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'Capitalisation Requirement for Foreign Investors and BITs of Bangladesh and Malaysia: A Comparison'

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Abstract: *The primary purpose of economic globalisation is the economic development of the developing and least-developed countries as well as to facilitate benefits of the home states. Bangladesh and Malaysia foreign investment laws and bilateral investment treaties (BITs) mainly protects foreign investors; however, neither of them has any specific provision regarding capitalisation requirements during entry of foreign investments. This paper will discuss the negative impact of FDI due to lack of capitalisation requirement provision, and then will highlight the significance of enacting it into the FDI laws or BITs. This paper will address three questions: (a) why the foreign investors should be required to fulfil capitalisation obligation during the entry of FDI? (b) to what extent the existing laws, policies, BITs or TIPs are compatible in relation to the capitalisation requirement? (c) what measures could be taken into consideration to overcome the problems? Using qualitative research method, the authors will critically analyse the existing FDI governing laws, policies, BITs and TIPs of Bangladesh and Malaysia in order to explore whether there is any provision of fulfilling capitalisation requirements by the foreign investors. The authors will also use comparative method to analyse FDI laws and BITs of different jurisdictions in relation to*

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capitalisation requirement to justify of enacting specific regulation by Bangladesh and Malaysia. The findings of this study will show that neither the existing laws nor the BITs (or TIPs) has any specific provision of fulfilling capitalisation requirements. Based on the findings, this study will recommend that the government of both states should consider this important factor; and require foreign investors to fulfil the minimum capitalisation requirement as an entry condition, either through amending the existing laws or through BITs.

Key words: *Bilateral investment treaties (BITs), capitalisation requirement, foreign direct investment (FDI), Bangladesh, Malaysia.*

1. Introduction

'Globacolisation' is a concept that derives from 'globalisation' and 'colonisation'. There was a time when the developed countries colonised the developing and least-developed countries in the world through land but since the independence of these countries during 1940-50s, the developed states invented a new idea to colonise them that is through economy. The developing and least developed countries (LDCs) have consumed the idea of 'globacolisation' so well that they started to compete with each other to liberate their trade barrier to attract more foreign investments with the expense of sovereignty, national interest and security or even human rights of citizens (Seid, 2018). These countries find themselves into an economic trap, if any of them try to come out of it; they are seriously hit with economically and politically by the developed states. For examples, Argentina, Zimbabwe, Brazil, Iran and recently Turkey has experienced the other side of globacolisation (Subedi, 2008). However, the supporters of 'neoclassical theory' propounds that FDI has contributed positively to the economic development of the host country (Bergten, 1978).

Economic development for Bangladesh is largely dependent on FDI, which remained negligible until 1993 but subsequently, FDI has experienced a fairly high annual growth over the past years.[1] Similarly, in Malaysia, FDI has a greater contribution in last fifty years.[2] The FDI in both countries present the impact of its contribution in the economic development. The FDI has played a key role in the modernisation of both countries social, cultural, infrastructure and other sectors.

Despite economic contribution of FDI in both states, there are also negative effects, which are caused due to lack of legislation and control. In this connection, this paper will analyse whether existing laws and policies or BITs impose capitalisation requirement to the foreign investors during entry stage; if not, then whether is it essential to consider implementing it through FDI related laws or BITs.

2. Significance of Capitalisation Requirement for Foreign Investors in Bangladesh

There are certain host countries imply capitalisation requirement as a condition to be given permission to invest in selected sectors so that the foreign investors bring its capital from the home state. The reasons behind this requirement are – to overcome the shortage of

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[1] http://bida.gov.bd accessed on 28 December 2018. According to the Bangladesh Bank, gross FDI inflows during the fiscal year 2016-17 reached US$ 3037.92 million and an increased by US$ 495.0 million in March 2018, compared with an increase of US$ 985.0 USD million in the previous quarter. See https://www.bb.org.bd/pub/halfyearly/fdisurvey/fdisurveyjanjun2018.pdf : 9.

[2] As at end of 2017, the expansion of FDI position to RM570.3 billion (2016: RM547.4 billion) was impelled by the continuous inflows of FDI; and as on 24 July 2018, Malaysia's FDI recorded net inflows of RM41.0 billion from RM47.0 billion in the previous year. See "Statistics of FDI in Malaysia", Department of Statistics Malaysia, accessed 4 November 2018, https://www.dosm.gov.my/v1/index.php?r=column/cthemeByCat&cat=322&bul_id=TENVb0xWNXFiTnJ4ekk3R2d0NkFkdz09&menu_id=azJjRWpYL0VBYU90TVhpclByWjdMQT09.

foreign currency, preventing foreign investor from raising capital locally, to attract local investors to share investment with foreign investors and so on. After agreeing to fulfill this requirement by the investor, in case of failure to comply with it (fully or partly), the host state posses the power to terminate or interfere with the foreign investment. This right arises as a matter of the internal law of the host state and exercising of this right cannot amount to an international wrong provided due process standards have been met (Sornarajah, 2010).

In *Amco v Indonesia*,[1] one of the conditions on which the foreign investor was permitted to partake in the venture in Indonesia for building a tourist complex in a joint venture with an Indonesian partner, was that he would bring an agreed amount of money into the country from overseas to capitalize the project. Under the law, he would have had to acquire certificates from the Bank of Indonesia to prove that such money had in fact been brought into the state. It was claimed that he had not brought in such money. Despite the fact that the foreign investor claimed that he had done so, there was no certification to this effect from the Bank of Indonesia. This was used as one of the reason for the termination of the contract by the administrative agency. The preliminary ICSID tribunal ruled in favour of the foreign investor, but the reward was nullified on the ground that the tribunal had not given adequate thought to the matter connecting to capitalisation. A new tribunal later also gave judgement in favour of the foreign investor on the ground that an appropriate process had not been followed in the termination of the foreign investor's privileges to function in the country; as the choice to revoke was not taken according to due procedure standards. The tribunal ruled that there had been a denial of justice for which liability arose. The ruling gives rise to the essential conclusion that, if minimum standards of procedural safeguards had been given to the foreign investor before a decision had been taken, the cancellation of the privileges would have been justified (Sornarajah,

[1] (1983) 23 *ILM* 354; (1988) 27 *ILM* 1281.

2010).[1] The Indonesian position in challenging the initial award has been explained by Reisman in the following terms:

"Indonesia apparently felt that it had to challenge the award because if a country establishes a programme to induce foreign investment and grants licences on the basis of that programme, but discrepancies of as much as sixteen percent of the foreign commitment to invest are internationally determined to be irrelevant such that the host government may not terminate the licence, the country will find itself in the position of being unable to enforce its own law." (Reisman, 1989)

This circumstances obviously has importance for considering whether a regulatory interference could amount to an expropriation. Where the foreign investor fails to conform to requirements that were imposed at the time of entry, and the investment is terminated as a sanction for such failure, an argument that the interference amounts to expropriation can scarcely be maintained. Prudence would require that procedural safeguards precede such interference.[2]

The authors now will analysis the FDI governing laws and policies of Bangladesh in relation to capitalization requirement. Bangladesh has adopted the followings in relation to FDI over the years, namely:[3]

(1) The Foreign Private Investment (Promotion and Protection) Act 1980 (FPIA 1980);
(2) The Bangladesh Export Processing Zones Authority Act 1980 (BEPZA 1980);

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[1] The judgement also raised the question whether it was a regulatory expropriation by Indonesia.
[2] It is interesting to consider whether what took place in *Amco v Indonesia* was a regulatory expropriation.
[3] http://bida.gov.bd accessed on 28 December 2018.

(3) The Bangladesh Private Export Processing Zones Authority Act 1980 (BPEPZA 1996);
(4) The Bangladesh Economic Zones Act 1980 (BEZA 2010);
(5) The National Industrial Policy 2016 (NIP 2016);
(6) The Bangladesh Investment Development Authority Act 2016 (BIDA 2016).

The FPIA 1980 as a core legislation offers a legal framework for the protection of FDI including fair and equitable treatment, equal treatment of foreign and local investments, safeguarding foreign investment from expropriation, and assuring the repatriation of finance and profit deriving from share disposal. Both the BEPZA Act 1980 and the BPEPZA 1996 offers a secure and conducive location for foreign companies with plenty of fiscal and non - fiscal initiatives. The BEZA founded the Bangladesh Economic Zones Authority in November 2010 with topmost priority to attract more FDI and to increase and diversify country's export to the world. The objectives of the NIP 2016 includes sustainable and inclusive industrial growth through generation of productive employment to create new entrepreneurs, mainstreaming women in the industrialisation process and international market linkage creation and transition to mid-income country by 2021. The aim of the BIDA Act 2016 is to encourage foreign investment in private sectors, identify hindrances to investment and provide necessary facilities and establishment of industries.

In Bangladesh, the above-mentioned FDI laws and policies has no provision in relation to foreign capitalisation. The foreign investors are only required to obtain a certificate from the Bangladesh Bank by declaring the amount they would invest in a particular joint-venture project.[1] Due to lack of regulations, the government cannot impose an obligation to the foreign investors to

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[1] "Files", Ministry of Finance, accessed 23 December 2018, https://mof.portal.gov.bd/sites/default/files/files/mof.portal.gov.bd/page/e8bc0eaa_463d_4cf9_b3be_26ab70a32a47/Ch-08%20(English-2017)_Final.pdf.

bring in all or a particular percentage of its capital from overseas. Therefore, Bangladesh is suffering from the shortage of foreign currency, and situation gets worse when the MNEs raise capital from the local banks through their local partners.[1] As a result, local savings that could be utilised for other benefited projects in Bangladesh, has been absorbed into serving the interest of the MNEs or foreign investors.[2]

Therefore, in Bangladesh, imposing a capitalisation requirement is a must, because it will also help to encourage the local investors and give them an opportunity to invest in a project with the MNEs. This will also assist to develop the local industries and service sectors. Sometimes, the foreign investors do not bring capital from overseas, instead, take loan from the local banks in Bangladesh with a low rate of interest and then invest the amount in a particular project. These kinds of activities are affecting seriously the development-objectives as mentioned in section 3 of the FPIA 1980. In such a situation, the government should apply the capitalisation requirement as an entry condition of FDI and require the foreign investors to bring capital from overseas. If they fail to comply with the obligation, then the government has the sovereign right to reject an investment proposal or even can terminate the permission of FDI. If the government follows due standard process, then it will not be considered as a violation of the international law.[3]

3. Significance of Capitalisation Requirement for Foreign Investors in Malaysia

Malaysia first adopted the Malaysia Investment Development Authority Act 1965 to regulate FDI and thereafter, enacted other

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[1] Mohammad Omar Faruk, 'The effect of FDI to accelerate the economic growth of Bangladesh and some problems & prospects of FDI,' *Asian Business Review,* 2015, 2(2) (2015): 37-43.

[2] "Foreign Exchange Reserve", Bangladesh Bank, accessed on 18 March 2019, https://www.bb.org.bd/econdata/intreserve.php

[3] *Amco v Indonesia* (1983) 23 *ILM* 354; (1988) 27 *ILM* 1281.

laws in relation to FDI. In Malaysia, the relevant laws of FDI are as follows:[1]

(1) The Malaysia Investment Development Authority Act 1965 (MIDA 1965);
(2) The Companies Act 2016 (CA 2016);
(3) The Industrial Coordination Act 1975 (ICA 1975);
(4) The Promotion of Investment Act 1986 (PIA 1986);
(5) The Ministerial Functions Act 1969 (MFA 1969);
(6) The Countervailing and Anti-Dumping Duties Act 1998 (CADDA 1998);
(7) The Safeguards Act 2012 (SA 2012).

The Government of Malaysia under the MIDA 1965 established the Malaysia Investment Development Authority (MIDA). The primary function of MIDA is to increase the inflow of FDI and provide guidance to the foreign investors in services and manufacturing sectors in Malaysia. The CA 2016 is the principal law, which governs the entry and practice of the foreign investors in Malaysia. According to the ICA 1975, the foreign investors must obtain license if the minimum capital is MYR 2.5 million or employs at least 75 full-time individual staff. The PIA 1986 provides a spectrum of incentives to attract FDI. Moreover, the MFA 1969 authorises government ministries to oversee investments under their jurisdiction. The CADDA 1998 provides for the investigation, the determination of dumping and the imposition of anti-dumping duties. It is the primary law that provides for trade remedies in Malaysia. With regard to safeguard measures, Malaysia enacted the SA 2012 to fulfill its obligations as a World Trade Organization (WTO) member.[2]

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[1] "Publications", MIDA, accessed 1 January 2019, http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20327.pdf.

[2] "Publications", MIDA, accessed 1 January 2019, http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20327.pdf.

The first formal securities business organisation in Malaysia was the Singapore Stockbrokers' Association, established in 1930. It was re-registered as the Malayan Stockbrokers' Association in 1937. The Malayan Stock Exchange was established in 1960 and the public trading of shares commenced. In 1964, the Stock Exchange of Malaysia was established. With the secession of Singapore from Malaysia in 1965, the Stock Exchange of Malaysia became known as the Stock Exchange of Malaysia and Singapore. The Kuala Lumpur Stock Exchange, which was incorporated on December 14, 1976 as a company limited by guarantee, took over the operations of the Kuala Lumpur Stock Exchange Berhad in the same year. On April 14, 2004, the name was changed to Bursa Malaysia Berhad and on 18 March 2005, Bursa Malaysia was listed on the Main Board of Bursa Malaysia Securities Berhad.[1]

In Malaysia, there are three markets: Main Market, ACE Market and LEAP Market.[2] As a general rule of thumb, large companies that have paid-up capital more than RM50 million could seek listing on the Main Market, while fast growing companies that have paid-up capital approximately RM5 million to RM10 million may seek for listing on ACE Market.[3] For a smaller company, based on our

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[1] See History, Bursa Malaysia, accessed on 9 July 2019, https://web.archive.org/web/20070419190041/http://www.klse.com.my/website/bm/about_us/the_organisation/history.html.

[2] The ACE Market that stands for 'Access, Certainty, Efficiency', is actually the new name for the formerly known MESDAQ (Malaysian Exchange of Securities Dealing and Automated Quotation) market. MESDAQ came into existence in 1997 when it was the home of mainly technological stocks and today the ACE Market under Bursa Malaysia replaces it. The ACE Market was derived together with the unification of the Main and Second Board into the Main Market of Bursa Malaysia in 2009. Bursa Malaysia has announced a new market namely 'Leading Entrepreneur Accelerator Platform (LEAP)' on 15 June 2017. The LEAP market complemented both the Main Market and ACE Market to address the funding gap faced by small and medium-sized enterprises (SMEs).

[3] See "Main Market Listing Requirements", Bursa Malaysia Securities Berhad, accessed on 8 July 2019,

understanding, a paid-up capital of RM2 million is suitable for the LEAP Market. Additional listing requirements, such as "Profit Test", "Market Capitalization Test" or "Infrastructure Project Corporation Test" is mandatory for listing on Main Market; while there is no strict test requirement for listing on ACE or LEAP Market.[1] Therefore, the clients are not aware about the track record of the ACE or LEAP listed companies, thus, in many cases have lost their investments due to companies poor performance (Raza, 2019). Moreover, in a study, the descriptive statistics analysis reveals that ACE Market companies do not perform better for the three-year test period; as a result, the number of listed stocks on the ACE Market is declining (Sulong, 2013). In such a case, the government may consider to reform the legal framework of both Markets.

One of the major differences between private and public companies is the fact that private companies cannot raise capital from the general public. In general, private companies capitalise through the founder's personal savings or bank loans. The public company, in contrast, is a vehicle designed specifically to raise large amounts of capital from the general public. As a result of its ability to raise large amounts of capital from the general public, the public company is directly subject to more onerous requirements; for example, s.763 of the Companies Acts 2006 of UK requires public companies to have a minimum capital of £50,000 (Talbot, 2015).

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http://www.bursamalaysia.com/misc/system/assets/15741/Consolidated_listing_requirement_main_market_consolidated_3Jun20192.pdf.

[1] In order to get listing in the Main Market, any company must provide a profit figure and uninterrupted profit after tax or profit after tax (PAT) of 3 to 5 full financial years, with an aggregate of a minimum of RM20 million; and a minimum of RM6 million PAT in the latest full financial year.[1] In addition, the company must also fulfill the 'Market Capitalisation Test', where the company must be able to offer a minimum of RM500 million totals in market capitalisation once it goes public; and incorporated and generated operating revenue of 1 full financial year before submission for listing. Furthermore, the company must provide details for the 'Infrastructure Project Corporation Test', where it must show that it has the ability and right to construct an infrastructure project in or outside of the country; with a minimum of RM500 million in project cost.

In Malaysia, sections 561-579 of the Companies Act 2016 (CA 2016) have provisions for foreign companies. Section 561 imposes prohibition on foreign companies to carry on business without registration including fulfilment of other requirements. However, as per the CA 2016, there is no minimum paid-up capital requirement to setup a foreign company. The reasons for foreign companies be subject to more onerous regulation than private companies due to their ability to raise capital from the general public; and simply have a greater potential to have a detrimental effect on the general public. If funds are to be available to businesses, the public needs to have confidence in the integrity of the individual foreign company; and more importantly, in the marketplace in which the foreign company raises capital (McLaughlin, 2018). Moreover, without any legal provision, the government cannot require any foreign investor to bring in all; or a particular percentage of its capital to overcome the shortage of foreign currency, and solving balance of problem issue (Salim, 2018).[1]

However, most government agencies, banks or other entities require that a company should meet a minimum amount to be considered for any application for a loan; licence; tender; as well as any business dealings. For example, the Immigration Department of Malaysia would require a minimum capital of RM500,000 for a foreign company to make a visa application; but the existing CA 2016 lacks any specific provision in this regard (Siddiqui & Armstrong, 2018).[2] It has been reported that few foreign companies has opened bank account without actually transferring the paid-up capital into the bank with the help of officers (due to personal relationship or offering bribe) (Nabilaa, 2019). Therefore, if the foreign investors are not required to bring in their capital

[1] Moreover, the BITs and MIAs of Malaysia has no specific reference to capitalisation requirement, see M. Kituyi, UNCTAD, accessed on 5 January 2019, https://investmentpolicyhub.unctad.org/IIA/CountryBits/127#iiaInnerMenu.
[2] See also, *Amco v Indonesia* (1983) *ILM* 354; (1988) 27 *ILM* 1281;

investments from overseas, then an assumed benefit of FDI that it leads to capital inflows from home state into Malaysia will be nullified (Sornarajah, 2010).

From the above discussion, it appears that capitalisation requirement is important as an entry requirement of FDI in Bangladesh and Malaysia; however, the existing laws and policies do not cover this requirement. In absence of any laws, it is the BITs, which generally govern the trade relationship between the contracting parties.

4. Capitalisation Requirement for Foreign Investors and BITs of Bangladesh and Malaysia

Since independence, Bangladesh and Malaysia has signed 30 and 66 BITs respectively with different countries in the world. Bangladesh has signed its first BIT with United Kingdom in 1980 and Malaysia has signed its first BIT with Germany in 1960.[1] Now the authors will analyse the Bangladesh and Malaysia BITs with same countries in order to find out if they contain any provision in relation to capitalisation requirement.[2]

The following table-1 is the summary of the comparison between Bangladesh and Malaysia signed BITs with other (same) countries in relation to capitalisation requirement:

Table-1: Comparison between Bangladesh and Malaysia BITs with other (same) countries

[1] Bangladesh and Malaysia signed BITs are available on https://investmentpolicyhub.unctad.org/IIA/CountryBits/127#iiaInnerMenu

[2] All BITs are available at "Investment Laws", UNCTAD, accessed 23 December 2018, https://investmentpolicyhub.unctad.org/IIA/country/16/treaty/390.

Country	Signing date & present status		Capitalisation requirement		FDI protection	
	BD	ML	BD	ML	BD	ML
Bangladesh-Malaysia	20/10/1994 In force	20/10/1994 In force	N	N	MFN, FET	MFN, FET
Austria	22/12/2000 In force	12/04/1985 In force	N	N	NT, MFN, FET	MFN, FET
Belgium - Luxembourg Economic Union	22/05/1981 In force	22/11/1979 In force	N	N	MFN, FET	MFN, FET
Denmark	05/11/2009 In force	06/01/1992 In force	N	N	NT, MFN, FET	NT, MFN, FET
Germany	06/05/1981 In force	22/12/1960 In force	N	N	NT, MFN, FET	NT, MFN
India	09/02/2009 In force	03/08/1995 Terminated (24/03/2021)	N	N	NT, MFN, FET	NT, MFN, FET
Korea	21/06/1999 Signed	11/04/1988 In force	N	N	NT, MFN, FET	NT, MFN, FET
Netherlands	01/11/1994 In force	15/06/1971 In force	N	N	NT, MFN, FET	NT, MFN, FET
Romania	13/03/1987 In force	25/06/1996 In force	N	N	MFN	MFN, FET
Switzerland	14/10/2000 In force	01/03/1978 In force	N	N	NT, MFN, FET	NT, MFN, FET
Turkey	12/04/2012 Signed	25/02/1998 In force	N	N	NT, MFN, FET	MFN, FET
UAE	17/01/2011 Signed	11/10/1991 In force	N	N	NT, MFN, FET	NT, MFN, FET
UK	19/06/1980 In force	21/05/1981 In force	N	N	NT, MFN, FET	NT, MFN, FET
Uzbekistan	18/07/2000 In force	06/10/1997 In force	N	N	FET	MFN, FET
Vietnam	01/05/2005 Signed	21/01/1992 In force	N	N	MFN, FET	MFN, FET

BD=Bangladesh, ML=Malaysia, N=No, NT=National treatment, MFN=Most-favoured nation treatment, FET=Fair and equitable treatment

From the above table, it can be seen that Bangladesh and Malaysia BITs has no specific reference to capitalisation requirements to be fulfilled by the foreign investors at pre-entry stage. All BITs mainly cover dispute settlement mechanism and provides FDI protections such as – fair and equitable treatment, most-favoured nation treatment, national treatment.[1]

5. Capitalisation Requirement for Foreign Investors in Different Countries

The developed countries such as China, Russia, Canada and others have specific FDI laws, including many developing and LDCs; but unfortunately, till to date, Bangladesh has failed to adopt any a FDI Act. The table below shows the laws of the LDCs and developing countries under which they could require the foreign investors to fulfil minimum capitalisation obligation during entry stage:

[1] See Mohammad Belayet Hossain, 'Fleshing out the provisions for protecting foreign investment', *Yustisia Jurnal Hukum*, 2018, 7(3): 406-427.

Table-2: Capitalisation requirement covered by laws of different countries

Country	Relevant Law regarding capitalisation requirement	Amount of foreign capital requirement
Albania	Article 8, Law on Strategic Investments in the Republic of Albania 2016	EUR 30,000,000.00
Angola	Article 2, Private Investment Law 2015	Kz 50,000,000.00
Chile	Article 2, Marco Para la Inversión Extranjera Directa en Chile 2015	USD 5,000,000.00
Congo	Article 8, Code des Investissements (2002)	USD 2,00,000.00
Ethiopia	Article 11, Investment Proclamation No. 769/2012 (2012)	USD 2,00,000.00
Georgia	Article 6, Law on the Investment Activity Promotion and Guarantees (1996)	USD 1,00,000.00
Ghana	Section 24, Ghana Investment Promotion Centre Act (2013)	USD 2,00,000.00
Iraq	Article 7, The Investment Law No. (13) of 2006 (2006)	USD 2,50,00,000.00
Liberia	Schedule, Investment Act of 2010 (2010)	USD 3,00,000.00
Mauritius	Part I, Investment Promotion Act 2000 (2001)	USD 1,00,000.00
Mongolia	Article 3, Law on Investment (2013)	USD 1,00,000.00
Oman	Article 2, Foreign Capital Investment Law (1994)	USD 5,00,000.00
Philippines	Section 8, Foreign Investment Act of 1991 (1991)	USD 1,00,000.00
Tanzania	Section 2, Tanzania Investment Act, 1997 (1997)	USD 3,00,000.00
Timor-Leste	Article 10, Private Investment Law (2011)	USD 1,500,000.00
Venezuela	Article 19 Ley Constitucional de Inversión Extranjera Productiva (2017)	USD 8,00,000.00

From the above table, it appears that the host countries mentioned are in similar position like Bangladesh, or comparatively economically weaker than Malaysia; but their FDI law imposes the capitalisation requirements as an entry condition of FDI. So it is questionable that why the FDI related laws or policies of Bangladesh

and Malaysia do not impose capitalisation requirement as an entry condition?

Moreover, even though the Bangladesh and Malaysia BITs contains that the FDI shall be regulated "according to the host country's laws, regulations and policies", but the existing laws has no reference to capitalisation requirements. Therefore, in absence of any laws or policies, the regulators cannot impose this requirement to the foreign investors through BITs, even though the practical situation demands.

Furthermore, there are host countries that used to be developing countries, but through proper regulation of FDI, have emerged as an economically powerful state nation in the world. For example, China (article 26 of the Foreign Investment Law of the People's Republic of China 2015) and Vietnam (article 48 of the Law on Enterprise 2014) has specific provision regarding capitalisation requirements, which must be fulfilled by the foreign investors.

6. Conclusion

From the above discussions and findings it appears that both Bangladesh and Malaysia laws, policies or BITs lacks any provision regarding capitalisation requirement. The FDI laws of both countries have provisions only to promote the inflow of FDI and after post-entry, provide different incentives and protections to the foreign investors. In absence of a global treaty or specific Act, regulating FDI in both states, is mainly depended upon the BITs; but there is no specific reference in the BITs either. Without proper regulations, there is a huge possibility of dispute between the contracting parties. Moreover, FDI related laws are scattered and in most cases, not adequate to regulate the FDI.

There are evidences which shows that only liberalisation does not necessarily result in the increased inflow of FDI in the host states. For example, according to the United Nations Conference on Trade

and Development (UNCTAD) report in 1999, there are many African states that have a very liberal investment regulation but failed to attract the inflow of FDI. In contrast, China has a restrictive investment regime; even then it has been the largest recipient of FDI amongst the developing world since 1992. Similarly, Thailand, Vietnam have more strict regulation comparing to the Latin American states but they are receiving more FDI than the latter.

In recent years, many academics and scholars also expressed their concern on protecting the national and socio-economic interests of host states and suggested for strict regulation of FDI by minimising liberal approach. The scholars, such as - Seid proposed 'regulated openness' of investment regimes where both regulation and openness co-exist in a balanced and pragmatic manner (Sherif, 2018). Sornarajah proposed a 'middle path' (Sornarajah, 2010) and Solomon and Mirsky hold that FDI legislations should be enacted in the consideration of some common problems that are significantly related to the development goals of FDI (Soloman, & Mirsky, 1990).

In practice, both liberalisation and restrictive regulation could have positive and negative effects in both states, so they should design their laws or BITs in a balanced way to meet their peculiar needs at any particular time. Bith Bangladesh and Malaysia can follow the footsteps of other LDCs and developing countries as discussed above and take guidelines from them if necessary. Based on the WTO principle of 'reciprocity' both states should design their FDI laws, policies and BITs in such a way that all parties interest are preserved equally, thus the economic relations will sustain for a long time between them. Moreover, it is necessary to insert capitalisation requirement through legal or policy documents or BITs to control foreign investment in sensitive fields by setting conditions; and FDI must satisfy for the purpose of national interest, fulfill social and economic development objectives.

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