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# Performance Requirements and the BITs of Bangladesh and Malaysia: A Comparison

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## Abstract

In absence of any global treaty, the BITs are playing an important role of regulating FDI in the host countries. According to UNCTAD, 2361 BITs are in force and like other members of the WTO, both Bangladesh and Malaysia also signed their BITs to facilitate trade. The primary purpose of economic globalization is the economic development of the developing and least-developed countries as well as the facilitation of benefits of the home states. In this article, the BITs signed between Bangladesh-Malaysia and by both Bangladesh and Malaysia with the same countries shall be analysed. The findings of this study will show that both Bangladesh and Malaysia BITs has provisions of protecting FDI but has no specific reference to performance requirements (except Malaysia-Germany BIT). This is significant because without written regulations, it will be difficult to take legal action against the MNEs. Therefore, the government should emphasize on this important factor while signing any future BITs. Recommendations are provided for consideration.

## Keywords

Bilateral investment treaties (BITs), performance requirements, foreign direct investment (FDI), Bangladesh, Malaysia.

## Introduction

The bilateral investment treaties (BITs) are kind of mutual agreements between two capital importing and exporting states, which regulate 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,

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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. Hence, there may be many BITs between the same countries but each of them may have different terms and conditions to determine their obligations (Kishoiyian, 1993; Subedi, 2008). When a BIT is concluded, it becomes 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 nature they differ from each other, till to date there is no global treaty which could regulate all BITs in the world (Hossain & Rahi, 2018).

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. In this article, we shall analyse the BITs signed between Bangladesh-Malaysia and by both Bangladesh and Malaysia with the same countries in order to find out if they cover (fully or partly) performance requirements.

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. In this article, we shall analyse the BITs signed between Bangladesh-Malaysia and by both Bangladesh and Malaysia with the same countries in order to find out if they cover (fully or partly) performance requirements.

### **The World Trade Organization (WTO) Principles and FDI**

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; (d) non-discrimination and (e) dispute settlement mechanism (Hossain, 2018). On the one hand, following the World Trade Organization (WTO) principles, the developing countries are liberalizing their national laws and policies on FDI; on the other hand, many developed countries (who are also members of World Trade Organization) are imposing restrictions on the flow and activities of FDI. The various laws and policies of the developed and other countries most commonly cover performance requirements (Bale, 1990; UNCTC, 1992; Fisher & Turner, 1983).

**Table 1:** Factor Covered by Different Jurisdictions

Factor	Countries	Statutes
Performance requirements	Australia	The Partnership for Development Scheme, Article 5(1)(c) and (g) of the Singapore - Australia Free Trade Agreement (2003) (“SAFTA”)
	Bolivia	Article 7 of the Ley de Promoción de Inversiones 2014
	China	Article 36-37 of the Foreign Investment Law of the People's Republic of China 2015
	USA	Article 8(1) of the 2004 U.S. Model BIT
	Canada	Article 7(1) of the 2004 Canada Model FIPA
	South Korea	Article 7 of the Law on Foreign Investment 1992
	Libya	Article 3 of the Law on Investment Promotion 2010
	Namibia	Article 4,5,14 of the Investment Promotion Act 2016
India	Article 10.5(1) of the India - Korea CEPA (2009)	

**Source:** The author.

### Performance Requirements

To protect the local interest, the host countries require the foreign investors to fulfill different performance requirements such as - requirement to establish a joint venture with domestic participation, requirements for minimum level of domestic equity participation, requirements to locate headquarters for specific region, employment requirements, export requirements, requirements to transfer technology, production process or other proprietary knowledge, and research and development requirements. Performance requirements tend to cause investors to pursue practices they would not otherwise adopt in the open market. For example, local content requirements could force or encourage firms to use local inputs in the production process, although one of the central considerations in determining where to get inputs from, in an open market setting, is cost competitiveness (Seid, 2017).

There are strong political and economic arguments both for and against performance requirements. The arguments in favour of performance requirements are as follows (Fisher & Turner, 1983; Bale, 1990):

- It serves as an appropriate means to promote and protect a local industry during its infancy and until it will be able to compete by itself in the world market;

- The requirement to provide information on intra-firm practices and a local content requirement, can be used as tools for preventing pricing abuses and tax evasion;
- It fosters transfer of technology and help the host country develop a comparative advantage in a particular sector of its economy in a relatively faster span of time;
- Export requirements have a balance of payments justification;
- The host country views performance requirements as a means of requiring foreign investors to serve national goals.

The foreign investors and multinational enterprises make their key strategic decisions outside of the host country and these decisions are usually influenced predominantly by factors such as global marketing objectives assigned to various divisions in the multinational enterprises and/or as international tax and other regulatory policies. Therefore, the use of performance requirements is seen as essential to assert the host country's control over the national economy and its development and channel foreign investment into areas of priority for the host country. However, there are counter arguments against performance requirements:

- The protection of infant industries through performance requirements tends to create inefficient indigenous firms, which may adversely affect the host economy. Higher prices and subsidisation costs are incurred in order to accelerate development in a sector that may have little chance of achieving a true competitive advantage;
- Consumers may not get better and cheaper products;
- Transfer pricing practices also can be regulated by other means, such as the use of world market prices or other commercial standards to determine arm's-length transactions between parent companies and their subsidiaries, rather than using performance requirements for such purposes;
- Since performance requirements protect the local industry and foreign investors are forced to purchase inputs locally, local manufacturers would not have the incentive to acquire new technology and become competitive;
- Performance requirements are not the best way to solve balance of payments problems since these problems can best be resolved by deflationary monetary or fiscal policies or exchange rate depreciation.

Regardless of arguments both for and against performance requirements, there are many host countries, which imposes some form of performance requirements on foreign investments. For examples, in Australia, the Partnership for Development Scheme requires foreign investors in the information technology industry making sales to government over a certain threshold to enter into agreements to achieve, within seven years, exports equal to at least 50% of annual imports. It also requires research and development expenditure equal to at least 5% of local turnover, and an average of 70% of local value added across all exports. In China, local content is required on a case-by-case

basis and depends on the level of technology and the export to output ratio. Foreign exchange balancing is also required (Article 36-37 of the Foreign Investment Law of the People's Republic of China 2015). Like Australia and China, other countries also has specific provision or policy for performance requirements, for examples: USA [article 8(1) of the 2004 U.S. Model BIT], Canada [article 7(1) of the 2004 Canada Model FIPA], South Korea (article 7 of the Law on Foreign Investment 1992), Libya (article 3 of the Law on Investment Promotion 2010), Namibia (article 4,5,14 of the Investment Promotion Act 2016) and India [article 10.5(1) of the India - Korea CEPA 2009].

### **Bangladesh-Malaysia BIT**

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 investors. The BIT has no specific reference to performance requirements.

### **Bangladesh and Malaysia BITs with Different Countries**

#### *A. Austria*

The People's Republic of Bangladesh signed the BIT with the Republic of Austria at Dhaka in 2000, which is still in force. This BIT provides fair and equitable treatment, full and constant protection and security, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. The Preamble of the BIT reaffirms both contracting parties commitment to the observance of the internationally recognised labour standards. Chapter two of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investors. The BIT has no specific reference to performance requirements.

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 performance requirements.

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

The People's Republic of Bangladesh signed the BIT with the Belgo-Luxembourg Economic Union (BLEU) in 1981 at Dhaka, which is still in force. The Preamble of the BIT desires to create favourable conditions for greater economic cooperation and recognises the reciprocal encouragement and protection under international agreements to promote investments for the mutual prosperity of the Contracting States. This BIT provides at all times fair and equitable treatment, full protection and security, most-favoured nation treatment, national 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 through International Centre for Settlement of Investment Disputes (ICSID). The BIT has no specific reference to performance requirements.

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 investors. The BIT has no specific reference to performance requirements.

### *C. Denmark*

The People's Republic of Bangladesh signed the BIT with the Kingdom of Denmark in Dhaka in 2009, which is still in force. The Preamble of the BIT desires to create favourable conditions for investments and recognises a fair and equitable treatment of investment on a reciprocal basis. Article 2(2) of the BIT states that investment objectives should be achieved without relaxing health, safety and environmental measures, and the Party who suffers any loss or damages, shall be accorded adequate and effective compensation as per its laws and regulations and if necessary, as per international law. This BIT provides full protection and security, 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 investors. The BIT has no specific reference to performance requirements.

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. Article 10 and 11 of the BIT has provisions to

settle the dispute between the Contracting Parties or any of its investors. The BIT has no specific reference to performance requirements.

#### *D. Germany*

The People's Republic of Bangladesh signed the BIT with the Federal Republic of Germany at Bonn in 1981, which is still in force. The Preamble of the BIT desires to intensify economic co-operation between both States and intends to create favourable conditions for investments by recognising promotion and reciprocal protection of such investments. This BIT provides fair and equitable treatment, full protection and security, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 10 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investors. The BIT has no specific reference to performance requirements.

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 investors. The BIT has a specific reference to performance requirements.

#### *E. India*

The People's Republic of Bangladesh signed the BIT with the Government of the Republic of India in 2009, which is still in force. The Preamble of the BIT desires to create conditions favourable for fostering greater investment by recognising the encouragement and reciprocal protection under international agreement for such investment. This BIT provides protection in accordance with the local laws and policy, fair and equitable treatment, 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 investors. The BIT has no specific reference to performance requirements.

The Federal 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 indus-

trial 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 investors. The BIT has no specific reference to performance requirements.

#### *F. Democratic People's Republic of Korea*

The People's Republic of Bangladesh signed the BIT with the Democratic People's Republic of Korea at Dhaka in 1999. The Preamble of the BIT desires to intensify economic co-operation to the mutual benefits of both States and intends to create and maintain favourable conditions for investments by recognising to promote and protect foreign investment. This BIT provides protection in accordance with the local laws and regulations, 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 investors. The BIT has no specific reference to performance requirements.

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 investors. The BIT has no specific reference to performance requirements.

#### *G. Netherlands*

The People's Republic of Bangladesh signed the BIT with the Government of the Kingdom of the Netherlands in 1994, which is still in force. The Preamble of the BIT desires to extend and intensify economic relations between both States by recognising to stimulate the flow of capital, technology and the economic development with desired fair and equitable treatment of investments. This BIT provides full protection and security in accordance with the local laws and regulations, fair and equitable treatment, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 9 and 13 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investors. Article 14(4) only entitles the Government of the Kingdom of Netherlands to terminate the appli-

cation of the present Agreement separately in respect of any of the parts of the Kingdom. The BIT has no specific reference to performance requirements.

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 investors. 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 performance requirements.

#### *H. Romania*

The People's Republic of Bangladesh signed the BIT with the Government of the Socialist Republic of Romania at Dhaka in 1987, which is still in force. The Preamble of the BIT desires to develop existing economic co-operation by creating favourable conditions and providing guarantee for investments of the capital. This BIT provides protection and guarantees as per the Agreement, most-favoured nation treatment, as well as other benefits to the investors of the home state. Article 8 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investors. The BIT has no specific reference to performance requirements.

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 investors. The BIT has no specific reference to performance requirements.

*I. Switzerland*

The People's Republic of Bangladesh signed the BIT with the Swiss Confederation at Dhaka in 2000, which is still in force. The Preamble of the BIT desires to intensify economic co-operation to the mutual benefits of both States and intends to create and maintain favourable conditions for investments by recognising the need to promote and protect foreign investments. This BIT provides full protection and security in accordance with the local laws and regulations, fair and equitable treatment, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 8 and 9 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investors. The BIT has no specific reference to performance requirements.

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 investors. The BIT has no specific reference to performance requirements.

*J. Turkey*

The People's Republic of Bangladesh signed the BIT with the Government of the Republic of Turkey at Ankara in 2012, which replaced earlier BIT of 1987. The Preamble of the BIT desires to promote greater economic cooperation and recognises the treatment to be accorded to such investments. In the Preamble, both Parties desires fair and equitable treatment of investments without relaxing health, safety and environmental measures of general application as well as internationally recognised labour rights. There is separate provision under article 4 for protection of public health and environment. This BIT also provides full protection and security in accordance with the local laws and regulations, minimum standard of treatment under international law, fair and equitable treatment, most-favoured nation treatment, national treatment, 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 investors. The BIT has no specific reference to performance requirements.

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 investors. The BIT has no specific reference to performance requirements.

*K. United Arab Emirates (UAE)*

The People's Republic of Bangladesh signed the BIT with the Government of the United Arab Emirates at Abu Dhabi in 2011. 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 investment. Article 4(5) states that 'Investor of a Contracting Party as far as possible shall comply with the international laws and regulations of the other Contracting Party in relation to public health and/or environmental policies'. This BIT also provides full and adequate protection and security in accordance with the local laws and regulations, fair and equitable treatment, 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 investors. The BIT has no specific reference to performance requirements.

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 investors. The BIT has no specific reference to performance requirements.

*L. United Kingdom (UK)*

The People's Republic of Bangladesh signed the first BIT with the Government of the United Kingdom of Great Britain and Northern Ireland at London in 1980. The Preamble of the BIT desires to create favourable conditions for greater investment by recognising the encouragement and reciprocal protection of such investment. This BIT also provides full protection and security in accordance with the local laws, fair and equitable treatment, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 8 and 9 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investors. The BIT has no specific reference to performance requirements.

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 investors. The BIT has no specific reference to performance requirements.

#### *M. Uzbekistan*

The People's Republic of Bangladesh signed the BIT with the Government of the Republic of Uzbekistan at Tashkent in 2000, which is still in force. The Preamble of the BIT desires to promote more extensive economic cooperation for mutual benefit by recognising the necessity of encouragement and protection of such investment. This BIT also provides protection in accordance with the local laws, fair and equitable treatment, 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 investors. The BIT has no specific reference to performance requirements.

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 investors. The BIT has no specific reference to performance requirements.

#### *N. Vietnam*

The People's Republic of Bangladesh signed the BIT with the Government of the Socialist Republic of Vietnam at Hanoi in 2005. The Preamble of the BIT desires to expand and deepen economic and industrial cooperation on a long-term basis and in particular to create and maintain favourable conditions for investments by recognizing the need to promote and protect such investments. This BIT also provides full protection and security in accordance with the local laws, 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 investors. The BIT has no specific reference to performance requirements.

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 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 investors. The BIT has no specific reference to performance requirements.

The following Table-2 is the summary of the comparison between Bangladesh and Malaysia signed BITs with other (same) countries in relation to performance requirements:

**Table 2:** Comparison between Bangladesh and Malaysia BITs With Other (same) Countries

Country	Signing date & present status		Performance requirements		FDI protection	
	BD	ML	BD	ML	BD	ML
BD-ML	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	Y	NT, MFN, FET	NT, MFN
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

(Table 2 Continued)

(Table 2 Continued)

Switzerland	13/03/1987 In force	14/10/2000 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	MFN, FET
UK	19/06/1980 In force	21/05/1981 In force	N	N	NT, MFN, FET	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, Y=Yes, N=No, NT=National treatment, MFN=Most-favoured nation treatment, FET=Fair and equitable treatment.

**Source:** The author.

## Findings

From the above discussion of the BITs and Table-2, it can be seen that Bangladesh and Malaysia BITs (except Malaysia-Germany BIT) has no specific reference to performance requirements. 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 Bangladesh and 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.

## Recommendation

As can be seen from the above findings that like other developing countries, Bangladesh and Malaysia BITs also lack performance requirements. In absence of any global treaty, the BITs at present regulating the FDI in both Bangladesh and Malaysia (Hossain, 2018). 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 regulations 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 both Bangladesh and Malaysia, so they should design their BITs in a balanced way to meet its peculiar needs at any particular time. Both countries should consider performance requirements to insert into the BITs in order to protect its legitimate interest and at the same time protect 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 both countries.

### **Limitation of the Study**

The main limitation of this study is that it lacks interviews on the subject matter. As mentioned earlier that Bangladesh and Malaysia has signed 30 and 66 BITs respectively and in this paper 15 BITs in total has been analysed. Therefore, further research in this space could be strengthened by including interviews with government officials, foreign investors and academicians. Another limitation is our focus on only BITs at pre-entry stage but relevant FDI laws of Bangladesh and Malaysia could also be considered.

### **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 manner (Seid, 2002). Sornarajah proposed a “middle path” (Sornarajah , 20105) 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 (Solomon & Mirsky, 1990).

The FDI laws of Bangladesh and 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 Bangladesh and Malaysia mainly depend on the BITs. Based on the WTO principle of “reciprocity” both countries should design their 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 performance requirements 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.

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