunications sectors, penalties can nonetheless be imposed based on lack of compliance. In aviation, for instance, parties can make an application to MAVCOM either before or after closing the transaction. If MAVCOM initiates an investigation into the merger transaction and it finds the merger to have an SLC effect, MAVCOM can require the modification or dissolution of the merger. Additionally, MAVCOM can impose a financial penalty not to exceed 10% of the worldwide turnover of the enterprise over the period during which the infringement occurred.

According to MACA Section 61, MAVCOM may not impose a fine on an enterprise for not implementing the remedies and/or commitments imposed by it. However, such remedies/commitments are enforceable by bringing proceedings before the High Court. If the High Court finds that the party has failed to comply with the decision, the High Court can make an order to require the party to comply with the decision. Failure to comply with the High Court is punishable as a contempt of court.

In telecommunications, the MCMC may seek to enforce any penalties as per Chapter 2 of Part VI of the CMA, including the imposition of a financial penalty or imprisonment.

Judicial appeals to MAVCOM and MCMC final decisions are possible. Pursuant to section 120 of the CMA, parties to the transaction may apply to the Appeal Tribunal for review of MCMC's decision. However, this can only be undertaken after exhausting all other remedies provided for under the CMA. Determinations made by the MCMC that a party to a transaction is in a dominant position are not subject to appeal. In the aviation sector, there is no avenue for the decisions of MAVCOM to be appealed within the administration. However, an appeal can be brought to the High Court within three months of the date of the decision.

Publicity and Deadlines for Merger Decisions

MAVCOM aims to publish all its decisions, but there are no published decisions yet. Per the MAVCOM Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger, once decisions are published, they will contain the facts on which MAVCOM bases its finding and the reasons for such finding.

MCMC, in the other hand, outlines a number of circumstances that may limit the publicity of decisions. Publication of information received following MCMC should be made available to the public. However, this obligation may be toned down by certain conditions such as MCMC considering that publication to be consistent with the objects of the CMA, potential impact on commercial interests of the parties, and confidentiality concerns.

In terms of deadlines for merger decisions, while MCMC guidelines impose pre-defined terms, MAVCOM has no such obligations. MCMC Guidelines provide an indicative timeframe for completion of Phase 1 set at 30 days from the date of commencement and Phase 2 set at 120 days from the date of commencement. These timelines may be extended by the MCMC at its absolute discretion. However, there are no statutory or formal deadlines for MAVCOM to make a decision in relation to a merger application. The duration for the assessment of an application will be determined on a case-by-case basis for both the first phase review and second phase review.

B. Leniency Program

MyCC's leniency program is set out in Section 41 of the Malaysian Competition Act, and in Guidelines on Leniency Regime published by MyCC.

The leniency regime under the MCA is only available with respect to cartels and allows for a reduction of up to 100% of the penalties. This is not available to certain infringers such as an enterprise that initiated the cartel. There is no criminal liability for an infringement of the prohibition under the MCA. There is also no individual liability for an infringement of the prohibition. Any leniency granted will not protect the successful applicant from other legal consequences, including civil proceedings initiated by an aggrieved private person who has suffered loss or damage directly caused by the infringement. The leniency regime covers subsequent applicants. Among the factors that may be taken into consideration in determining the amount of the reduction is reporting another cartel or competition infringement. The MyCC's leniency decision is final with no appeal available.

Marker System

Per the MyCC Guidelines on Leniency Regime, to request a marker, the applicant must provide the name of the enterprise(s) that will be covered by the leniency and sufficient details to identify the infringement. Moreover, the leniency application must be made in writing along with supporting documentation. MyCC cannot use any self-incriminatory information obtained by leniency applications against any unsuccessful leniency applicant. A marker will remain valid for 30 days from the date it was granted.

Confidentiality

MyCC requires the leniency applicant not to disclose to anyone that the applicant has made an application for leniency. Therefore, confidentiality including the identity of the applicant will be maintained before starting — and during — the investigation. The grant of unconditional leniency will be made in the infringement decision (if any); hence, the identity of the leniency applicant will likely be disclosed in MyCC's decision or after the decision is rendered.

There is no concept of leniency statement. In all leniency applications, the applicants are required to enter into a written conditional leniency agreement with MyCC that contains all the conditions that the applicant is required to satisfy in order to receive (unconditional) leniency. Whether the terms of the written conditional leniency agreement will be kept confidential will largely depend on the terms of that agreement (or failing which, confidentiality will depend on common law principles).

Cooperation with other competition authorities

The current leniency regime does not expressly provide for cooperation with other competition authorities.

ENDNOTES

[1] The WTO services sectoral classification list (W/120) is a comprehensive list of services sectors and sub-sectors covered under the GATS. It was compiled by the WTO in July 1991 and its purpose was to facilitate the Uruguay Round negotiations, ensuring cross-country comparability and consistency of the commitments undertaken. The 160 sub-sectors are defined as aggregate of the more detailed categories contained in the United Nations provisional Central Product Classification (CPC). The list can be accessed under the following link: http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc.

Services are categorized into 12 sectors:

1. Business services
2. Communication services
3. Construction and related engineering services
4. Distribution services
5. Educational services
6. Environmental services
7. Financial services
8. Health related and social services
9. Tourism and travel related services
10. Recreational, cultural and sporting services
11. Transport services
12. Other services not included elsewhere

[2] For the purposes of this research, the following 32 sectors have been identified. This is not an exhaustive list of all sectors of the economy.

Primary:	Services:
1. Agriculture, Hunting, Forestry, and Fishing 2. Mining, Quarrying, and Petroleum	18. Electricity, Gas, and Water 19. Alternative Energy 20. Construction 21. Wholesale and Retail Trade 22. Hotels and Restaurants 23. Other Travel and Tourism-related Services 24. Logistics, Transport, and Storage 25. Telecommunications 26. Computer and Software Services 27. Financial Services including Insurance 28. Real Estate 29. Business Services 30. Professional, Scientific and Technical Services (Engineering, Architecture, and so on) 31. Health Services 32. Media and Entertainment
Manufacturing: 3. Agroprocessing, Food Products, and Beverages 4. Textiles, Apparel, and Leather 5. Chemicals and Chemical Products 6. Rubber 7. Plastic Products 8. Pharmaceuticals, Biotechnology, and Medical Devices 9. Metals and metal products 10. Non-metal mineral products 11. Wood and wood products (other than Furniture) 12. Furniture 13. Paper and paper products 14. Printing and publishing 15. Automobiles, Other Motor Vehicles, and Transport Equipment 16. Information Technology and Telecommunications Equipment 17. Machinery and Electrical and Electronic Equipment and Components	

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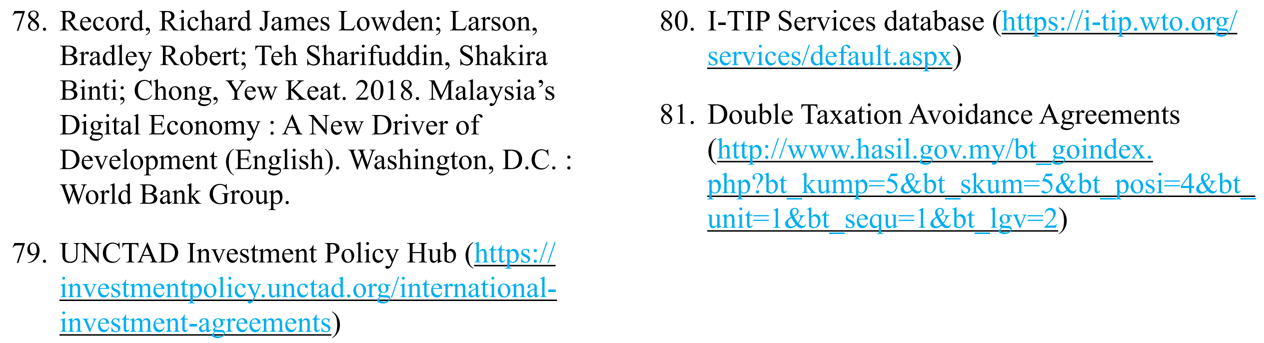
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This Investment Policy and Regulatory Review presents information on the legal and regulatory frameworks governing foreign direct investment and competition that affect businesses and foreign investors. Since legal and regulatory frameworks are constantly evolving, a cut-off date was set for the research. This country review therefore covers information available as of **May 31, 2019**, unless otherwise indicated in the review. IPRRs are available for the following middle-income countries: Brazil, China, India, Indonesia, Malaysia, Mexico, Nigeria, Thailand, Turkey and Vietnam.

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