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## **‘Screening of Foreign Investments and the Bilateral Investment Treaties of Malaysia’**

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**Abstract:** *In absence of any global treaty, the bilateral investment treaties are playing an important role of regulating foreign investments in the host countries. According to the United Nations Conference on Trade and Development, there are 2361 bilateral investment treaties are in force and like other members of the World Trade Organization Malaysia also signed bilateral investment treaties to facilitate trade. The primary purpose of economic globalization is the economic development of the developing and least-developed countries as well as to facilitate benefits of the home states. Malaysia foreign investment laws and bilateral investment treaties mainly protects foreign investors, however, neither of them has any specific provision regarding screening of foreign investments. This paper addresses two questions: (a) Do the bilateral investment treaties of Malaysia allow the host state for screening of foreign investments at entry stage? (b) Should the screening of foreign investments be required during the entry of foreign direct investment in Malaysia? Using doctrinal research method, we critically analyzed 15 bilateral investment treaties to explore whether there is any reference for screening of foreign investments in Malaysia. We find that the existing Malaysia bilateral investment treaties has provisions to promote and protect foreign investments but has no reference in relation to screening of foreign investments, therefore, the government of Malaysia should consider this important factor while signing any future bilateral investment treaties.*

**Keywords:** *Bilateral investment treaties, World Trade Organization, screening of foreign investments, foreign direct investment, Malaysia.*

### **1. Introduction**

The bilateral investment treaties (BITs) are a kind of mutual agreement between two capital importing and exporting states, which regulates the foreign investment in host state. The key objective is to safeguard the foreign investment against nationalisation or expropriation and in case any of them occurs, obtain compensation as per international minimum standard. Depending on the individual investment concerned, the negotiators of both countries determines the terms and conditions of the BITs. So there may be many BITs between the same countries but each of them may have different terms and conditions to determine their obligations.<sup>1</sup>When a BIT is concluded, is applicable to nationals and companies in both countries under the local foreign direct investment (FDI) laws and policies. As BITs are mainly created by the negotiation of the two countries and by

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<sup>1</sup>Bernard Kishoiyian, ‘The utility of bilateral investment treaties in the formulation of customary international law’, *Nw. J. Int’l L. & Bus.* 14 (1993), at 327; See also Surya P. Subedi, *International Investment Law: Reconciling Policy and Practice* (Hart Publishing, 2008).

nature, differ from each other, therefore, till to date there is no global treaty which could regulate all BITs in the world.<sup>2</sup>

Since independence, Malaysia has signed 66 BITs with different countries in the world and has signed its first BIT with Germany in 1960.<sup>3</sup> This paper analysed the BITs signed by Malaysia with 15 countries in order to find out if they cover (fully or partly) screening of foreign investments.

## 2. Literature Review

Dunning's so-called OLI model states that FDI is undertaken if ownership-specific advantages ("O") like proprietary technology be existent concurrently with location-specific advantages ("L") in host countries, e.g., low factor costs, and potential benefits from internalisation ("I") of the production process overseas.<sup>4</sup> Since 1990s due to the growth of multinational enterprises, the world witnessed a rapid proliferation of BITs. As such, the number of BITs in the world reached to 2971 as of January 2019, up from 385 at the end of the 1980s.<sup>5</sup> Therefore, the analytical focus of empirical models on the factors determining FDI has shifted from conventional determinants of locational advantages to policy-oriented issues, like exchange rate and openness as well as to the governance and human development areas and lately to liberalization under BITs, bilateral trade agreements (BTAs) and regional trade agreements (RTAs).<sup>6</sup>

Basically, there is inadequate and alternate indication of the FDI effects of BITs, especially in the perspective of developing and least-developed host states. Egger and Pfaffermayr analysed OECD data and found that due to the signing of BITs by the developing host states, it encourages the foreign investors to choose to invest in the developing states.<sup>7</sup> Busse also concluded the same as Egger and Pfaffermayr.<sup>8</sup> Plummer and Cheong<sup>9</sup> reveals that BITs signed by the ASEAN states exert affirmative but trivial effects on inward FDI but Ullah<sup>10</sup> found a negative important effect for the complete example of 34 home and 74 host states. Mina asserts that FDI-seeking host states may perhaps make an effort to sign BITs in tandem with improving their institutional functions.<sup>11</sup>

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<sup>2</sup>Hossain, Mohammad Belayet and Rahi, Saida Talukder. "International Economic Law and Policy: A Comprehensive and Critical Analysis of the Historical Development." *Beijing Law Review* 9, no. 04 (2018): 524.

<sup>3</sup>Malaysia BITs are available on

<https://investmentpolicyhub.unctad.org/IIA/CountryBits/127#iialInnerMenu>

<sup>4</sup>J.H. Dunning, "Trade, location of economic activity and MNE: a search for an eclectic approach", in *The International Allocation of Economic Activity*, ed. B. Ohlin (Macmillan, London, 1977), 395-418; J.H. Dunning, *Explaining International Production* (Unwin Hyman, London, 1988).

<sup>5</sup>"Bilateral Investment Treaties," UNCTAD, accessed 24 January 2019, <https://investmentpolicyhub.unctad.org/IIA>

<sup>6</sup>Muhammad Shariat Ullah and Kazuo Inaba, "Liberalization and FDI Performance: evidence from ASEAN and SAFTA member countries," *Journal of Economic Structures* 3, no. 1 (2014): 6.

<sup>7</sup>P. Egger and M. Pfaffermayr, "The impact of bilateral investment treaties on foreign direct investment," *J Comp Econ* 32, no. 4 (2004): 788–804.

<sup>8</sup>M. Busse *et al.*, "FDI promotion through bilateral investment treaties: more than a BIT?," *Rev World Econ* 146, no.1 (2010):147–177.

<sup>9</sup>MG Plummer and D Cheong, "FDI effects of ASEAN integration," *Rég Dév* 29, no.1 (2009): 49–67.

<sup>10</sup>Muhammad Shariat Ullah and Kazuo Inaba, "Liberalization and FDI Performance: evidence from ASEAN and SAFTA member countries," *Journal of Economic Structures* 3, no. 1 (2014): 6.

<sup>11</sup>WM Mina, "The institutional reforms debate and FDI flows to the MENA region: the "best" ensemble," *World Dev* 40, no. 9 (2012): 1798–1809.

Hallward-Driemeier finds modest proof that BITs have encouraged FDI flows from the OECD countries to the least-developed and developing states.<sup>12</sup>

Blonigen and Wang contend that in the least-developed and developing states the factors determining the location of FDI differ steadily in a way that is not captured by the present experimental models of FDI.<sup>13</sup> Chantasawat analysed Asian host states of both major FDI-making countries (eg. the Republic of Korea, Malaysia, and Singapore) and major FDI-seeking countries (eg. Indonesia and Thailand) and found that countries' performances in hosting FDI differ significantly.<sup>14</sup> Plummer and Cheong<sup>15</sup>, and Vogiatzoglou<sup>16</sup> also concluded that the FDI effects of BITs and of institutional characteristics are quite insufficient in the perspective of states that are principally FDI-receiving, instead of FDI-making. Therefore, it is noticeable that the literature lacks consensus on the relationship between FDI and BITs.

The FDI is seen as producing unequal income distribution, which in turn may result in less growth. It is said that FDI creates a foreign dominated local high income-group or elite who formulate policies and enact laws that protect foreign interest and ignore the needs of the people. The result is smaller income shares and lower standard of living for majority of the people in the host country.<sup>17</sup> In other cases, foreign investment is prohibited or discouraged from areas or activities where the host country believes domestic entrepreneurship and capability is adequate or can be developed, either because such activities do not require much capital investment or because they are relatively less complex.<sup>18</sup> Proponents of state intervention argue that protection of infant industries in developing countries from the competition of industries in already developed countries is essential for national development. This view is opposed by neoclassical economists on the ground that resources should be allocated according to comparative or relative advantage.<sup>19</sup>

As the administrative, technical and managerial capabilities of host countries increased, they became more confident and sophisticated in their abilities to gain greater economic benefits from FDI, thus should make regulatory control of FDI a necessary alternative.<sup>20</sup> It is argued that a rapid increase in FDI stock could exacerbate the balance-of-payment problems of the host state. To avoid

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<sup>12</sup>M. Hallward-Driemeier, "Do bilateral investment treaties attract FDI? Only a bit ... and they could bite," Policy research working paper 3121 (World Bank, Washington, 2003).

<sup>13</sup>BA Blonigen and M Wang, "Inappropriate pooling of wealthy and poor countries in empirical FDI studies," Working paper 10378 (NBER, Cambridge, 2004).

<sup>14</sup>B. Chantasawat *et al.*, "FDI flows to Latin America, East and Southeast Asia, and China: substitutes or complements?," *Rev Dev Econ* 14, no. 3 (2010): 533–546.

<sup>15</sup>MG Plummer and D Cheong, "FDI effects of ASEAN integration," *Rég Dév* 29, no.1 (2009): 49–67.

<sup>16</sup>K. Vogiatzoglou, "Vertical specialization and new determinants of FDI: evidence from South and East Asia," *Glob Econ Rev* 36, no. 3 (2007): 245–266.

<sup>17</sup>John M. Rothgeb Jr, "Developing Countries: A Comparative Regional Analysis," *Foreign Direct Investment in a Changing Global Political Economy* (2016): 188.

<sup>18</sup>Sherif H. Seid, *Global regulation of foreign direct investment* (Routledge, 2018), 22.

<sup>19</sup>Richard Grabowski, "The successful developmental state: Where does it come from?," *World Development* 22, no. 3 (1994): 413–422. See further Alemayehu Geda, "The Success Story of East Asian and African Developmental States and the Lesson for Africa: With a Focus on Trade and Industrialization Policy," *Researchgate* (2017).

<sup>20</sup>C.R. Kennedy, "Relations between Transnational Corporations and Governments of Host Countries: a look to the future", *Transnational Corporations* 1, no. 1 (1992): 67–91. See further Geoffrey Jones, *Multinationals and global capitalism: From the nineteenth to the twenty first century* (Oxford University Press, 2005).

this problem, state should constrain the rate of FDI to not exceed the growth rate of local investment.<sup>21</sup>

Some governments that are very keen to attract FDI, are sometimes reluctant to put in place the proper regulatory mechanisms, which might deter foreign investors from investing in their countries.<sup>22</sup> Among countries that had the fastest economic growth in the past decade, most of them were favourably disposed towards FDI.<sup>23</sup> In fact, it now appears that there is an emerging broad consensus among both developing and developed countries that FDI can hasten economic growth and that any possible adverse effects can be controlled.<sup>24</sup> Therefore, in order to realize the full potential of FDI, it is necessary for any government to have an interventionist role and adopt a policy that is selective with respect to projects and the volume and timing of FDI inflows.<sup>25</sup>

### **3. Methodology**

The aim of this study was to identify whether bilateral investment treaties has any provision in relation to screening of foreign investments in Malaysia. The questions of this study are:

- (a) Do the bilateral investment treaties of Malaysia allow the host state for screening of foreign investments at entry stage?
- (b) Should the screening of foreign investments be required during the entry of foreign direct investment in Malaysia?

Using doctrinal research method, we critically analyzed 15 BITs signed by Malaysia with different countries. Our analysis focused on screening of foreign investments factor as well as foreign investment protections such as - most-favoured nation treatment, national treatment, fair and equitable treatment, full protection and security, dispute settlement mechanisms.

### **4. The World Trade Organization (WTO) principles and FDI**

When World Trade Organization (WTO) came into existence in 1995, replacing General Agreement on Tariffs and Trade (GATT), provided guidelines on how to regulate FDI in host countries. The main objective of General Agreement on Tariffs and Trade (GATT) was the liberalisation of international trade, and that remains the main objective of the World Trade Organization (WTO) regime. The system aims to achieve the liberalisation of trade by these principles: (a) most-favoured nation treatment (MFN); (b) national treatment (NT); (c) reciprocity;

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<sup>21</sup> Martin Khor, *Vital Issues for WTO: Developed and Developing Nations Differ on Need to Discuss Investment Pact Now* (Singapore, 1996). See also Martin Khor, "Third World Network," *Global Economy Series* 4 (2005).

<sup>22</sup> Sherif H. Seid, *Global regulation of foreign direct investment* (Routledge, 2018), 14.

<sup>23</sup> John H. Dunning, *International Production and the Multinational Enterprise (RLE International Business)* (Routledge, 2013), 558.

<sup>24</sup> I. Shihata, "Promotion of FDI-A General Account, with particular reference to the role of the World Bank Group", *ICSID Review* 6 (1991): 484-509. See further Sergio Puig and Gregory Shaffer, "Imperfect Alternatives: Institutional Choice and the Reform of Investment Law," *American Journal of International Law* 112 (2018):361.

<sup>25</sup> Sherif H. Seid, *Global regulation of foreign direct investment* (Routledge, 2018), 30.

(d) non-discrimination and (e) dispute settlement mechanism.<sup>26</sup> On the one hand, following the World Trade Organization (WTO) principles, the developing countries are liberalizing their national laws and policies on FDI but on the other hand, many developed countries (who are also members of World Trade Organization) imposing restrictions on the flow and activities of FDI. The various laws and policies of the developed and other countries most commonly cover screening of foreign investment.<sup>27</sup>

**Table 1: Factor covered by different jurisdictions<sup>28</sup>**

<b>Factor</b>	<b>Countries</b>	<b>Statutes</b>
Screening of foreign investments	Australia	Article 25(1A) of the Foreign Acquisition and Takeovers Act 1975
	Iceland	Articles 3-4 of the Act on Investment by Non-residents in Business Enterprises 1991
	China	Article 4 of the Law on Chinese-Foreign Equity Joint Ventures 1990
	Indonesia	Article 12 of the Law Concerning Investment 2007
	Philippines	Sections 8 & 15 of the Foreign Investment Act of 1991
	Qatar	Article 2 of the Law on Organization of Foreign Capital in the Economic Activity 2000
	Saudi Arabia	Articles 3 & 18 of the Foreign Investment Law 2000

*Source: Researcher’s own findings.*

## **5. Screening of Foreign Investments**

The host state very often requires the foreign investment proposal to go through screening procedures before initiating any business operation in order to decide on the approval or rejection of the proposal.<sup>29</sup> The host state applies this procedure to examine or evaluate the proposal to find out the potential impact on the local economy or suitable to fulfill the economic goals of the country or fulfilled the established guidelines as set out by the law and policies.<sup>30</sup> There are many BITs made in recent years that provides for the right of entry and establishment of foreign investment in the host states. These treaties extend national treatment to the pre-entry phase as well but the right is not recognized as an absolute right as parties to these treaties continue to made wide limitations on entry into certain sectors. They also exempt some of their laws from the scope of investment treaties through the use of appropriate formulae. This, many investment principles define the FDI

<sup>26</sup> Mohammad Belayet Hossain, “Fleshing out the provisions for protecting foreign investment,” *Yustisia Jurnal Hukum*, vol 7, no. 3, Sep-Dec, 2018, 406-427.

<sup>27</sup> See Muthucumaraswamy Sornarajah, *The international law on foreign investment* Cambridge University Press, 2010), 104-111; F.V. Garcia-Amador *et al.*, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (NY: Dobbs Ferry, 1974), 369. *Azinian v Mexico*, ICSID case no. ARB(AF)/97/2.

<sup>28</sup> These are different jurisdictions whose legislations also cover screening of foreign investment, due to limitation some of them has been selected as examples.

<sup>29</sup> For examples – Tanzania [the National Investment (Promotion and Protection) Act 1990], Uganda (the Investment Code 1991), Zimbabwe (the Promotion of Investment: Policy and Regulation, 1991).

<sup>30</sup> See Surya P. Subedi, *International Investment Law: Reconciling Policy and Practice* (Hart Publishing, 2008).

given protection by the treaty as foreign investment ‘made in accordance with the laws and regulations’ of the host state.<sup>31</sup>

Generally, the host country has an administrative agency, which regards to the impact of the FDI and ensures that it brings tangible benefits on the local economy. The agency also has the responsibility to ensure that local businesses do not suffer damage due to the entry of a powerful foreign company into an industrial sector. Many host countries have investment codes with a list of sectors in which investment by foreign investors cannot be made. Some sectors are reserved for state corporations. Some are reserved for local business people. Some legislation also identifies areas into which foreign investment may enter only in joint venture with local entrepreneurs. For example, the Mexican legislation reserves petroleum sector for Pemex, a state monopoly and other sectors are reserved for local business. When Mexico ratified NAFTA, consistent with its domestic laws, it excluded these sectors from the scope of NAFTA, which provides for both pre- and post-national treatment. Economic literature that opposes neo-liberal believes that in infant-industry protection in developing states.<sup>32</sup>

However, if any host states take any measure before or after entry, then the question of discrimination against the foreign investor may arise. In such a situation, the discrimination could be justified on economic reasons unless there is a treaty provision to provide national treatment in like circumstances. In developing host states, exclusion of certain sectors could be justified on the following grounds:

- It would be better that basic industries be handled by local entrepreneurs, as otherwise a state could be left stranded by a foreign multinational which relocates;
- The entry of a foreign business giant may stifle the emergence of an entrepreneurial class within the state or destroy infant industries;
- Local entrepreneurs cannot handle high-technology industries without help from foreign multinationals, so this sector is open to foreign investors but local entrepreneurs are capable to deal with low technology, labour-intensive areas.<sup>33</sup>

Developed host states also adopt different policies to keep foreign investors out of specific sectors due to national security ground or protecting local interest.<sup>34</sup> For instance, Australia’s Foreign Investment Policy requires all foreign investments to go through the screening procedures and the Treasurer can apply his or her discretion to block any foreign investment proposal when it

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<sup>31</sup> See Muthucumaraswamy Sornarajah, *The international law on foreign investment*. (Cambridge University Press, 2010), 104.

<sup>32</sup> See Chang, Ha-Joon. *Bad samaritans: Rich nations, poor policies, and the threat to the developing world* (New York: Random House Business, 2007).

<sup>33</sup> See Muthucumaraswamy Sornarajah, *The international law on foreign investment*. (Cambridge University Press, 2010), 105.

<sup>34</sup> F.V. Garcia-Amador *et al.*, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (BRILL, 1974), 369.

goes against the national interest of Australia.<sup>35</sup> Example also includes European Union,<sup>36</sup> Iceland (articles 3-4 of the Act on Investment by Non-residents in Business Enterprises 1991), China (article 4 of the Law on Chinese-Foreign Equity Joint Ventures 1990), Indonesia (article 12 of the Law Concerning Investment 2007), Philippines (sections 8 & 15 of the Foreign Investment Act of 1991), Saudi Arabia (articles 3 & 18 of the Foreign Investment Law 2000) and Qatar (article 2 of the Law on Organization of Foreign Capital in the Economic Activity 2000).

## **6. Malaysia BITs with different countries<sup>37</sup>**

### **A. Austria**

The Government of Malaysia signed the BIT with the Republic of Austria in 1985, which is still in force. The Preamble of the BIT desires to create favourable conditions for greater economic cooperation and recognises the promotion and reciprocal protection of the investments. This BIT provides fair and equitable treatment, full protection, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 9 and 10 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to screening of foreign investment.

### **B. Belgo-Luxembourg Economic Union (BLEU)**

The Government of Malaysia signed the BIT with the Belgo-Luxembourg Economic Union (BLEU) at Kuala Lumpur in 1979, which is still in force. The Preamble of the BIT desires to create favourable conditions for greater economic cooperation and recognises the encouragement and reciprocal protection of the investments. This BIT also provides fair and equitable treatment, full protection, most-favoured nation treatment, national treatment under international law, as well as other benefits to the investors of the home state. Article 10 and 11 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to screening of foreign investment.

### **C. Denmark**

The Government of Malaysia signed the BIT with the Kingdom of Denmark in 1992, which is still in force. The Preamble of the BIT desires to create favourable conditions for investments and to promote greater economic cooperation, and also recognizes a fair and equitable treatment of investment on a reciprocal basis. This BIT also provides full protection and security, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state.

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<sup>35</sup> Article 25(1A) of the Foreign Acquisition and Takeovers Act 1975. See Department of the Treasury web page at [www.treasury.gov.au](http://www.treasury.gov.au), accessed 30 November 2018.

<sup>36</sup> Proposal for a Union Act on the Screening of Foreign Investment in Strategic Sectors, submitted to the European Parliament by MEPs: Weber, Caspary, Saifi, I Winkler, Cicu, Proust, Quisthoudt-Rowohl, Reding, Schwab, Szejnfeld on 20 March 2017, accessed 4 December 2018, <http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/2017-03-20-Draft-Union-Act-on-Foreign-Investment.pdf>.

<sup>37</sup> All BITs are available at “Investment Laws”, UNCTAD, accessed 23 December 2018, <https://investmentpolicyhub.unctad.org/IIA/country/16/treaty/390>.

Article 10 and 11 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to screening of foreign investment.

#### D. Germany

The Government of Malaysia signed the BIT with the Federal Republic of Germany at Kuala Lumpur in 1960, which is still in force. The Preamble of the BIT desires to foster and strengthen economic cooperation and intends to create favourable conditions for investments by recognising a contractual protection of such investments. This BIT also provides most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 9 states that both countries ‘shall co-operate with each other in furthering the interchange and use of scientific and technical knowledge and development of training facilities particularly in the interest of increasing productivity and improving standards of living in their territories’. Protocol 9 states that both countries ‘shall refrain from any measures which contrary to the principles of free competition, may prevent or hinder sea-going vessels of the other Contracting Party from participating in the transport of goods that are intended for investment within the meaning of this Agreement’. Article 10 of the BIT has provisions to settle any dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to screening of foreign investment.

#### E. India

The Government of Malaysia signed the BIT with the Government of the Republic of India at Kuala Lumpur in 1995, which is terminated in 2017. The Preamble of the BIT desires to expand and strengthen economic and industrial cooperation on a long-term basis and in particular, to create favourable conditions for investments by recognizing the need to protect such investments. This BIT also provides full and adequate protection and security at all times, fair and equitable treatment, most-favoured nation treatment, as well as other benefits to the investors of the home state. Article 7 and 8 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to screening of foreign investment.

#### F. Democratic People’s Republic of Korea

The Government of Malaysia signed the BIT with the Democratic People’s Republic of Korea at Seoul in 1988, which is still in force. The Preamble of the BIT intends to create favourable conditions for investments and recognizes the need to promote and protect such investments. This BIT also provides fair and equitable treatment, full protection and security, most-favoured nation treatment, national treatment under international law, as well as other benefits to the investors of the home state. Article 3 states that with respect to investments and returns in banking and insurance sectors, most-favoured nation treatment and national treatment shall be accorded in compliance with the relevant laws and regulations of each Contracting Party. Article 9 and 10 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to screening of foreign investment.

#### G. Netherlands



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The Government of Malaysia signed the BIT with the Government of the Kingdom of Netherlands in 1971, which is still in force. The Preamble of the BIT desires to strengthen the ties of friendship and to foster and promote closer economic relations and to encourage investments on the basis of mutual benefits. As per Article 2(2), both States agree to promote co-operation within the framework of their respective laws and regulations, which would contribute towards the improvement of the standards of living of the people. Also both States undertake to promote the development of international shipping services and in all respects of vessels in waters (except coastal trade and fisheries), shall accord national and most-favoured nation treatment principles (Article-4). Article 7 facilitates the importation without payment of customs duties of goods, material and equipment for purposes of exhibitions and displays, provided that they are re-exported within due period. This BIT also provides fair and equitable treatment, most-favoured nation treatment, national treatment under international law, as well as other benefits to the investors of the home state. Article 12, 13 and 15 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. Article 17(4) only entitles the Government of the Kingdom of Netherlands to terminate the application of the present Agreement separately in respect of any of the parts of the Kingdom. The BIT has no specific reference to screening of foreign investment.

#### H. Romania

The Government of Malaysia signed the BIT with the Government of the Socialist Republic of Romania at Bucharest in 1996, which is still in force and replaced earlier signed BIT of 1982. The Preamble of the BIT desires to expand and deepen economic and industrial co-operation on a long-term basis and in particular to create favourable conditions for investments by recognizing the need to protect such investments. This BIT also provides equitable treatment at all times, full adequate protection and security, most-favoured nation treatment, as well as other benefits to the investors of the home state. Article 6 and 7 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to screening of foreign investment.

#### I. Switzerland

The Government of Malaysia signed the BIT with the Government of the Swiss Confederation at Kuala Lumpur in 1978, which is still in force. The Preamble of the BIT intends to create favourable conditions for capital investments by recognizing the need to protect such investments. This BIT provides protection in accordance with the local legislation, fair and equitable treatment, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 9 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to screening of foreign investment.

#### J. Turkey

The Government of Malaysia signed the BIT with the Government of the Republic of Turkey in 1998, which is still in force. The Preamble of the BIT desires to expand and deepen economic and industrial co-operation on a long-term basis and in particular to create favourable conditions for investments by recognizing the need to protect such investments. This BIT provides full and

adequate protection and security at all times in accordance with the local legislation, fair and equitable treatment, most-favoured nation treatment, as well as other benefits to the investors of the home state. Article 7 and 8 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to screening of foreign investment.

#### K. United Arab Emirates (UAE)

The Government of Malaysia signed the BIT with the Government of the United Arab Emirates at Kuala Lumpur in 1991, which is still in force. The Preamble of the BIT desires to create favourable conditions for greater economic co-operation for investments by recognizing the need to protect such investments. This BIT provides full protection and security at all times in accordance with the local legislation, fair and equitable treatment, most-favoured nation treatment, as well as other benefits to the investors of the home state. Article 9 and 10 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to screening of foreign investment.

#### L. United Kingdom (UK)

The Government of Malaysia signed the BIT with the Government of the United Kingdom of Great Britain and Northern Ireland at London in 1981, which is still in force. The Preamble of the BIT desires to create favourable conditions for greater investment by recognising the encouragement and reciprocal protection under international agreement of such investments. This BIT provides full protection and security at all times in accordance with the local legislation, fair and equitable treatment, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 7 and 8 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to screening of foreign investment.

#### M. Uzbekistan

The Government of Malaysia signed the BIT with the Government of the Republic of Uzbekistan at Kuala Lumpur in 1997, which is still in force. The Preamble of the BIT desires to expand and strengthen economic and industrial cooperation on a long-term basis and in particular to create favourable conditions for investments by recognizing the need to protect such investments. This BIT provides full and adequate protection and security at all times in accordance with the local laws, regulations and national policies, equitable treatment, most-favoured nation treatment, as well as other benefits to the investors of the home state. Article 7 and 8 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to screening of foreign investment.

#### N. Vietnam

The Government of Malaysia signed the BIT with the Government of the Socialist Republic of Vietnam at Kuala Lumpur in 1992, which is still in force. The Preamble of the BIT desires to expand and deepen economic and industrial cooperation on a long-term basis and in particular to create

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favourable conditions for investments by recognizing the need to protect such investments. This BIT provides full protection and security at all times in accordance with the local laws, regulations and administrative practices, fair and equitable treatment, most-favoured nation treatment, as well as other benefits to the investors of the home state. Article 7 and 8 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to screening of foreign investment.

O. Bangladesh

The People’s Republic of Bangladesh signed the BIT with the Government of Malaysia at Kuala Lumpur in 1994, which is still in force. The Preamble of the BIT desires to expand and strengthen economic and industrial cooperation on a long-term basis and in particular to create favourable conditions for investments by recognising the need to protect such investments. This BIT provides full and adequate protection and security in accordance with local laws, regulations and national policies, equitable treatment, most-favoured nation treatment, as well as other benefits to the investors of the home state. Article 6 and 7 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to screening of foreign investment.

The following table is the summary of the Malaysia BITs with 15 different countries in relation to screening of foreign investment:

**Table-2: Malaysia BITs with different countries**

<b>Country</b>	<b>Signing date &amp; present status</b>	<b>Screening of foreign investment</b>	<b>FDI protections</b>	<b>Dispute settlement provisions</b>
Austria	22/12/2000 In force	No	NT, MFN, FET	Yes
Belgium – Luxembourg Economic Union	22/05/1981 In force	No	NT, MFN, FET	Yes
Denmark	05/11/2009 In force	No	NT, MFN, FET	Yes
Germany	06/05/1981 In force	No	NT, MFN	Yes
India	09/02/2009 In force	No	MFN, FET	Yes
Korea	21/06/1999 Signed	No	NT, MFN, FET	Yes
Netherlands	01/11/1994 In force	No	NT, MFN, FET	Yes
Romania	13/03/1987 In force	No	MFN, FET	Yes

Switzerland	14/10/2000 In force	No	NT, MFN, FET	Yes
Turkey	12/04/2012 Signed	No	MFN, FET	Yes
UAE	17/01/2011 Signed	No	MFN, FET	Yes
UK	19/06/1980 In force	No	NT, MFN, FET	Yes
Uzbekistan	18/07/2000 In force	No	MFN, FET	Yes
Vietnam	01/05/2005 Signed	No	MFN, FET	Yes
Bangladesh	20/10/1994 In force	No	MFN, FET	Yes

NT=National treatment, MFN=Most-favoured nation treatment, FET=Fair and equitable treatment

## 7. Findings

From the above discussions and table-2, it can be seen that Malaysia BITs has no specific reference to screening of foreign investments. All the BITs mainly cover dispute settlement mechanism and only few BITs cover areas such as environment, human (labour) rights, and sustainable development. From the Malaysia BITs, it also appears that all of them have specific provisions for full and adequate protection and security, fair and equitable treatment, most-favoured nation treatment, national treatment, compensation for expropriation and nationalization as well as other benefits for the foreign investors.

## 8. Importance of screening of foreign investments in Malaysia

The Malaysian government has authority to review and approve all foreign and domestic investments as a means for the government to assess whether the proposed investment meets the criteria for the various incentives available in target sectors and regions.<sup>38</sup> It has been reported on several occasions by the United States businesses to raise their concern about delays in the government's review process and also criticized the lack of transparency in government decision-making.<sup>39</sup> The implementations of rules on government procurement contracts are a recurring concern. Non-Malaysian pharmaceutical companies claim to have lost bids against ethnic Malay-owned companies despite offering more effective medicines at lower cost.<sup>40</sup> Another difficult situation exist due to the 'Bumiputera Policy', when the government discriminates against foreign investors on racial grounds on the basis that foreign investors or nationals belongs to the particular race (*i.e.* Chinese, Indians, Singaporeans) already dominating Malaysia's economy and that the influx of more FDI of these race would cause resentment within Malaysia and give rise

<sup>38</sup> "Promoted Activities", MIDA, accessed 2 January 2019, <http://www.mida.gov.my/home/promoted-activities-and-products-for-manufacturing-sector/posts/>.

<sup>39</sup> "Malaysia Investment Climate Statement 2015," U.S. Department of State (Bureau of Economic and Business Affairs), accessed 6 July 2016, <https://www.state.gov/e/eb/rls/othr/ics/2016/eap/254293.htm#5performance>.

<sup>40</sup> *Ibid.*

to protests against the foreign investors.<sup>41</sup> An unintended consequences of this policy was worsening income distribution, a widening of the income gap between town and country and most importantly, greater inter-ethnic inequality.<sup>42</sup> In these circumstances, is it possible for Malaysian government to enact legislation preventing entry by foreign investors of these particular races or to use screening devices to ensure that they do not enter?<sup>43</sup>

## **9. Recommendation**

As can be seen from the above findings that Malaysia BITs lacks to cover screening of foreign investments. In absence of any global treaty, the BITs at present regulating the FDI in Malaysia.<sup>44</sup> The 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 practice, both liberalisation and restrictive regulation could have positive and negative effects in Malaysia, so it should design its BITs in a balanced way to meet its peculiar needs at any particular time. Malaysia should consider screening of foreign investments to insert into the BITs in order to protect its legitimate interest and at the same time protecting the foreign investors interest as per WTO principles. Therefore, a well-balanced BITs need to be struck between liberalisation and restrictive regulation to ensure sustainable development of in Malaysia.

## **10. Limitation of the study**

The main limitation of this study is that it lacks interviews on the subject matter. As mentioned earlier that Malaysia has signed 66 BITs and in this paper 15 BITs in total has been analysed. Therefore, further research in this space would be strengthened by including interviews with government officials, foreign investors and academicians. Another limitation is our focus only on BITs at pre-entry stage but relevant FDI laws of Malaysia should also be considered.

## **11. Conclusion**

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

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<sup>41</sup>K.S. Jomo and Chang Yii Tan, "The Political Economy of Post-colonial Transformation" in *Law, Institutions and Malaysian Economic Development* ed.K.S. Jomo and W.S. Ngan (NUS Press, 2008), 26.

<sup>42</sup>*ibid.*

<sup>43</sup> A. Shome and S. Hamidon, "The Contradiction of Entrepreneurship through Affirmative Action: The Case of Malaysia," *The Copenhagen Journal of Asian Studies* 27, no. 1 (2009): 38-66.

<sup>44</sup> See Mohammad Belayet Hossain, "International efforts to regulate foreign investment and Multinational Enterprises (MNEs)," *Lex-Warrior: Online Law Journal*, vol 9, issue 9, 2018, 401-414.

manner.<sup>45</sup> Sornarajah proposed a ‘middle path’<sup>46</sup> 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.<sup>47</sup>

The FDI laws of Malaysia have provisions only to promote the inflow of FDI and after post-entry, provide different incentives and protections to the foreign investors. In the absence of a global treaty or specific Act, regulating the FDI in Malaysia, is mainly depended upon the BITs. Based on the WTO principle of ‘reciprocity’ Malaysia should design its 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 screening of foreign investments through legal or policy regime 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, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens.

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<sup>45</sup>Seid, Sherif H. *Global regulation of foreign direct investment*, (Ashgate, 2002: 194).

<sup>46</sup> See Sornarajah, Muthucumaraswamy. *The international law on foreign investment*. (Cambridge University Press, 3<sup>rd</sup> ed., 2010, 55).

<sup>47</sup>Soloman, Lewis D., and David H. Mirsky. "Direct Foreign Investment in the Caribbean: A Legal and Policy Analysis." *Nw. J. Int'l L. & Bus.* 11 (1990): 257.

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