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ENVIRONMENTAL PROTECTION AND THE BILATERAL INVESTMENT TREATIES OF MALAYSIA

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ABSTRACT

Since the 1990s, globalisation has been a widely accepted concept all over the world. Among the original aims of economic globalisation were to improve the host states' economy and provide benefits to the foreign investors' home countries. Due to the absence of an international treaty in the host states, the Bilateral Investment Treaties (BITs) play a significant role in controlling or regulating the Foreign Direct Investments (FDIs). According to the United Nations Conference on Trade and Development (UNCTAD), different countries have signed 2896 BITs so far, in which, at present, 2361 BITs are in force. As a member of the World Trade Organisation (WTO) and following other states, Malaysia also signed 71 BITs to facilitate trade of which 54 are in force at present. Malaysian FDI laws and BITs mainly protect foreign investors. However, most BITs lack the specific provision for protecting the environment. This paper addresses two questions: (a) Do the Malaysian BITs allow the host state to take measures to protect the environment? (b) How could the environment be protected against degradation during the pre-entry stage of FDIs in Malaysia? In this study, the doctrinal research method has been used to critically analyse fifteen BITs, with the aim to find out whether they contain any specific provision regarding the protection of the environment in Malaysia. The

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findings of this study suggest that the existing Malaysian BITs have provisions to promote and protect foreign investments but have no reference (except the Malaysia-Germany BIT) to the protection of the environment. Therefore, this study recommends that the government of Malaysia should consider inserting a specific provision regarding the protection of the environment in Malaysia while signing any future BITs.

Keywords: Bilateral investment treaties, World Trade Organisation, environmental protection, foreign direct investment, Malaysia.

PERLINDUNGAN ALAM SEKITAR DAN PERJANJIAN PELABURAN DUA HALA MALAYSIA

ABSTRAK

Sejak 1990-an globalisasi adalah konsep yang diterima secara meluas di seluruh dunia. Matlamat asal globalisasi ekonomi adalah untuk peningkatan ekonomi negara tuan rumah dan juga untuk memberi manfaat kepada negara asal pelabur asing. Disebabkan ketiadaan perjanjian antarabangsa di negara tuan rumah, Perjanjian Pelaburan Dua Hala (BIT) memainkan peranan penting untuk menguasai atau mengawal Pelaburan Langsung Asing (FDI). Menurut Persidangan Pertubuhan Bangsa-Bangsa Bersatu mengenai Perdagangan dan Pembangunan (UNCTAD), pelbagai negara yang berbeza telah menandatangani 2896 BIT setakat ini, di mana pada masa ini, 2361 BIT telah dikuat kuasakan. Sebagai ahli Pertubuhan Perdagangan Dunia (WTO) dan mengikuti negara-negara lain, Malaysia juga menandatangani 71 BIT untuk memudahkan perdagangan di mana 54 daripadanya dikuatkuasakan pada masa ini. Undang-undang FDI Malaysia dan BIT khusus melindungi pelabur asing, namun, kebanyakan BIT tidak mempunyai peruntukan khusus dalam melindungi alam sekitar. Artikel ini membincangkan dua persoalan: (a) Adakah BIT Malaysia membenarkan negara tuan rumah mengambil langkah untuk melindungi alam sekitar? (b) Bagaimanakah alam sekitar boleh dilindungi daripada kemusnahan semasa peringkat pra-kemasukan FDI di Malaysia? Dalam kajian ini, kaedah penyelidikan doktrin telah digunakan untuk menganalisis secara kritis lima belas BIT bagi mengetahui sama ada ia mengandungi sebarang peruntukan khusus mengenai perlindungan alam sekitar di Malaysia. Dapatan kajian ini mencadangkan bahawa BIT Malaysia sedia ada mempunyai peruntukan untuk menggalakkan dan melindungi pelaburan asing tetapi tidak mempunyai peruntukan (kecuali BIT Malaysia-Jerman) untuk melindungi alam sekitar. Oleh itu, kajian ini mengesyorkan bahawa

kerajaan Malaysia harus mempertimbangkan untuk memasukkan peruntukan khusus mengenai perlindungan alam sekitar di Malaysia semasa menandatangani mana-mana BIT akan datang.

Kata kunci: Perjanjian pelaburan dua hala, Pertubuhan Perdagangan Dunia, perlindungan alam sekitar, pelaburan langsung asing, Malaysia.

INTRODUCTION

The bilateral investment treaties (BITs) are a kind of mutual agreement between the capital importing and exporting states, which regulate the foreign investment in the host state. The key objective is to safeguard the foreign investment against nationalisation or expropriation and, should any of this occurs, compensation as per international minimum standard should be obtained. Depending on the individual investment concerned, the negotiators of both countries will determine 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 in determining their obligations.[1] After a BIT is concluded, it applies to nationals and companies in both countries under the local foreign direct investment (FDI) laws and policies. The BITs are mainly created through the negotiation of the two countries and, by nature, differ from each other. Therefore, to date, there is no global treaty that could regulate all BITs in the world.[2]

Since independence, Malaysia has signed 71 BITs with different countries where the first BIT was signed with Germany in 1960.[3] This paper analyses the BITs signed by Malaysia with 15 countries in order to find out if the treaties cover the matters on environmental protection.

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1 Bernard Kishoiyian, "The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law," *Northwestern Journal of International Law & Business* 14 (1993): 327; See also, Surya P. Subedi, *International Investment Law: Reconciling Policy and Practice* (Hart Publishing, 2008), 34-42.

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

3 "Malaysia BITs," last modified April 19, 2020, https://investmentpolicyhub.unctad.org/IIA/CountryBits/127#iiaInnerMenu.

Dunning's so-called ownership, location, internalisation (OLI) model states that FDI is undertaken if ownership specific advantages (O) like proprietary technology be existent concurrently with location-specific advantages (L) in the host countries, *e.g.*, low factor costs, and potential benefits from internalisation (I) of the production process overseas.[4] Since the 1990s, due to the growth of multinational enterprises, the world has witnessed a rapid proliferation of BITs. As such, the number of BITs in the world reached 2971 as of January 2019, up from 385 at the end of the 1980s.[5] Therefore, it can be said that "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. It also covers the governance, human development areas and liberalisation under the BITs, bilateral trade agreements (BTAs) and regional trade agreements (RTAs)".[6]

There is an 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 Organisation for Economic Co-operation and Development (OECD) data and found that the signing of BITs by the developing host states encourages foreign investors to choose in investing in the developing states.[7] Busse also concluded the same as Egger and Pfaffermayr.[8] Plummer

4 John H. Dunning, Trade, Location of Economic Activity and MNE: ASearch for an Eclectic Approach," in *The International Allocation of Economic Activity*, ed.B. Ohlin (Macmillan, London, 1977), 395-418, John H. Dunning, *Explaining International Production* (Unwin Hyman, London, 1988).

5 "Bilateral Investment Treaties," last modified January 24, 2019, https://investmentpolicyhub.unctad.org/IIA.

6 Muhammad S. Ullah and Kazuo Inaba, "Liberalization and FDI Performance: Evidence from ASEAN and SAFTA Member Countries," *Journal of Economic Structures* 3, no. 1 (2014): 6.

7 Peter Egger and Micheal Pfaffermayr, "The Impact of Bilateral Investment Treaties on Foreign Direct Investment," J. Comp. Econ.32, no. 4 (2004): 788–804.

8 Matthias Busse et al., "FDI Promotion Through Bilateral Investment Treaties: More than a BIT?," Rev. World Econ. 146, no.1 (2010):147–177.

and Cheong[9] reveal that ASEAN states have also signed many BITs which exert affirmative, however, has trivial impacts on incoming FDI, but Ullah[10] found an important negative effect for the complete example of 34 homes and 74 host states. Mina asserts that FDI-seeking host states may perhaps make an effort to conclude bilateral treaties with developed states to improve their organisational structures or functions.[11] Hallward-Driemeier finds modest proof that bilateral treaties encouraged FDI inflows from the OECD countries to the least-developed and developing states.[12]

Blonigen and Wang contend that in the least-developed and developing states, the factors determining the location of FDI differ steadily in a manner that the present experimental models do not capture the FDIs.[13] Chantasasawat analysed Asian host states of both leading FDI-making states (*e.g.* Singapore, Malaysia, and the Republic of Korea) and major FDI-seeking countries (*e.g.* Indonesia and Thailand) and found that there are huge differences between states concerning performance to host the FDIs.[14] Plummer and Cheong,[15] and Vogiatzoglou[16] also concluded that the FDIs have rather insufficient effects on BITs and institutional characteristics from the perspective of states that are principally FDI-receiving instead of FDI-making. Therefore, it is noticeable that the literary study lacks accord on the relationship between foreign investments and bilateral treaties.

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9 Micheal G. Plummer and David Cheong, "FDI effects of ASEAN Integration," Rég. Dév. 29, no.1 (2009): 49–67.

10 Ullah and Inaba, "Liberalization and FDI Performance," 6.

11 Wasseem Mina, "The Institutional Reforms Debate and FDI Flows to the MENA Region: The "Best" Ensemble," World Development 40, no. 9 (2012): 1798–1809.

12 Mary Hallward-Driemeier, Do Bilateral Investment Treaties Attract FDI? Only a BIT and They Could Bite (World Bank, Washington, 2003), 6-7

13 Bruce A. Blonigen and Miao Wang, Inappropriate Pooling of Wealthy and Poor Countries in Empirical FDI Studies (NBER, Cambridge, 2004), 13.

14 Busacon Chantasasawat 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.

15 Plummer and Cheong, "FDI Effects," 49–67.

16 Klimis Vogiatzoglou, "Vertical Specialization and New Determinants of FDI: Evidence from South and East Asia," Glob. Econ. Rev. 36, no. 3 (2007): 245–266.

Suppose the proper regulatory mechanisms are not in place. In that case, FDI may cause considerable environmental damage that includes pollution of rivers and groundwater, damage to fishing and farming, disruption of the local population and damage to the health of workers and the local population.[17] Sometimes foreign investors apply hazardous technology with disastrous consequences. In the Bhopal disaster in India, gas leakage was caused in a plant constructed by the U.S.A company Union Carbide, resulting in enormous damage to life and property.[18] In some cases, such environmental destruction has led to major social unrest, including calls for secession.[19] Environmental protection is costly, and some multinational enterprises may resist elaborate environmental protection requirements because of their impact on profit. Some may even seek investment in a developing country to escape the burden and costs of the stringent environmental regulations in their home countries.[20]

This study aims to identify whether bilateral investment treaties have any provision concerning the protection of the environment in Malaysia. The questions of this study are:

a) Do the Malaysian BITs allow the host state to take measures to protect the environment?

b) How the environment could be protected against degradation during the pre-entry stage of FDIs in Malaysia?

In this study, a doctrinal research method has been used to critically analyse fifteen BITs in finding out whether they contain any specific provision regarding protecting the environment in Malaysia. The analysis in this paper focuses on the environmental protection factors and foreign investment protections such as most-favoured-nation

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17 David N. Smith, "Foreign Investment in Natural Resources: What Can Go Wrong," in *Current Developments in International Investment Law,* ed. H. P. Kee (Butterworths, 1992).

18 Rebecca S. Oh, "The Claims of Bodies: Practices of Citizenship After Bhopal in Survivor Testimony and Indra Sinha's Animal's People," *Interventions* 21, no. 1 (2019): 70-91.

19 *Ibid, 439.*

20 Michael E. Porter, *Competitive Advantage of Nations: Creating and Sustaining Superior Performance,* vol. 2 (Simon and Schuster, 2011), 23-25.

treatment (MFN), national treatment (NT), full protection and security, fair and equitable treatment, and dispute settlement mechanisms.

IMPORTANCE OF PROTECTING THE ENVIRONMENT IN MALAYSIA

It has been reported that there were 149 cases of oil spills in Malaysian territorial waters between 2009 to 2017.[21] The foreign investors are concerned with maximising their profit and take less care about the degradation of the environment, for example, dumping hazardous waste by Asia Rare Earths – a subsidiary of Mitshubishi in Malaysia. During the last decade, projects such as Bakun Dam, Kuala Lumpur Outer Ring Road, Forest Plantation Development, Empire Residence Development, Pan Borneo Highway had created controversies and these projects were completed at the expense of sacrificing the natural forest.[22]

During the investment screening, the relevant authority studies the impact of the FDI on the environment before approving the entrance of the FDI. The authority can refuse permission if there are serious effects on the environment. However, this study suggests that the environmental law standards in Malaysia are not advanced like many developed states.[23] When there is a conflict between the security of the FDI and the environment, the arbitral tribunals usually decide in favour of investment protection.[24] It is also challenging to determine whether the intervention is a preventive activity planned to keep foreign investors out of the economy or whether the motivation behind

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21 Hidir Reduan, "New Law Being Prepared to Deal with New Environmental Complexity," *The Straits Times*, November 9, 2017, accessed March 28, 2021, https://www.nst.com.my/news/nation/2017/11/301179/new-law-being-prepared-deal-new-environmental-complexity-doe.

22 Howard Frumkin, *Environmental Health: From Global to Local* (John Wiley & Sons, 2016), 45-47.

23 Maizatun Mustafa *et al.*, "Progression of Policies and Laws Towards Addressing Climate Change and Sustainability Issues: Recent Initiatives from Malaysia," *Human and Environmental Security in the Era of Global Risks* (2019): 133-147.

24 *Metalclad v Mexico (2000) 5 ICSID Reports 209; Santa Elena v Costa Rica (2000) 39 ILM 317; Tecmed v Mexico (2006) 10 ICSID Reports 54.*

the intervention is anxiety about environmental protection.[25] If the authority interferes, it becomes more problematic after granting permission for entry because the authority must have the weightiness of rhetoric and law behind it to justify such intervention.[26] The Environmental Quality Act 1974 seems insufficient to deal with these new and complex environmental issues as well as it has no provision regarding sustainable development.[27] Moreover, apart from Malaysia-Germany BIT, other bilateral investment treaties signed by Malaysia have no specific reference to environmental protection.[28]

THE WORLD TRADE ORGANISATION (WTO) PRINCIPLES AND THE FDI

When the World Trade Organisation (WTO) came into existence in 1995, replacing the General Agreement on Tariffs and Trade (GATT), it provided guidelines on how to regulate FDI in host countries. The main objective of the General Agreement on Tariffs and Trade (GATT) was the liberalisation of international trade, and that remains the main objective of the World Trade Organisation (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.[29] Following the WTO principles, the developing countries are liberalising their national laws and policies on FDI, but on the other hand, many developed countries (who are also members of the World Trade Organisation) impose restrictions on the flow and activities of

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25 *S. D. Myers v Canada (2000) 40 ILM 1408.*

26 *Methanex v United States (2005) 44 ILM 1345.*

27 Abdull H. Embong, "Environmental Justice in Malaysia: Issues and Challenges*,"* (paper presented at the 2nd National Seminar on Environmental Justice, Perak, Malaysia, October 15-18,2015.

28 "Malaysia BITs", last modified July 23, 2019, https://investmentpolicyhub.unctad.org/IIA/CountryBits/127#iiaInnerMenu.

29 Mohammad B. Hossain, "Fleshing Out the Provisions for Protecting Foreign Investment," *Yustisia Jurnal Hukum* 7, no. 3 (2018): 406-427.

FDI. The various laws and policies on environmental protection enforced in some selected countries are illustrated in Table 1 below.[30]

Table 1: Environmental protection laws of selected countries[31]

Factor	Countries	Statutes
Environmental protection	Albania	Article 2 of the Foreign Investment Act 1990
	Australia	Part 3 of the Environment Protection and Biodiversity Conservation Act 1999
	Azerbaijan	Article 7 of the Law on the Protection of Foreign Investments 1992
	Belarus	Articles 5-6 of the Law of the Republic of Belarus on Investments 2013
	Burkina Faso	Article 8 of the Code des Investissements 1995
	Central African Republic	Article 9 of the Charte Communautaire de l'Investissement 2001
	Chad	Article 11 of the Charte des Investissements 2008
	China	Article 6 of the Environmental Protection Law of the People's Republic of China 2014

30 See David N. Smith, "Foreign Investment in Natural Resources: What Can Go Wrong,"in *Current Developments in International Investment Law*, ed. H. P.Kee *et al.* (Singapore: Butterworths, 1992); Gunther Handl, *Transferring Hazardous Technologies and Substances* (London, 1989), 3-39; *Dillingham-Moore v Murphyores (1979) 136 CLR 1; International Bank of Washington v OPIC (1972) 11 ILM 1216; Metalclad v Mexico (2000) 5 ICSID Reports 209; Santa Elena v Costa Rica (2002) 5 ICSID Reports 153; S.D. Myers v Canada (2000) 40 ILM 1408; Methanax v United States (2005) 44 ILM 1345; Tecmed v Mexico (2006) 10 ICSID Reports 54.*

31 These are different jurisdictions whose legislations also cover environment issue, due to limitation some of them has been selected as examples.

	Cuba	Article 20 of the Foreign Investment Act 2014
	Dominican Republic	Article 5 of the Ley Sobre Inversión Extranjera 1995
	Gambia	Article 28 of the Investment and Export Promotion Agency Act 2010
	Guinea	Article 5 of the Code Des Investissements 2015
	Guyana	Section 6 of the Investment Act 2004
	Nigeria	Article 2 of the Nigerian Environmental Impact Assessment Act 2004
	Indonesia	Article 1 of the Environment and Climate Change Law 2018
	Myanmar	Article 3 of the Myanmar Investment Law 2016

Source: UNCTAD website. ~~(Pleaase cite properly)~~

ENVIRONMENTAL PROTECTION

For sustainable development and to protect the environment from damages such as – pollution of rivers and seas, damage to the health of the workers and local citizens, and air pollution, the host country requires the foreign investors to follow the environmental law of the country concerned.[32] The issue concerned is that the host countries have environmental laws, but in the developing states, the environmental standards are lax. As a result, several environmental damages had occurred in different host states in the world, such as – US-Mexico border case, where Mexican border towns have become garbage dumps for millions of barrels of benzine solvents, pesticides, raw sewage and battery acid spewed out by foreign companies;[33] in Papua New Guinea, disposal of cyanide and other hazardous chemicals

[32] Gunther Handl, *Transferring Hazardous Technologies and Substances* (London, 1989), 3-39; *see also, S. D. Myers v Canada (2000) 40 ILM 1408; Methanax v United States (2005) 44 ILM 1345; Tecmed v Mexico (2006) 10 ICSID Reports 54.*

[33] Jeff. Atkinson, *APEC-Winners and Losers* (Canberra, 1995), 80.

from OK Tedi copper mines into the river had severely damaged fisheries, forests, wildlife, and farming land;[34] while in India the Bhopal disaster case had killed and injured thousands of people.

Due to lax environmental laws and escaping the burden and costs of the stringent environmental regulations in their home countries, the multinational enterprises choose developing states as havens to make their profit. The BITs arguably secure exporting of highly polluting industries into the developing states, and if any action is being taken against them for damaging the environment, these treaties raise the issue of expropriations.[35] To tackle this situation, the NGOs argued that BITs should have provisions in order to permit host countries to protect their environment.[36] For instance, the US-Canada BIT has provisions addressing this issue, and Article 1114(1) of the North American Free Trade Agreement (NAFTA) states:

> "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure, otherwise consistent with this Chapter, that it considers appropriate to ensure that the investment activity in its territory is undertaken in a manner sensitive to environmental concerns".[37]

However, in *S. D. Myers v Canada*,[38] the tribunal interpreted the above proviso and commented that its nature was simply 'hortatory'. Canada defended by arguing that their hazardous waste should not be sent across the border into the U.S.A. for disposition, but rather should be disposed of in Canada, but the tribunal thought this defence had no merit. The tribunal took this view even though Canada consistently followed its obligations under the Basel Convention on the Transboundary Movements of Hazardous Waste. The attitude of tribunals was based on the result of the infrequent environmental

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34 David N. Smith, "Foreign Investment in Natural Resources: What Can Go Wrong", in *Current Developments in International Investment Law,* ed. H. P. Kee *et al.* (Singapore: Butterworths, 1992), 439.

35 See *Santa Elena v Costa Rica (2000) 39 ILM 317; (2002) 5 ICSID Reports 153.*

36 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*. (Cambridge University Press, 2017), 225.

37 "NAFTA-Chapter 11-Investment," last modified July 23, 2020, https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta.aspx?lang=eng

38 *(2000) 40 ILM 1408; (2002) 121 ILR 7.*

provisions, contained in BITs. Hence the original ground of these investment treaties is preserved as investment protection treaties.[39] However, a far stronger provision is available in Article 10 of the Canadian model treaty, which allows for interference with the FDI and imposes liability on environmental grounds. Article 10 states as follows:

> "1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:
>
> a) to protect human, animal or plant life or health;
>
> b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
>
> c) for the conservation of living or non-living exhaustible natural resources."

The above Article 10 conserves the legality of every national law and environmental regulation and ensures that a broad scope of environmental concerns is covered within the exception mentioned above. Therefore, this provision could no longer be treated as 'merely hortatory' as was interpreted in the case of *S. D. Myers v Canada*. Most importantly, this Canadian BIT has provisions that prohibit reducing environmental standards to attract more FDI. If there is any reason to believe that the standard has been lowered, then this BIT also entitles Canada to request a consultation with the host country. However, almost all BITs do not have an environmental exception in which case there is an attitude to stress the security of foreign investment and ignore environmental protection. The changing legal perceptions would demand the scope of the intervention, which should be taken into consideration while assessing any obligation and this could be justifiable. Any intervention can be justified to protect the environment as it will be considered a regulatory interference.[40]

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39 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2017), 226.

40 *Ibid.* See further the Norway model BIT.

Moreover, the host states, such as Australia's national environment law,[41] make it an offence for any person to take any action that is likely to significantly impact matters protected by the Act unless they have approval from the Australian environment minister. Protected matters are matters of national environmental significance as well as the environment of Commonwealth land. Among the countries which have enacted the environmental-related law are China (Article 6 of the Environmental Protection Law of the People's Republic of China 2014), Nigeria (Article 2 of the Nigerian Environmental Impact Assessment Act 2004), Indonesia (Article 1 of the Environment and Climate Change Law 2018) and Myanmar (Article 3 of the Myanmar Investment Law 2016)

THE BITs OF MALAYSIA WITH DIFFERENT COUNTRIES[42]

A. Austria[43]

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

B. Belgo-Luxembourg Economic Union (BLEU)[44]

The government of Malaysia signed the BIT with the Belgo-Luxembourg Economic Union (BLEU) in Kuala Lumpur in 1979,

41 Part 3 of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act).

42 "Home | UNCTAD Investment Policy Hub," accessed December 23, 2022, https://investmentpolicy.unctad.org/.

43 Agreement Between the Republic of Austria and Malaysia for the Promotion and Protections of Investment.

44 Investment Guarantee Agreement Between Malaysia and the Belgo-Luxemburg Union.

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 for fair and equitable treatment, full protection, most-favoured-nation treatment (MFN), national treatment (NT) under international law, as well as other benefits to the investors of the home state. Article 10 and 11 of the BIT consist provisions on settlement of dispute between the Contracting Parties or any of its investors. The BIT has no specific reference to environmental protection.

C. Denmark[45]

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, promote greater economic cooperation, and recognise a fair and equitable treatment of investment on a reciprocal basis. This BIT also provides full protection and security, most-favoured-nation treatment (MFN), national treatment (NT), and other benefits to the investors of the home state. Article 10 and 11 of the BIT have provisions to settle the dispute between the Contracting Parties or any of its investors. The BIT has specific reference to the environmental protection.

D. Germany[46]

The government of Malaysia signed the BIT with the Federal Republic of Germany in 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 contractual protection of such investments. This BIT also provides for the WTO's MFN and NT principles and other benefits to the investors of the home state. Article 9 states that both countries

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45 Agreement Between the government of the Kingdom of Denmark and the government of Malaysia for the Mutual Promotion and Protection of Investments.

46 Agreement Between the Federal Republic of Germany and the Federation of Malaya Concerning the Promotion and Reciprocal Protection of Investments.

"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 specific references to environmental protection.

E. India[47]

The government of Malaysia signed the BIT with the government of the Republic of India in Kuala Lumpur in 1995, which is terminated in 2017. The Preamble of the BIT desires to strengthen and expand industrial and economic cooperation on a long-term basis, and in specific, by creating a favourable atmosphere for FDIs by recognising the necessity of protecting such foreign investment. This BIT also provides for full and adequate protection and security at all times, fair and equitable treatment, MFN treatment, and other benefits to the investors of the home state. Article 7 and 8 of the BIT have provisions to settle the dispute between the Contracting Parties or any of its investors. The BIT has no specific reference to environmental protection.

F. Democratic People's Republic of Korea (South Korea)[48]

The government of Malaysia signed the BIT with the Democratic People's Republic of Korea in Seoul in 1988, which is still in force. The BIT Preamble intends to adopt a suitable atmosphere for FDIs and recognises the necessity to promote and protect such foreign

[47] Agreement Between the government of the Republic of India and the government of Malaysia for the Promotion and Protection of Investments.

[48] Agreement Between the government of Malaysia and the government of the Democratic People's Republic of Korea for the Promotion and Protection of Investments.

investment. This BIT also provides for the MFN treatment, full protection and security, MFN treatment, NT under international law, and other benefits to the investors of the home state. Article 3 states that with respect to investments and returns in the banking and insurance sectors, MFN treatment and NT shall be accorded in compliance with the relevant laws and regulations of each Contracting Party. Article 9 and 10 of the BITS have provisions to settle the dispute between the Contracting Parties or any of its investors. The BIT has no specific reference to environmental protection.

G. Netherlands[49]

The government of Malaysia signed the BIT with the government of the Kingdom of Netherlands in 1971, which is still in force. This BIT also provides for fair and equitable treatment, MFN treatment, NT under international law, as well as other benefits to the investors of the home state. The Preamble of the BIT desires to strengthen the ties of friendship, foster and promote closer economic relations, and encourage investments based on mutual benefits. As per Article 2(2), both states agree to promote cooperation within the framework of their respective laws and regulations, which would contribute to improving the people's standards of living. 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 NT and MFN treatment principles (Article4). Article 7 facilitates the importation without payment of customs duties of goods, materials and equipment for exhibitions and displays, provided that they are re-exported within the due period. Article 12, 13 and 15 of the BIT have 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 environmental protection.

[49] Agreement on Economic Co-operation between the Kingdom of the Netherlands and Malaysia.

H. Romania[50]

The government of Malaysia signed the BIT with the government of the Socialist Republic of Romania in Bucharest in 1996, which is still in force and replaced the earlier signed BIT of 1982. The Preamble of the BIT desires to flourish and deepen industrial and economic cooperation for a long period, and especially to create suitable conditions for FDIs by recognising the necessity of protecting such foreign investment. This BIT also provides for equitable treatment at all times, full adequate protection and security, MFN treatment, as well as other benefits to the investors of the home state. Article 6 and 7 of the BIT have provisions to settle the dispute between the Contracting Parties or any of its investors. The BIT has no specific reference to environmental protection.

I. Switzerland[51]

The government of Malaysia signed the BIT with the government of the Swiss Confederation in Kuala Lumpur in 1978, which is still in force. The Preamble of the BIT intends to create favourable conditions for capital investments by recognising the need to protect such investments. This BIT protects in accordance with the local legislation, fair and equitable treatment, MFN treatment, NT, and other benefits to the investors of the home state. Article 9 of the BIT has provisions to settle disputes between the Contracting Parties or any of its investors. The BIT has no specific reference to environmental protection.

J. Turkey[52]

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50 Agreement Between the government of Malaysia and the government of Romania for the Promotion and Reciprocal Protection of Investments.

51 Agreement between government of the Swiss Confederation and the government of Malaysia concerning the promotion and reciprocal protection investments.

52 Agreement Between the government of the Republic of Turkey and the government of Malaysia for the Reciprocal Promotion and Protection of Investments.

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 flourish and deepen industrial and economic cooperation for a long period, and especially to create suitable conditions for FDIs by recognising the necessity of protecting such foreign investment. This BIT provides for full and adequate protection and security at all times in accordance with the local legislation, fair and equitable treatment, MFN treatment, and other benefits to the investors of the home state. Article 7 and 8 of the BIT have provisions to settle disputes between the Contracting Parties or any of its investors. The BIT has no specific reference to environmental protection.

K. United Arab Emirates (UAE)[53]

The government of Malaysia signed the BIT with the government of the United Arab Emirates in Kuala Lumpur in 1991, which is still in force. The Preamble of the BIT desires to create favourable conditions for greater economic cooperation for investments by recognising the need to protect such investments. This BIT provides for full protection and security at all times in accordance with the local legislation, fair and equitable treatment, MFN treatment, and 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 environmental protection.

L. United Kingdom (UK)[54]

The government of Malaysia signed the BIT with the government of the United Kingdom of Great Britain and Northern Ireland in 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 an international

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53 Agreement Between the government of the United Arab Emirates and the government of Malaysia for The Promotion and Protection of Investments.

54 Agreement Between the government of of the United Kigdom of Great Britain and Northen Ireland and the government of Malaysia for the Promotion and Protection of Investments.

agreement of such investments. This BIT provides for full protection and security at all times in accordance with the local legislation, fair and equitable treatment, MFN treatment, NT, and other benefits to the investors of the home state. Article 7 and 8 of the BIT have provisions to settle the dispute between the Contracting Parties or any of its investors. The BIT has no specific reference to environmental protection.

M. Uzbekistan[55]

The government of Malaysia signed the BIT with the government of the Republic of Uzbekistan in Kuala Lumpur in 1997, which is still in force. This BIT provides for full and adequate protection and security at all times in accordance with the local laws, regulations and national policies, equitable treatment, MFN treatment, as well as other benefits to the investors of the home state. The Preamble of the BIT desires to flourish and deepen industrial and economic cooperation for a long period, and especially to create suitable conditions for FDIs by recognising the necessity of protecting such foreign investment. Articles 7 and 8 of the BIT have provisions to settle disputes between the Contracting Parties or any of its investors. The BIT has no specific reference to environmental protection.

N. Vietnam[56]

The government of Malaysia signed the BIT with the government of the Socialist Republic of Vietnam in Kuala Lumpur in 1992, which is still in force. This BIT provides for full protection and security at all times in accordance with the local laws, regulations and administrative practices, fair and equitable treatment, MFN treatment, as well as other benefits to the investors of the home state. The Preamble of the BIT desires to flourish and deepen industrial and economic cooperation for a long period, and especially to create suitable conditions for FDIs by recognising the necessity of protecting such foreign investment.

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55 Agreement Between the government of Malaysia and the government of the Republic of Uzbekistan for the Promotion and Protection of Investments.

56 Agreement Between the government Of the Socialist Republic of Vietnam and the government of Malaysia for the Promotion and Protection of Investments.

Articles 7 and 8 of the BIT have provisions to settle disputes between the Contracting Parties or any of its investors. The BIT has no specific reference to environmental protection.

O. Bangladesh[57]

The People's Republic of Bangladesh signed the BIT with the government of Malaysia in Kuala Lumpur in 1994, which is still in force. The Preamble of the BIT desires to flourish and deepen industrial and economic cooperation for a long period, and especially, to create suitable conditions for FDIs by recognising the necessity of protecting such foreign investment. This BIT provides for full and adequate protection and security in accordance with local laws, regulations and national policies, equitable treatment, MFN treatment, as well as other benefits to the investors of the home state. Articles 6 and 7 of the BIT have provisions to settle the dispute between the Contracting Parties or any of its investors. The BIT has no specific reference to environmental protection.

The following Table 2 is the summary of the Malaysian BITs with 15 different countries in relation to environmental protection:

Table 2: Malaysian BITs with Foreign Countries

Country	**Signing date & present status**	**Environmental protection**	**FDI protections**	**Dispute settlement provisions**
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

[57] Agreement Between the government of Malaysia and the government of the People's Republic of Bangladesh for the Promotion and Protection of Investment.

Denmark	05/11/2009 In force	No	NT, MFN, FET	Yes
Germany	06/05/1981 In force	Yes	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.

Source: Author's finding from BITs.

From the above discussions and Table 2, it can be seen that only Malaysia-Germany BIT has specific references to environmental protection. Apart from this, the rest of the BITs have no specific reference to environmental protection. All the BITs mainly cover dispute settlement mechanisms and only a few BITs cover areas such as 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 nationalisation as well as other benefits for the foreign investors.

ENVIRONMENTAL PROTECTION IN MALAYSIA FROM THE PERSPECTIVE OF THE RESPONDENTS

In this study, the respondents were asked: Whether the existing FDI governing laws of Malaysia comparable in relation to protecting the environment? Concerning this, opinions received from the respondents are centred on the followings: FDI and environmental protection, the Environmental Quality Act 1974 and BITs. This can be seen below:

A. Interference with FDI and Environmental Protection

There is a certain clash between the protection of FDI and the environment. Sometimes it is difficult to determine whether the interference is a protective measure designed to keep foreigners out of the economy; or whether the motive behind the interference is a concern for the environment. In this regard, the respondents were asked about their opinion on how to tackle this problem. To answer this question, Respondent 7 suggested as follows:[58]

> To tackle the inconsistency between FDI and environmental protection, these are the possible solutions that may overcome the problem: (a) increased business responsibility is necessary for the transition to sustainability; (b) international economic agreements must not undermine environmental laws; (c) new international regulation is needed to promote sustainable investment flows.

[58] R7 (Advocate), interviewed by the researcher, Kuala Lumpur, Malaysia, September 12, 2019.

Respondent 8 explained the position of Malaysia Investment Development Authority (MIDA) regarding tackling any clash between FDI and environmental protection:[59]

> As far as MIDA is a concerned, it makes sure due diligence because it wants the project to come in. If it is a chemical or petrochemical project, which may affect the environment, it is very concern. MIDA ask them to do an Environmental Impact Assessment (EIA) or assessment study. So they must get consent from the Department of Environment (DoE) before even MIDA issue any licence. ….. If they want in principle, sometimes MIDA does provide but with the condition to say that they must get all the necessary approval from the DoE. Without that, they cannot operate the plant anyway.

He further commented:

> Now, a case like Linus, where there was an objection from the public. Then again MIDA does the due diligence, invited experts to analyse and to find out exactly what they are doing, what they are supposed to do and then it imposes all the necessary conditions. The government is trying to help Linus because this is a very unique project in Malaysia.

Respondent 9 opined:[60]

> To reduce any dispute, proper procedures should be followed. If any Multinational corporations damage the environment, after proper investigation, at first, a warning letter should be issued to them for explanation. Then based on their response, actual compensation can be claimed through legal procedures.

Respondent 10 did not comment on the issue.[61]

From the above opinions, it can be asserted that to avoid any clash between FDI and the protection of environment, proper procedures should be followed. In this regard, various measures, such as corporate responsibility should be increased; environmental laws of the host states must be respected; any new law or policy should have international standard and must promote environmental protection;

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59 R8 (Executive Director, MIDA), interviewed by the researcher, Kuala Lumpur, Malaysia, September 05, 2019.

60 R9 (Advocate), interviewed by the researcher, Penang, Malaysia, October 26, 2019.

61 R10 (Professor), interviewed by the researcher, Sintok, Malaysia, March 21, 2021.

legal procedures must be followed to recover actual compensation from the MNEs. From the response of the MIDA, it appears that MIDA sometimes issues a licence without receiving any clearance from the DoE; this type of policy should be stopped. Instead, foreign investors should be required to submit all the necessary documents as it is their responsibilities; and the MIDA must increase monitoring and compliance to check those documents.

B. Environmental Quality Act 1974s

In this regard, the respondents were asked whether any changes are necessary for the Environmental Quality Act (EQA 1974) to maintain a higher standard like many developed countries. Respondent 7 commented:[62]

> By looking at Singapore, a country that is ranked 3rd in the Environmental Regulatory Regime Index, Singapore has provided an extra-territorial liability jurisdiction enabling it to take action against companies or entities that cause pollution from abroad. The environmental Act should have this provision to become a better nation in the future.

Respondent 8 has this to say:[63]

> The standard that Malaysia has is better than many developed countries, based on the opinion of investors from EU countries (they said Malaysian standard is higher than their own country) but it can be checked if it is true or not.

Respondent 9 opined:[64]

> At first, this Act should be amended. Environmental laws of the U.K., Australia, Canada, the U.S.A. could be followed for guidance. New Act (if amended) should be drafted in such a way that environment is completely protected from any degradation.

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62 R7 (Advocate), interviewed by the researcher, Kuala Lumpur, Malaysia, September 12, 2019.

63 R8 (Executive Director, MIDA), interviewed by the researcher, Kuala Lumpur, Malaysia, September 05, 2019.

64 R9 (Advocate), interviewed by the researcher, Penang, Malaysia, October 26, 2019.

Respondent 10 did not comment on the issue.[65]

From the above, it appears that the respondents suggested the amendment of the EQA 1974. The Act should meet all the international standards, and the guidelines could be taken from the developed countries. Provision such as the 'extra-territorial liability jurisdiction' should be included. This is necessary to enable legal action could be taken against the MNEs, which causes environmental degradation in Malaysia by foreign investors.

C. Inclusion of Environmental Protection into the BITs of Malaysia

Table 3: Opinion from Respondents

Respondent	Should include	Should not include
R7	Yes	
R8	No comment	
R9	Yes	
R10	Yes	

Source: *Researcher's own finding from the interview.*

From the above Table 3, four respondents were asked about the inclusion of environmental protection into the BITs of Malaysia. In this regard, Respondent 7 is in favour of the inclusion of specific provisions and he commented:[66]

> Among the potential avenues that could be explored to increase the protection in the face of environmental damage caused by investment activities in its territory is the incorporation of civil liability principles into the Multilateral Investment Agreements.

He further opined:

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65 R10 (Professor), interviewed by the researcher, Sintok, Malaysia, March 21, 2021.

66 R7 (Advocate), interviewed by the researcher, Kuala Lumpur, Malaysia, September 12, 2019.

> By incorporating screening into the MIAs, Malaysia can retain the policy of autonomy.

Respondent 8 did not comment due to a lack of knowledge on BITs.[67] Respondents 9 and 10 are in favour of including specific provisions.[68]

From the above, it can be concluded that the respondents are in favour of the inclusion of environmental protection into the BITs of Malaysia. Therefore, to protect the legitimate interest of Malaysia, specific provisions should be included into the BITs. This is because clear provision or description will help minimising investment disputes and chances of winning over those disputes.

RECOMMENDATIONS

As can be seen from the above findings, Malaysia's BITs lack coverage of environmental issues. Due to the lack of any international treaty, the BITs at present regulate the FDI in Malaysia.[69] The FDI-related laws are scattered and environmental standards are lax. There are shreds of evidence which suggest that the increment of FDI inflows in the host country does not entirely depend on the liberalisation of FDI laws and regulations. For instance, the United Nations Conference on Trade and Development (UNCTAD) in 1999 reported that despite having very liberal FDI laws and regulations, many African states have failed to attract more FDIs. In comparison, China is one of the most restrictive investment regimes in the world; however, since 1992, it is the largest recipient of foreign investments in the developing world. Likewise, Vietnam, Thailand and Russia have more restrictive FDI laws in comparison with the Latin American countries but FDIs inflow in these states are more than the latter.

The EQA 1974 seems insufficient to deal with these new and complex environmental issues; as well as, it lacks any specific provision regarding sustainable development. It also lacks an extra-

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67 R8 (Executive Director, MIDA), interviewed by the researcher, Kuala Lumpur, Malaysia, September 05, 2019.

68 R9 (Advocate), interviewed by the researcher, Penang, Malaysia, October 26, 2019.

69 Mohammad B. Hossain, "International Efforts to Regulate Foreign Investment and Multinational Enterprises (MNEs)," *Lex-Warrier Law Journal* 9, issue 9 (2018): 401-414.

territorial liability jurisdiction enabling it to take action against companies or entities that cause pollution from abroad. Therefore, it is proposed that the EQA 1974 should include the following provision regarding sustainable development:

a) It is the state's duty to promote economic and social development, through an increment in production and productivity;

b) That one way to promote economic and social development is to increase local and foreign investment that devotes resources to productive activities, necessary to generate employment and maintain sustained economic growth, benefiting all inhabitants of the country;

c) That besides promoting and providing incentives to invest in general; it is important to attract foreign investment to the country so that with the input of capital, technology, know-how and experience, efficiency and competitiveness of the productive activities to which those resources are allocated are increased;

d) That to increase the level of foreign investment in the country, an adequate legal framework, including clear and precise regulations, in accordance with the best practices on the subject, and allowing for an international competition to attract new investments is required;

e) That to the above-mentioned effects, it is convenient to set up a Governmental agency in charge of promoting investment and facilitating investors to comply with the requisites and procedures established by law.

Furthermore, taking an example from Singapore, it is proposed that the EQA 1974 should also include an extra-territorial liability jurisdiction enabling government agencies to take legal action against companies or entities that cause pollution from abroad. It can be concluded that in Malaysia both restrictive and liberalised regulation could have positive and negative effects in practice, thus the government should consider designing its BITs in such a proportionate manner that it meets the need of both parties. Malaysia should consider environmental protection to be inserted into the BITs in order to protect its legitimate interest and at the same time protect the foreign investors' interests as per WTO principles. Therefore, well-balanced BITs need to be struck between liberalisation and restrictive regulation to ensure the sustainable development of Malaysia. The researcher proposes that the future BITs of Malaysia should include the following provision regarding the environment:

Environment: Malaysia shall authorise foreign investments as long as they do not affect the national defense and security, the national heritage, or the environment of the country. Any foreign investors must comply with the environmental requirement of the country.

CONCLUSION

In recent years, many academics and scholars also expressed their concern about protecting the national and socio-economic interests of host states and suggested 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.[70] Sornarajah proposed a 'middle path'[71] and Solomon and Mirsky hold that FDI legislation should be enacted in the consideration of some common problems that are significantly related to the development goals of FDI.[72]

From the above study, it appears that the Malaysian BITs mainly contain provisions, which promote the influx of foreign investments, as well as after post-entry, give various protections and offer incentives to the foreign investors. In the absence of a global treaty or specific Act, regulating the FDI in Malaysia is mainly dependent upon the BITs. Based on the WTO principle of 'reciprocity' Malaysia should design its BITs in such a way that all parties' interests are preserved equally, thus the economic relations will sustain for a long time between them. Moreover, it is necessary to insert environmental protection requirements through legal or policy regimes or BITs to control foreign investment in sensitive fields. This can be done by setting conditions and FDI must satisfy for the purpose of national interest, fulfilling certain conditions. These include 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 would be secured.

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70 Sherif H. Seid, *Global Regulation of Foreign Direct Investment* (Ashgate, 2002), 194.

71 Sornarajah, Muthucumaraswamy, *The International Law on Foreign Investment* (Cambridge University Press, 2010), 55.

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