

REGULATIONS AND POLICIES FOR SCREENING OF FOREIGN INVESTMENT PROPOSALS IN MALAYSIA

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ABSTRACT

Foreign investors most commonly have the intention to maximise their profit against capital investment and in doing so, they prefer the least-developed and developing countries for investments due to the weak legal frameworks. They can easily bypass their responsibility towards the host countries including corporate social responsibility. In this context, it is very important for the host state to properly screen any foreign investment proposal before allowing it. Malaysia has a central government body which is responsible for screening foreign investment proposals. This study scrutinises the existing regulations or policies of screening to find out whether there are any loopholes or in need of amendments. This paper addresses one major question: is the existing legal framework compatible to ensure proper screening of foreign investment proposals? This study applies the doctrinal legal research method and semi-structured interviews. Four respondents were interviewed with expertise in FDI laws and regulations in Malaysia. Findings show that there is a need for improvements in the existing regulatory mechanisms for the screening of foreign investment proposals and recommendations are provided accordingly.

Keywords: Malaysia Investment Development Authority, Foreign Direct Investment, Screening, Regulation, Multinational Enterprises.

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PERATURAN DAN DASAR SARINGAN CADANGAN PELABURAN ASING DI MALAYSIA

ABSTRAK

Pelabur asing lazimnya mempunyai niat untuk memaksimumkan keuntungan mereka berbanding pelaburan modal dan dengan berbuat demikian, mereka memilih negara yang kurang membangun dan membangun untuk pelaburan kerana rangka kerja undang-undang yang lemah. Mereka boleh dengan mudah memintas tanggungjawab mereka terhadap negara tuan rumah termasuk tanggungjawab sosial korporat. Dalam konteks ini, adalah sangat penting bagi negara tuan rumah untuk menapis dengan betul sebarang cadangan pelaburan asing sebelum membenarkannya. Malaysia mempunyai badan kerajaan pusat yang bertanggungjawab menapis cadangan pelaburan asing. Kajian ini akan meneliti peraturan atau dasar saringan sedia ada untuk mengetahui sama ada terdapat sebarang kelemahan atau memerlukan pindaan. Kertas kerja ini menjawab satu persoalan utama: adakah rangka kerja undang-undang sedia ada serasi untuk memastikan penyaringan yang betul bagi cadangan pelaburan asing? Kajian ini menggunakan kaedah kajian perundangan doktrin dan temu bual separa berstruktur. Empat responden telah ditemu bual dengan kepakaran dalam undang-undang dan peraturan FDI di Malaysia. Penemuan menunjukkan bahawa terdapat keperluan untuk penambahbaikan dalam mekanisme kawal selia sedia ada untuk menapis cadangan pelaburan asing dan cadangan disediakan sewajarnya.

Kata Kunci: Lembaga Pembangunan Pelaburan Malaysia, Pelaburan Langsung Asing, Saringan, Peraturan, Perusahaan Multinasional.

INTRODUCTION

After the end of the Second World War, developing and least-developed countries (LDCs) were highly dependent on developed nations for financial aid(s) and loans. In the current global context, it is the foremost feature of the countries to achieve economic supremacy in the world; and foreign direct investment (FDI) has emerged as a potent catalyst for economic development for the LDCs and developing countries.¹ The communist countries maintained that

¹ Sherif Seid, *Global Regulation of Foreign Direct Investment* (Routledge,

FDI was uniformly injurious for the developing host countries as it can create economic supremacy over them, which would result in them becoming permanently dependent upon capital-exporting developed countries.² In contrast, the European Union and the United States of America had a very liberal attitude towards FDI; and successfully convinced the host states that FDI is necessary for their economic development.³

In Malaysia, FDI also plays a key role since the 1960s.⁴ The FDI inflows in Malaysia have been on a growing trend since 2001; and it reached a new high in 2016 with an amount of RM47.0 billion, mostly contributed by the Asian region in the services sector.⁵ In 2017, the FDI inflows were largely channelled to the services sector, especially in insurance and financial; real estate; information and communication activities; manufacturing sector; and mining and quarrying sectors.⁶

In 2019, the FDI inflow into Malaysia was MYR3.73 billion and at the end of March 2020 it increased to MYR6.37 billion. However, in Q2 2020 the FDI slowed down from RM6.4 billion to RM2.2 billion in the past period.⁷ Malaysia has signed its first bilateral investment treaties (BIT) with Germany in 1960 and since

2018), 126.

² Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge university press, 2021), 43.

³ *Ibid.*

⁴ Ong, Nurhafiza Azman, Nur Liyana Mohamed Yousop, Zuraidah Ahmad, Norhasniza Mohd Hasan Abdullah, Ferri Nasrul, and Mohd Hanafi Azman Ong. "Foreign Direct Investment Inflows in Malaysia: A Quantitative Approach." *e-Academia Journal* 7, no. 1 (2018).

⁵ *Ibid.*

⁶ Mohammad U. Mahidin, Department of Statistics, Malaysia, accessed November 9, 2022, https://www.dosm.gov.my/v1/index.php?r=column/cthemeByCat&cat=322&bul_id=TENVb0xWNXFiTnJ4ekk3R2d0NkFkdz09&menu_id=azJjRWpYL0VBYU90TVhpclByWjdMQT09.

⁷ Mohammad U. Mahidin, Department of Statistics, Malaysia, accessed November 9, 2022, https://www.dosm.gov.my/v1/index.php?r=column/cthemeByCat&cat=322&bul_id=TENVb0xWNXFiTnJ4ekk3R2d0NkFkdz09&menu_id=azJjRWpYL0VBYU90TVhpclByWjdMQT09.

then, as of July 10, 2020, has signed 71 BITs and 27 treaties with investment provisions (TIPs) with various regions and states.⁸ Malaysia has adopted the following laws in relation to FDI:⁹

- (a) Malaysian Investment Development Authority (Incorporation) Act 1965 (MIDA 1965);
- (b) Companies Act 2016 (CA 2016);
- (c) Promotion of Investment Act 1986 (PIA 1986);
- (d) Industrial Coordination Act 1975 (ICA 1975);
- (e) Ministerial Functions Act 1969 (MFA 1969);
- (f) Countervailing and Anti-Dumping Duties Act 1998 (CADD 1998);
- (g) Safeguards Act 2012 (SA 2012).

The Government of Malaysia under the MIDA 1965 established the Malaysia Investment Development Authority (MIDA). The primary function of MIDA is to boost the inflow of FDI and provide supervision to foreign investors in the services, and manufacturing sectors in Malaysia. Sections 561-579 of the CA 2016 are the principal law which governs the entry and practice of foreign

⁸ Mukhisa Kituyi, United Nations Conference on Trade and Development (UNCTAD), accessed November 8, 2022, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/127/malaysia>. A list of BITs and TIPs is attached with the thesis as Appendix D.

⁹ Malaysian Investment Development Authority (MIDA), Laws of Malaysia, accessed October 4, 2022, <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20327.pdf>. This is to be noted that all these seven Acts are relevant to FDI in Malaysia, which covers both the pre- and post-entry stages. In this study, the first five Acts shall be discussed as they relate to the pre-entry stage. Last two Acts are relevant to the post-entry stage, which is outside of the scope of this study.

companies in Malaysia. According to the ICA 1975, foreign investors must acquire a licence if the minimum capital is MYR2.5 million or employs at least 75 full-time individual staff. In order to attract more FDI, the PIA 1986 offers various incentives to investors. Under the MFA 1969, the government ministries have the authority or jurisdiction to administer investments.¹⁰

As mentioned above, Malaysia has foreign investment laws and policies alongside a central organisation to administer the entire investment-related activities for domestic and foreign investors. The government of Malaysia retains its right to review and approve all domestic and foreign investments to assess whether the proposed FDI met the economic goals; potential impact on the local economy; and requirements for the different incentives that are obtainable in specific regions and sectors.¹¹ Delays and lack of transparency in the Malaysian government's review and decision-making process had been reported.¹² The foreign-owned pharmaceutical companies claimed that they offered lower prices for more effective medicines but lost bids against ethnic Malay-owned companies. There is a recurring concern about the proper implementation of the rules on government procurement contracts.¹³ This study examines the issue of whether the regular entry regulatory factors are favourable to the escalation of the development progression; and how far the

¹⁰ Malaysian Investment Development Authority (MIDA), Laws of Malaysia, accessed October 12, 2022, <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20327.pdf>. This is to be noted that all these seven Acts are relevant to FDI in Malaysia, which covers both the pre- and post-entry stages. In this study, the first five Acts shall be discussed as they relate to the pre-entry stage. Last two Acts are relevant to the post-entry stage, which is outside of the scope of this study.

¹¹ Azman Mahmud, Malaysian Investment Development Authority (MIDA), accessed November 10, 2022, <http://www.mida.gov.my/home/promoted-activities-and-products-for-manufacturing-sector/posts/>.

¹² Clayton Hays, U. S. Department of State (Bureau of Economic and Business Affairs), accessed July 6, 2019, <https://www.state.gov/e/eb/rls/othr/ics/2016/eap/254293.htm#5performance>.

¹³ *Ibid.*

administrative organization (MIDA) has performed their duties as per existing laws and policies in Malaysia.

SCREENING OF FOREIGN DIRECT INVESTMENT IN MALAYSIA

The Armenian Code states that certain economic activities “may only be conducted by enterprises with foreign investment only after obtaining a license in an established manner”.¹⁴ Generally, an application should be made by foreign investors to the governmental authority before investing to acquire permission or approval. In a host country, screening of the FDI is a system of scrutiny and is usually used to control its entry into the country. Following the national laws and policies, the host country applies its screening method to decide whether the FDI proposal should be accepted or rejected; and also, to ensure that foreign investors are complying with the established requisite.¹⁵ The host state might have different objectives to apply the screening process to FDI proposals; however, the followings are the most common:¹⁶

- a) to examine how far the FDI proposal will suit the economic goals;
- b) to evaluate the potential impact on the local economy;
- c) whether foreign investors have followed the procedures as required in the specific sector in the prescribed manner.

The opinion differs amongst international legal scholars regarding screening regulations in the host states. At the beginning of FDI, scholars such as Victoria and Vattle opined that “fundamental human rights, which inheres in all men to trade with the people of

¹⁴ Article 14 of the Law of the Republic of Armenia on Foreign Investments 1994 (Armenia).

¹⁵ UNIDO, Guidelines for Foreign Investment Promotion Agencies (2003), [Unido.org](http://www.unido.org), accessed November 10, 2022, <http://www.unido.org>.

¹⁶ Al-Yagout, Mona Mohammed Abdulla. "The regulation of foreign investment in Kuwait: The role of law, politics and economic policy in the development process." PhD diss., University of Warwick, 1997.

other lands and thus fulfils the human urge to the community”.¹⁷ Fatouros considered that “the imposition of conditions, such as screening of FDI proposal, is a key hindrance to foreign investment in developing countries”.¹⁸

In contrast, Shahita commented that “all or most proposal investments are subject to scrutiny or screening by the authorities; and must receive formal approval, such as an investment licence before an investment can actually be made. The screening process typically involves an assessment of the projected investment’s economic impact and in particular, of the economic benefits that may accrue to the host country from investment”.¹⁹

Moreover, the host state’s regulation to monitor FDI is very common where any foreign investment is considered to be against sovereignty or national interests.²⁰ Due to the competition between the developing countries to attract more FDI, they started to relax and simplify their screening system. Thus, they follow an ‘open door policy’ by allowing FDI through minimal registration, or prior permission in a numeral of sectors.²¹ However, in recent years, many developed and developing states have adopted protective measures, for example, Australia²²; France²³; Japan²⁴; Canada²⁵; Russia²⁶;

¹⁷ *Ibid.*

¹⁸ Arghyrios A. Fatouros, *Government Guarantees to Foreign Direct Investment* (Columbia University Press, 1962), 290.

¹⁹ Shihata, Ibrahim FI. "Recent trends relating to entry of foreign direct investment" ICSID review 9, no. 1 (1994): 47-70.

²⁰ *Ibid.*

²¹ La Porta *et al.*, *Investor Protection: Origins, Consequences, Reform* (Cambridge, 2017), 23.

²² In Australia, under the Foreign Acquisitions and Takeovers Act of 1975, “the Government must determine whether proposed foreign acquisitions are consistent with Australia’s national interest. A new policy was announced in February 2008 for proposed investments by sovereign investors. It requires the review of applications consider six specific issues, including whether an investors operations are independent from the relevant foreign Government; the investors observance of standard of business behaviour; the investments impact on national security; and the contribution of an investment to the country’s economy and community”. See Karl P. Sauvant, “FDI Protectionism is on the Rise (Research Working Paper No. 5052),” Worldbank.org, accessed October

China²⁷; and India²⁸. Even though the screening method of these states varies; in most cases, it includes strategically important and economically sensitive sectors for sovereignty or national security purposes.

In Malaysia, the MIDA is empowered to screen every domestic and foreign investment, and upon satisfaction, approved them for the government to evaluate, whether the proposed

13, 2019, www.worldbank.org.

²³ In France, a decree was issued at the end of 2005 identifying eleven strategic sectors in which investment proposals fall under the purview of review authorities. *Ibid*.

²⁴ In Japan, according to its Foreign Exchange and Foreign Trade Act, foreign investment that potentially impairs national security, disturbs the maintenance of public order, hinders the protection of public safety, or has a significant adverse effect on the smooth management of the Japanese economy must be screened by the Ministry of Finance and the Ministry having jurisdiction over the business". *Ibid*.

²⁵ In Canada, on March 12, 2009, the foreign investment law was amended. Apart from changes that liberalised the country's foreign investment review process of general application, the amendment included "a national security test for proposed investments, which applies to a much broader range proposed transactions than the pre-existing net benefit test". *Ibid*.

²⁶ In Russia, "a 2008 law on Procedures for Foreign Investments in Companies of Strategic Importance of National Defense and Security requires Government approval for certain transactions involving foreign investors if (i) the Russian company is engaged in an activity of strategic importance to the country's defense and national security and (ii) the foreign investor would control either the company or rights to natural resource deposits having federal importance". *Ibid*.

²⁷ China strengthened its review system in August 2006 by announcing the Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors. Under this, "a new screening mechanism was developed which was further enhanced in a five-year plan of National Development adopted in November of the same year. Besides this it also enacted an anti-monopoly law in August 2008". *Ibid*.

²⁸ In India, "the Government recently introduced investment policy measures that include a requirement of prior approval for the transfer of ownership or control from resident Indian citizens to non-resident entities in specific sectors, including air transport services, banking, insurance and telecommunications". *Ibid*.

investment meets the economic goals; potential impact on the local economy; criteria for the different incentives acquirable in specific regions and sectors.²⁹ It evaluates the following applications for projects in the manufacturing and services sectors:

- a) tax incentives;
- b) manufacturing licenses;
- c) duty exemptions on raw materials and components;
- d) expatriate posts;
- e) duty exemptions on machinery and equipment for the agricultural sector and selected services sector.

Besides, MIDA is accountable to issue a ‘Confirmation Letter’ regarding the application status before it seeks any permission from the Royal Malaysian Customs Department to claim any import duty exemption on equipment, machinery, consumables, spare parts, container trailers and prime movers for manufacturers in the principal customs area (PCA).³⁰ The MIDA 1965 allows FDI only in the manufacturing and service sectors; but lacks any specific provision, which could empower the Authority to prohibit or restrict any FDI proposal at the entry level.³¹

In 2013, Malaysia conducted an investment policy review through the Organization for Economic Cooperation and Development. The review underscored “the generally positive

²⁹ Azman Mahmud, “Promoted Activities,” Mida.gov.my, accessed January 2, 2019, <http://www.mida.gov.my/home/promoted-activities-and-products-for-manufacturing-sector/posts/>.

³⁰ Sundor Raja, “Malaysia Investment Performance Report 2018,” Mida.gov.my, accessed October 10, 2022, https://www.mida.gov.my/home/administrator/system_files/modules/photo/uploads/20190315105335_MIDA%20IPR%202018.pdf.

³¹ Azman Mahmud, “General Guidelines,” Mida.gov.my, accessed November 10, 2022, <http://www.mida.gov.my/home/general-guidelines-&-facilities/posts/>.

direction of economic reforms and efforts at liberalisation, the recommendations emphasized the need for stronger intellectual property protections; greater service sector liberalisation; enhanced guidance and support from MIDA; and continued corporate governance reforms”.³² The government of Malaysia prefers to increase FDI as it can positively contribute to economic development; however, due to the burdensome regulatory regime and restrictions in certain areas, the developmental process is hampered.³³

In 2018, Malaysia was on the rise in several global rankings. For example, in Bloomberg's Emerging Market Scorecard, Malaysia carried its lead from 2017 and clinched the top spot in a line-up of 20 other emerging market peers. According to the World Bank Group's Doing Business 2020 report, Malaysia ranked 12 among 190 economies in the world.³⁴ In the World Economic Forum's (WEF) Global Competitiveness Report (GCR) 2018, Malaysia scored 74.4 and ranked 25th place out of 140 countries.³⁵ Also, in 2020, in the Management Development's (IMD) World Competitiveness annual rankings (Switzerland-based Institute), Malaysia registered an improvement of two notches as being the only Southeast Asian country.³⁶

To adopt international regulatory best practices, six business reforms were carried out by MIDA in the areas of starting a business, getting electricity, dealing with construction permits, trading across borders, resolving insolvency and registering property. However, as per ‘Doing Business Report 2017’, Malaysia made starting a business

³² Clayton Hays, Malaysia Investment Climate Statement 2015 (U.S. Department of State, 2015), 4.

³³ La Porta *et al.*, Investor Protection: Origins, Consequences, Reform (Cambridge, 2017), 6.

³⁴ The World Bank, Doing Business Report 2020, accessed October 13, 2022, <https://www.doingbusiness.org/en/rankings>.

³⁵ World Economic Forum, The Global Competitiveness Report 2018, accessed November 7, 2022, <https://www.weforum.org/reports/the-global-competitiveness-report-2018>.

³⁶ Institute for Management Development (IMD), World Competitiveness Annual Rankings 2020, accessed April 8, 2022, <https://www.imd.org/wcc/world-competitiveness-center-rankings/world-competitiveness-ranking-2020/>.

more difficult by requiring that companies with annual revenue of more than MYR500,000 register as Goods and services tax (GST) payers.³⁷ Also, according to the ‘Doing Business Report 2020’ Malaysia is ranked 126 among 190 economies in the world for ‘Starting a Business’, which indicates that measures need to be taken by MIDA in this regard.³⁸

Foreign investments are subjected to an approval process and the imposition of equity conditions. Their precise details, level of scrutiny and degree of enforcement have depended upon the nature of investment and the particular sector. These equity conditions, strictly speaking, are no more than administrative guidance and do not have the force of law.³⁹ But previously, the Malaysian Courts have voided contracts of foreign investors for non-compliance on grounds of ‘public policy’; along with the statutory-based licensing system conferring an absolute discretion on the Minister to refuse and revoke licences; as well as to add whatever conditions ‘they think fit’, gives them quasi-legal status.⁴⁰ Moreover, the government of Malaysia is criticised for the lack of transparency and for making decisions in favour of businesses and individuals, who have close relations with superior officials.⁴¹

It has been reported about delays in the Malaysian government’s review process and a lack of transparency in government decision-making.⁴² Transparency is a core principle of high-quality decision-making. Transparency supports the wise use of limited development funds, from planning investments to measuring

³⁷ The World Bank, Doing Business Report 2020, accessed October 13, 2022, www.doingbusiness.org.

³⁸ *Ibid.*

³⁹ Ho Kok Cheong Sdn Bhd & Anor v Lim Kat Hong [1979] 2 MLJ 224; Thong Foo Ching & Others v Shigenori [1998] 4 MLJ 595.

⁴⁰ Sections 2-3 of the MFA 1969; see also, David Hey v New York Ann Realty Sdn Bhd [1985] 1 MLJ 167.

⁴¹ Yvonne Tan, “Malaysia Issues Licences to Five Foreign Banks,” The Star, June 1, 2019, <https://www.thestar.com.my/business/business-news/2010/06/18/bank-negara-issues-5-new-commercial-banking-licences-to-foreign-banks>.

⁴² Clayton Hays, Malaysia Investment Climate Statement (U.S. Department of State, 2015), 8.

the results. As stated by one of Malaysia's renowned economists, Tan Sri Dr. Sulaiman Mahbob, "good governance and transparency are keys to propelling Malaysia's economy to a higher level, which refers to the lack of good governance and transparency in Malaysia; as well as the increasing convergence of interests between political masters and local businessmen or entrepreneurs, were not healthy for the country's economy".⁴³

One of the examples of lack of transparency can be seen in the issue that involves the Federal Land Development Authority (FELDA).⁴⁴ It was reported that the FELDA was tottering under a monstrous MYR8 billion debt after the purchase of Grand Plaza Kensington (GPK) for MYR220 million⁴⁵. It can be argued that this is an example of poor management, bad investment decisions and loopholes in governance. Before purchasing the GPK, a proper market survey should have been done. Even if there was any, there must be some kind of lacking (for instances, lack of in-depth market research, indecision and inaction, fear of risk or the truth, and/or too many options) in the report, otherwise there could not be such a huge debt against comparatively much lower investments. Among the challenges in implementing transparency in decision-making are:

- a) Malaysia is not proactively publishing whom public officials meet, giving reasons to justify their decisions;
- b) do not record while creating any legislation or policy; and

⁴³ Sulaiman Mahbob, "Good Governance, Transparency Vital for Malaysia's Economy," *The Star*, October 14, 2019, <https://www.thestar.com.my/business/business-news/2014/01/08/economist-says-good-governance-transparency-vital-for-economy>.

⁴⁴ Faizia Ismail, "Felda's Black Mark: 'Poor Governance'," *New Straits Time*, October 14, 2019, <https://www.nst.com.my/news/exclusive/2018/12/436668/feldas-black-mark-poor-governance>.

⁴⁵ *Ibid.*

- c) to maintain good governance.⁴⁶

According to Transparency International (TI), a lack of transparency can lead to corruption.⁴⁷ This includes a lack of transparency in decision-making. Not having a good governance will allow corruption to occur. The government can take steps to remedy the issue by implementing policies to ensure transparency in decision-making and speed up the review process without any delay. To tackle these challenges completely, the government needs to integrate anti-corruption measures in all spheres. Accordingly, TI advocates a stricter implementation of the UN Convention against Corruption, the only global initiative that provides a framework for eradicating corruption.⁴⁸

Furthermore, foreign investors continuously criticise “the lack of transparency in the decision-making process of the Government. Bureaucratic and regulatory burdens largely support the ‘grabbing-hand’ theory, which asserts that politicians and bureaucrats exploit rent-seeking opportunities. Undeniably, the elements of transparency and accountability are the vanguard for an efficient regulatory framework”.⁴⁹ Therefore, MIDA needs to emphasise the followings:

- a) “a consultative process for reviewing, changing or modifying established rules;
- b) a systematic openness of the rules governing the regulation of the economic activity in question;
- c) the periodic evaluation of the effectiveness of the regulatory programme; and

⁴⁶ *Ibid.*

⁴⁷ Transparency International, What is Corruption?, accessed November 9, 2022, <https://www.transparency.org/what-is-corruption>.

⁴⁸ Transparency International, What is Corruption?, accessed November 9, 2022, <https://www.transparency.org/what-is-corruption>.

⁴⁹ William A. Nielson, Regulation: An Introduction to Legal Sources, Administrative Models and Compliance Design (Longman, 2016), 78-84.

d) the accountability of those in authority in the public service and the Cabinet”.⁵⁰

It is to be noted that the ministries and agencies have the jurisdiction to review any FDI in services and both the controlled or fully liberalised sub-sectors are still requiring their approval. This screening process is in place to ensure that all FDI proposals meet the government’s qualifications for different incentives offered and also to promote economic development goals. Nonetheless, the Ministerial Functions Act 1969 (MFA 1969) permits related ministries to have wide discretionary powers while approving any particular investment projects. However, targeted investors in industries have the opportunity to negotiate favourable business terms with the ministries, or other bodies that are regulating the particular industry. This can include “assistance in navigating a complex web of regulations and policies, some of which can be waived on a case-by-case basis. Foreign investors in non-targeted industries tend to receive less government assistance in obtaining the necessary approvals from the various regulatory bodies and therefore can face greater bureaucratic obstacles”.⁵¹

The swiftly developing worldwide manufacturing landscape calls for manufacturing firms to re-evaluate their current strategies and approaches to remain competitive and relevant. In this regard, the National Policy on Industry 4.0 (NPI 4.0) outlines 13 broad strategies for Malaysia to embark on a journey that will transform its manufacturing industry landscape over the next decade.⁵² However, the strategies and action plans outlined in this Policy require “collaborative efforts across multiple stakeholders and organisations. To accelerate or improve the intended outcome of these actions, several factors must be taken into consideration to identify the most efficient and effective implementation approach. For instance, the availability of capital and incentives from the beginning ensures that

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Sundor Raja, “The Malaysian Investment Performance Report 2018,” Mida.gov.my, accessed August 27, 2022, http://www.mida.gov.my/home/administrator/system_files/modules/photo/uploads/20190315105335_MIDA%20IPR%202018.pdf.

NPI 4.0 programmes have a solid start in Malaysia. Funding and incentives should be directed towards both R&D and adoption of these technologies in the manufacturing process”.⁵³

In July 2013, the Malaysian government initiated a National Policy on Development and Implementation of Regulations (NPDIR).⁵⁴ Under this policy, “the Federal government embarked on a comprehensive approach to minimise redundancies in the country’s regulatory framework. The main components of the policy have been: (a) a regulatory impact assessment (a cost-benefit analysis of all newly proposed regulations); and (b) the creation of a regulations guide, Pasukan Petugas Khas Pemudahcara Perniagaan (PEMUDAH) to aid civil society organisations and businesses in understanding regulatory requirements affecting their organisations’ activities”.⁵⁵ Despite the effort to make the process more inclusive and to make the government more answerable for its rules, there are several foreign investors still criticizing the government’s decision-making process and the lack of transparency.

There is also a frequent concern about the implementation of regulations or rules on government procurement contracts. It was reported by the U.S. Department of State (Bureau of Economic and Business Affairs) that the non-Malaysian pharmaceutical companies claimed that despite offering more effective medicines at a lower cost, they lost their bids against the Bumiputera-owned companies. For instance, in the case of public hospitals, there is a continuous suspicion of an unofficial set of rules relating to a contract for providing medical devices.⁵⁶ In October 2014, “a group of Malaysian medical device manufacturers launched a public relations campaign with the intent of reversing a Ministry of Health contract awarded

⁵³ *Ibid.*

⁵⁴ Ali Hamsa, National Policy on Development and Implementation of Regulations (Malaysia Productivity Corporation, 2013), 3.

⁵⁵ PEMUDAH is similar to the role MIDA plays for prospective investors. See Pemudah, About, accessed October 17, 2022, <http://www.mpc.gov.my/pemudah/>.

⁵⁶ Clayton Hays, FDI Report on Malaysia: U. S. Department of State (Bureau of Economic and Business Affairs), <https://www.state.gov/e/eb/rls/othr/ics/2016/eap/254293.htm#5performance>.

earlier in the year. The company that won the contract was started by a former senior-level Ministry of Health official and was alleged to be merely a front company for foreign-produced medical devices. The ministry began an investigation but has not made public either its findings or information about the contract awardee”.⁵⁷

Therefore, the government can adopt the recommended solutions issued by Access Info Europe to rectify this issue.⁵⁸ Among the measures are:

- a) “transparency applies to all (all public bodies which bear responsibility for decision making should fall under the scope of the access to information laws);
- b) create records (public authorities have a duty to document information around decision-making processes that is essential to ensure public participation and scrutiny, as well as for the historical record);
- c) improve proactive publication requirements (public authorities and representatives should be obliged to keep records and proactively publish information, such as their agendas, minutes of meetings, third-party documents and information justifying decisions taken);
- d) reduce the time taken to make information publicly available (prompt responses to requests are essential to facilitate potential participation in decision-making processes. This also counts when responding to appeals and reviews);
- e) apply exceptions narrowly to information related to decision making (exceptions should always be applied narrowly and always

⁵⁷ Clayton Hays, FDI Report on Malaysia: U. S. Department of State (Bureau of Economic and Business Affairs), <https://www.state.gov/e/eb/rls/othr/ics/2016/eap/254293.htm#5performance>.

⁵⁸ Helen Darbishire, Defending and Promoting the Right of Access to Information in Europe (Access Info Europe), <https://www.access-info.org>.

taking into account any overriding public interest in full or partial disclosure of information)”).

From the above discussions, it can be recommended that as a primary reviewing and approving authority, MIDA must ensure that any FDI proposal meets all criteria or requirements; as well as must consider sovereignty, national interest and security, economic goals and potential impact on the local economy. The MIDA should take necessary measures in the area of starting any business to improve rankings in the ‘Doing Business’. More measures should be taken to reduce delays in the government’s authorisation and review process, which must be transparent; as well as bureaucratic obstacles, should be removed.

The government must ensure proper implementation of the National Policy on the NPDIR to make the governmental body more accountable for its rules and to make the process more inclusive. The government can follow the European Union (EU)’s FDI screening framework as the reference point, which will likely improve the screening process. The framework is a much-organised structure, especially for maintaining security and public order for foreign investment and benefit the country.

The MIDA needs to take necessary steps regarding political stability, consistent FDI policies, efficient public administration and high-quality support services. To be sufficient, there is a need for greater collaborative efforts between the various government agencies and the private sector in creating a much more investor-friendly and smoothly functioning business environment.⁵⁹ The MIDA should present a new posture that plays a key role as a facilitator for economic development and generation of growth. It must not act purely as administrators who display power when dispensing services as though it is doing a favour to the businessmen in their quest for profits.⁶⁰

⁵⁹ Cheah C. Sooi, “MIDA Comes of Age,” *Malaysian Business* (2018): 17.

⁶⁰ *Ibid.*

Good governance and transparency are keys to propelling Malaysia's economy to a higher level.⁶¹ Therefore, a stricter implementation of the UN Convention against Corruption is necessary to eradicate corruption. This is because a country's economic progress could be halted due to corruption. A foreign investor generally prefer a host country with less (or none) corruption. The government can take steps to remedy the issue by implementing policies to ensure transparency in decision-making and speed up the review process without any delay. To fully address these challenges, the government needs to integrate anti-corruption measures in all spheres. In this regard, the government should adopt the recommended solutions issued by Access Info Europe as mentioned earlier⁶²

SCREENING OF FDI IN MALAYSIA FROM THE PERSPECTIVE OF THE

RESPONDENTS

In this study, four participants⁶³ were interviewed and their responses were centred on the followings: delay, review, transparency, and screening process. This can be seen below:

Delays in Review Process and Transparency in Decision-making

In this regard, the participants were asked: how to overcome situations, such as delays in the government's review process and lack

⁶¹ *Ibid.*

⁶² Helen Darbishire, *Defending and Promoting the Right of Access to Information in Europe* (Access Info Europe), <https://www.access-info.org>.

⁶³ P1 (Mr Norhisham Abd Bahrin, Advocate, Azmi & Associates); P2 (Mr Sivasuriyamoorthy Sundara Raja, Executive Director, Malaysian Investment Development Authority); P3 (Mr Peter Huang, Advocate, Peter Huang & Richard); P4 (Prof. Madya Dr. Siti Nurazira Binti Mohd Daud, Universiti Utara Malaysia).

of transparency in decision-making. To answer the question, Participant 1 suggested:⁶⁴

“The government can take steps to remedy the issue by implementing policies to ensure transparency in decision-making and speed up the review process without any delay. To fully address these challenges, the government needs to integrate anti-corruption measures in all spheres.”

Participant 2 explained the position of MIDA regarding delays in decision-making as follows:⁶⁵

“Firstly, MIDA has a very clear client charter. When a company comes in, MIDA will give them a licence within two or four weeks. For incentives, it is four weeks. But sometimes there is a delay because of wanting more documents from the company but they delay to provide us. Sometimes it takes months. MIDA does not want to close the files immediately. That is always been its policy because of investment promotions. Secondly, MIDA is also concerned about the implementation of the project. There are representatives in MIDA from the immigration, customs, labour, machinery, and telecommunication departments. The idea is to provide better service in the major areas, but there may be a delay because of the number of applications it receives in a year.”

Participant 3 opined:⁶⁶

“Typical symptoms of lack of transparency are sub-optimization, duplicate work, bad decision-making and inability to innovate. These things do not just impact the bottom-line results negatively, they also hamper an organisation's ability to compete and survive in the long haul. In recent years, there are many allegations against the government organisation; lack of transparency is one of them. It should be tackled properly if not public acceptance of any decision will be in question. So, this situation can be improved by being honest in any decision-making and must be for the benefit of the country.”

⁶⁴ P1 (Advocate), interviewed by the researcher, Kuala Lumpur, Malaysia, September 12, 2019.

⁶⁵ P2 (Executive Director, MIDA), interviewed by the researcher, Kuala Lumpur, Malaysia, September 05, 2019.

⁶⁶ P3 (Advocate), interviewed by the researcher, Penang, Malaysia, October 26, 2019.

Participant 4 commented on:⁶⁷

“Reviewing the process and identifying the source of the problem. Related policy and regulation to conform the transparency in decision making.”

From the above, it can be asserted that all participants opined about the delays in the government’s review process and the lack of transparency in decision-making. The lack of transparency has negative effects, such as duplicate work, sub-optimization, inability to innovate, bad decision-making and so on. To overcome these situations, the government needs to take proper initiative to speed up the review process and appropriate implementation of policies to ensure transparency in decision-making.

Improvements of FDI Screening Process

Participants were asked: how to improve the FDI screening process. In this regard, Participant 1 opined:⁶⁸

“Taking the EU’s FDI screening framework as the reference point, will likely improve the screening process for Asia and even Malaysia. The framework is a much-organised structure, especially for maintaining security and public order for foreign investment and the benefit of the country.”

Participant 2 explained the position of MIDA regarding the screening of any FDI as follows:⁶⁹

“There is a very good and proper screening process as far as MIDA is concern. MIDA has overseas centres, if there is any doubt; officials visit the project, interview the parties, and sometimes collect news or views from other parties like the embassy or consultancy company to find out. The report that

⁶⁷ P4 (Professor), interviewed by the researcher, Sintok, Malaysia, March 21, 2021.

⁶⁸ P1 (Advocate), interviewed by the researcher, Kuala Lumpur, Malaysia, September 12, 2019.

⁶⁹ P2 (Executive Director, MIDA), interviewed by the researcher, Kuala Lumpur, Malaysia, September 05, 2019.

is presented to the Committee, sometimes takes hours to approve. The overseas centres are its backbone to see whether or not whatever foreign investors are saying, is true or not.MIDA also check financial report, performance report and so on.”

However, MIDA always needs to improvise or improve itself. For example, Singapore always ranks number one in ‘Doing Business’ because they are a city-state, which enables them to make their decision fast. In Malaysia, there are various states which function separately and the policies of MIDA are implemented differently. As a result, sometimes it is difficult to implement a policy in all states at the same time.⁷⁰ However, unlike any other investment promotion agency, MIDA goes to the investors to invite investment but can rank better if the implementation is improved.⁷¹ The approval process should be streamlined further, timeline taken to the approval process can be shortened, making it more transparent for companies to view the status or what stage is the application (online). Therefore, these measures can be taken by the government for further improvement of the screening process.

Participant 3 opined:⁷²

“MIDA as an administrative agency should ensure that foreign investor brings tangible benefits to Malaysia. It should have regard to the impact of the FDI on the domestic economy and must ensure that local entrepreneurs are not affected by the entry of powerful MNCs into an industrial sector.”

Participant 4 did not comment on the issue.⁷³

From the above, it can be concluded that MIDA requires improvements in the FDI screening process. The participant from MIDA accepted that the approval process of FDI needs to be

⁷⁰ P1 (Advocate), interviewed by the researcher, Kuala Lumpur, Malaysia, September 12, 2019.

⁷¹ P2 (Executive Director, MIDA), interviewed by the researcher, Kuala Lumpur, Malaysia, September 05, 2019.

⁷² P3 (Advocate), interviewed by the researcher, Penang, Malaysia, October 26, 2019.

⁷³ P4 (Professor), interviewed by the researcher, Sintok, Malaysia, March 21, 2021.

improved to rank well in ‘Doing Business’. Any new measures must ensure that FDI brings tangible benefits to Malaysia, national interests and domestic businesses are protected against the MNEs. In such a case, guidelines can be taken from the EU’s FDI screening framework.

FINDINGS AND RECOMMENDATIONS

The MIDA 1965 allows FDI only in the manufacturing and service sectors; but it lacks any specific provision which could empower the Authority to prohibit or restrict any FDI proposal at the entry level. According to the ‘Doing Business Report 2020’, Malaysia is ranked 126 among 190 economies in the world for ‘Starting a Business’. Foreign investors in non-targeted industries tend to receive less government assistance in obtaining the necessary approvals from the various regulatory bodies and also face greater bureaucratic obstacles. Despite the initiation of the NPDIR to make the government process more inclusive and more accountable for its rules. Many foreign investors continuously criticising the delays and lack of transparency in the government’s decision-making process. Moreover, there is a recurring concern about the implementation of rules on government procurement contracts. Despite offering more effective medicines at a lower cost, the non-Malaysian pharmaceutical companies claim to have lost their bids against Bumiputera-owned companies.

As a primary reviewing and approving authority, MIDA must ensure that any FDI proposal meets all criteria or requirements; as well as must consider sovereignty, national interest and security, economic goals and potential impact on the local economy. The researcher proposes that the government can follow the EU FDI screening framework as the reference point, which will likely improve the screening process in Malaysia. The framework is a much-organised structure, especially for maintaining security and public order for foreign investment and the benefit of the country. Thus, the EU’s screening framework is as follows:

(a) To create an enabling legal framework which embraces the diversity of Malaysia’ approaches to FDI screening and its exclusive responsibility for national security, while taking into account the competence for FDI;

- (b) To set basic requirements as well as time-limits for FDI screening procedures;
- (c) A non-exhaustive list of factors that may be taken into consideration in the screening process;
- (d) To reaffirm that Malaysia may maintain, amend or adopt FDI screening mechanisms on grounds of security or public order under the conditions of the proposed Regulation, that Malaysia would not be obliged to create an FDI screening mechanism and that it retains the final decision-making power on FDI;
- (e) To introduce a new Regulatory Body competence to screen FDI and issue a non-binding opinion, if an FDI in Malaysia may affect the security or public order of projects or programmes;
- (f) To create a cooperation mechanism between the Malaysian government and the new Regulatory Body, which aims to enhance the coordination of screening decisions taken by them;
- (g) To increase the awareness of the Malaysian government and the new Regulatory Body about planned or completed FDI that may affect security or public order by way of exchanges of information;
- (h) To introduce transparency and information requirements for screening mechanism;
- (i) To introduce an Investment Coordination Group as a second institutional coordination body next to the envisaged FDI screening contact points;
- (j) To require all foreign investors to submit an annual FDI report to the Regulatory Body to provide additional information on their application, based on which the Regulatory Body is to draw up and publish an annual report.

It is proposed that MIDA should take necessary measures in the area of starting any business to improve rankings in the ‘Doing Business’. More measures should be taken to reduce delays in the

government's authorisation and review process, which must be transparent; as well as bureaucratic obstacles, should be removed. The government must ensure proper implementation of the NPDIR to make the governmental body more accountable for its rules, and to make the process more inclusive. In this regard, the opinion received from Participant 1 can be taken into consideration:

"The government can take steps to remedy the issue by implementing policies to ensure the transparency in decision-making and speed up the review process without any delay. To fully address these challenges, the government needs to integrate anti-corruption measures in all spheres."

It is proposed that MIDA needs to take necessary steps regarding political stability, consistent FDI policies, efficient public administration and high-quality support services. To be sufficient, there is a need for greater collaborative efforts between the various government agencies and the private sector in creating a much more investor-friendly and smoothly functioning business environment. MIDA should present a new posture that plays a key role as a facilitator for economic development and generation of growth. It must not act purely as administrators which display power when dispensing services as though it is doing a favour to the businessmen in their quest for profits.

CONCLUSION

The governmental authorities should be more enlightened and proactive and willing to protect the interests in Malaysia. The regulatory bodies should wake up to their responsibilities and ensure that other officers are acquainted with the basic knowledge of their duties and responsibilities; as well as how to enforce the FDI governing laws and policies. Foreign investors can form an association mainly protecting their interests; but at the same time, should act as the best forum that will cooperate with the regulatory bodies. This association should also encourage foreign investors to comply with the local laws and policies; as well as refrain from any activity, which may go against the interest of both countries. The amendments of FDI's relevant laws and policies will help

significantly in ensuring that foreign investments are regulated properly. In conclusion, the incorporation of recommendations provided in this study will strengthen the existing laws and policies further and also increase legal certainty.